CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39802/98
by L.B.
against Austria

The European Court of Human Rights (First Section), sitting on 18 April 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mrs F. TULKENS, *judges*, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 23 December 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, L.B., is an Austrian national of Hungarian origin, born in 1939 and living in Maria Enzersdorf (Austria). He is represented before the Court by Mr R. Armster, a lawyer practising in Maria Enzersdorf.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant has lived in Austria since 1971 and obtained Austrian citizenship in 1979. On 9 October 1991 he filed a request with the Employees Pension Insurance Office (*Pensionsversicherngsanstalt der Angestellten*) to pay contributions under Section 227 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz - "ASVG"*) for the time he had been at school and had studied in Hungary.

On 18 March 1992 the Employees Pension Insurance Office dismissed the request. It found that the applicant had not shown that he had undergone a period of training as specified by Section 227 *ASVG*.

On 26 August 1992 the Regional Governor of Lower Austria (*Landeshauptmann*) dismissed the applicant's appeal. He noted that periods of training in foreign countries were not mentioned in S. 227 *ASVG*. Therefore it was not possible to pay contributions for these periods.

On 6 April 1993 the applicant filed a complaint with the Constitutional Court claiming that the above decision violated the principle of equality (*Gleichheitssatz*).

On 15 June 1993 the Constitutional Court refused to entertain the applicant's complaint for lack of prospect of success. It referred to its previous case-law on Section 227 § 1 *ASVG*, according to which territorial restraints (*territoriale Beschränkung*) of the social security system were in accordance with the Federal Constitution: Just as being employed in Austria was a legitimate requirement for participation in the social pensions scheme, the substitute requirement of having undergone training in Austria - and not abroad - was the same. Upon the applicant's request it transferred the case to the Administrative Court.

On 22 November the applicant supplemented his complaint to the Administrative Court. He argued that although the wording of Section 227 § 1 (1) *ASVG* explicitly mentioned attending a school in Austria as a condition this criterion should rather be construed as to mean training for a diploma which is subsequently recognised by Austria authorities.

On 24 June 1997 the Administrative Court dismissed the applicant's complaint. It rejected the applicant's argument and found that the wording of Section 227 § 1 (1) *ASVG* was clear and unambiguous and required that such training be attended in Austria. It was reasonable to enable

back-payments into the pension scheme for periods of pre-professional training only in cases when, without such training, the person concerned would have been employed in Austria and would have contributed to the Austrian social pension system.

B. Relevant domestic law

The Austrian social pension scheme is based on the principle that pension rights are acquired by contributions during a person's employment (*Beitragszeiten*). Section 227 of the General Social Security Act also provides for the possibility to pay pension contributions for certain periods during which a person was not gainfully employed. By paying such contributions a person acquires pension rights and – when he or she retires – receives a higher pension.

Section 227 § 1 of the Act defines these latter periods (*Ersatzzeiten*). As to periods of training, the provision only includes periods during which a person has attended an Austrian secondary school or university (*inländische mittlere Schule oder Hochschule*).

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the proceedings on his request for having accepted additional contributions to the social pension scheme accepted lasted unreasonably long. He further complains under Article 1 of Protocol No. 1 that the Austrian authorities and courts when rejecting his request under S. 227 *ASVG* discriminated against him on the ground of his national origin.

THE LAW

1. The applicant complains that the proceedings on his request for payment of additional contributions to the social pension scheme accepted lasted unreasonably long. He relies on Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

The Court recalls that, according to the principles laid down in its case-law, Article 6 § 1 of the Convention extends only to "contestations" (disputes) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. Article 6 § 1 is not aimed at creating new

substantive rights, without a legal basis in the Contracting State, but at providing procedural protection of rights already recognised in domestic law (W. v. United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 32, § 73; Kraska v. Switzerland judgment of 19 April 1993, Series A no. 254-B, p. 48, § 24; Zander v. Sweden judgment of 25 November 1993, Series A no. 279, p. 39, § 24). The dispute over a right must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (Allan Jacobson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 19, §§ 66-67; Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A, p. 17, § 44; *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, 6.4.2000, § 43). Lastly, the right must be a "civil" right.

In the present case, Section 227 § 1 *ASVG* states that it is a precondition for the payment of voluntary contributions to the social pension scheme for periods of training that this training has been undergone in Austria. The provision is unambiguous, and the applicant did not contend in the domestic proceedings that he had undergone training in Austrian. It must have been apparent to him from the clarity of the replies he received from the Employees Pension Insurance Office, the Regional Governor and the Administrative Court that ordinary law precluded a successful application for having voluntary contributions accepted.

The applicant, however, made a constitutional complaint in which he alleged that the legislation in force violated the principle of equality. The Court must therefore also decide whether the applicant's relying on the principle of equality in those constitutional proceedings was capable of amounting to a serious and genuine dispute as to the existence of a right to the particular voluntary contributions at issue.

In the case of Pauger v. Austria the Court has found that Article 6 § 1 of the Convention applied to proceedings before the Constitutional Court in which the conformity of a provision of ordinary law with the Federal Constitution had been challenged. That dispute related to a recent amendment of the Pension Act, following the quashing of certain of its provisions on two occasions by the Constitutional Court. That last amendment had introduced a right to a widower's pension, but, at the same time, restricted entitlement to such a pension in various ways. The Constitutional Court gave its decision in ordinary proceedings and explained is some detail why it did not follow Mr. Pauger's arguments claiming that the recent amendment was unconstitutional (Pauger v. Austria judgment of 28 May 1997, *Reports of Judgments and Decisions* 1997-III, §§ 44-49).

The present case is different from the Pauger case. In the present case, the Constitutional Court, in summary proceedings, declined to deal with the applicant's complaint for lack of prospect of success and, in explaining its reasons for this decision briefly referred to its previous case-law on Section 227 *ASVG*. The Court cannot find that in such circumstances merely invoking the principle of equality before the Constitutional Court, as the applicant did, is sufficient for qualifying the underlying proceedings as ones which involve "a genuine and serious dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law". To hold otherwise would deprive this criterion, which is firmly established in the Court's case-law on Article 6 § 1 of the Convention, of any real meaning. While in the Court's view the circumstances in the case of Pauger v. Austria show that there was a genuine and serious dispute, the Court finds that this was not so in the case at issue. Accordingly Article 6 § 1 of the Convention is not applicable.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 § 3 of the Convention.

2. Further, the applicant complains under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 that the refusal of his voluntary contributions to the social pension scheme by the Austrian authorities, based on the fact that he had spent the relevant periods of training in Hungary and not in Austria constituted discrimination on the ground of his origin in breach of the Convention.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1, insofar as relevant, reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Court recalls that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22).

In so far as Article 1 of Protocol No. 1 is concerned, the Court recalls that, although there is no right as such to an old-age pension under the Convention or the Protocols thereto, the Convention organs have nevertheless recognised that payment of compulsory contribution to a compulsory pension fund may create a property right in a portion of such a fund (*Aunola v. Finland* (dec.), no. 30517/96, 15.3.2001).

By granting the possibility to make voluntary payments into the social pension scheme participants to this scheme are given the opportunity to increase their future pension payments. Thus, the facts of the present case come within the scope of Article 1 Protocol No. 1. It follows that Article 14, taken together with Article 1 Protocol No. 1, is applicable.

As regards compliance with Article 14, the Court recalls that a difference in treatment is discriminatory for the purposes of this provision if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (Petrovic v. Austria judgment of 27 March 1998, *Reports* 1998-II, § 30). Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment (Gaygusuz v. Austria judgment of 16 September 1996, *Reports* 1996-IV, § 42).

The Court is not persuaded by the applicant's argument that the difference in treatment at issue is based on his national origin. In the first place the criterion mentioned in Section 227 § 1 of the Social Security Act is not the nationality of the person seeking to make voluntary payments (see, however, the above quoted Gaygusus v. Austria judgment, op. cit., § 50). Moreover, to make participation in the scheme dependent on employment in a specific country and to accept payments for alternative periods only on the basis that these periods are passed in the same country does not appear unreasonable or arbitrary (No. 14128, R.W. v. Austria, Dec. 12.2.1990, unpublished).

The Court considers that the difference drawn by Section 227 § 1 *ASVG* does not constitute discrimination prohibited by Article 14 of the Convention. It follows that also this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos.ROZAKIS
President