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

FIRST SECTION

DECISION

Application no. 24912/08
Johann NISTLER
against Austria

The European Court of Human Rights (First Section), sitting on 19 November 2013 as a Chamber composed of:

Isabelle Berro-Lefèvre, President,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, judges,

and André Wampach, Deputy Section Registrar,

Having regard to the above application lodged on 25 April 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Johann Nistler, is an Austrian national, who was born in 1945 and lives in Vienna. He was represented before the Court by Mr H. Graupner, a lawyer practising in Vienna.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of European and International Affairs.

The circumstances of the case

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

4. The applicant and Mr V. jointly owned a house. Apparently, Mr V. had not been paying his share of the regular operating costs of the property.

5. On 13 July 2006 the applicant lodged an action with the Vienna Regional Court against Mr V. for payment of his share of the operating costs.

6. The first hearing was scheduled on 16 January 2007; the applicant, his counsel and Mr V.'s (the defendant's) counsel were present at the hearing and the applicant gave a statement of the events.

7. The next hearing was scheduled on 27 March 2007. Neither the defendant nor his counsel attended the hearing, and the court declared the hearing closed (*Schluß der Verhandlung*).

8. On 27 April 2007 the defendant, Mr V., requested that the proceedings be reinstituted (*Wiedereinsetzung in den vorigen Stand*) as he had missed the hearing on 27 March 2007 owing to unforeseen circumstances. The applicant submitted a statement (*Äußerung*) containing his arguments against the reinstatement of the defendant.

9. On 12 June 2007 the Vienna Regional Court (*Landesgericht Wien*) held a hearing on the request for reinstatement, and dismissed it on 6 July 2007.

10. The defendant appealed against that decision on 17 August 2007. The applicant submitted observations on the appeal (*Rekursbeantwortung*) on 26 August 2007. Since the law did not provide for the admission of observations in this type of proceedings, the applicant argued in his submissions that, in his opinion, Article 6 of the Convention was applicable to the present proceedings. He should thus be granted the right to be heard by the court and his observations should be admitted.

11. By decision of 3 October 2007 the Vienna Court of Appeal (*Oberlandesgericht Wien*) granted the appeal, thereby setting aside the Regional Court's decision of 6 July 2007. It rejected the applicant's observations as inadmissible, holding that the legal issue at stake was one of procedural law and consequently did not touch on the applicant's civil rights within the meaning of Article 6 of the Convention. The Court of Appeal added that the applicant's observations contained no further arguments than those already submitted in his first statement on the reinstatement request.

12. On 4 December 2007 the Regional Court held a fresh hearing on the question of reinstatement, which it ultimately granted on the same day. By decision of 21 December 2007 the defendant was ordered to pay the applicant's costs for the reinstatement proceedings in the amount of 2,893.85 euros (EUR); however, as the applicant's observations had been rejected as inadmissible, the defendant was not ordered to reimburse the costs related to them. The applicant thus had to bear those costs himself, amounting to EUR 1,201.14.

13. It is not known when the decision of 4 December 2007 was served on the applicant's counsel. The decision of the Regional Court of

21 December 2007 was served on the applicant's counsel on 17 January 2008.

14. Following the Regional Court's decision of 4 December 2007 to reinstate the defendant in the civil proceedings, the proceedings continued before that court. On 28 February 2011, after the taking of evidence, the Vienna Regional Court declared the proceedings thus far null and void. In line with recent case-law of the Supreme Court (*Oberster Gerichtshof*), it found that the subject matter of the present proceedings had to be examined pursuant to the Non-Contentious Proceedings Act (*Außerstreitgesetz*). The Regional Court therefore referred the action to the competent District Court (*Bezirksgericht*) for examination. According to the applicant, the proceedings are thus pending before the District Court, which has commissioned a new expert opinion.

COMPLAINT

15. The applicant complained, under Article 6 of the Convention, that by rejecting his observations on the defendant's appeal in the reinstatement proceedings, the domestic courts had violated his right to equality of arms and therefore to a fair trial.

THE LAW

16. In complaining of a lack of equality of arms in the reinstatement proceedings, the applicant relied on Article 6 § 1 of the Convention, which reads, as far as relevant, as follows:

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

A. The parties' submissions

17. The Government contended, firstly, that Article 6 was applicable to proceedings that, *inter alia*, determine civil rights and obligations. Reinstatement proceedings, however, were interlocutory and did not in themselves determine civil rights and obligations; they preceded the determination of the main claim. The fact that compensation for the costs of the proceedings was foreseen in the reinstatement proceedings did not allow for a different understanding of the situation. In that respect, the present case was to be distinguished from the case of *Beer v. Austria* (no. 30428/96, 6 February 2001). As regards the substance of the complaint, the

Government asserted that the reinstatement proceedings had not violated the principle of equality of arms enshrined in the fairness principle of Article 6 of the Convention. This assessment was not changed by the fact that the domestic procedural law had been amended and now allowed for observations by the opposing party in appeal proceedings concerning reinstatement.

18. The applicant contested the Government's argument and stated that Article 6 was applicable to the present proceedings, since in his opinion the reinstatement proceedings were part of the main proceedings determining civil rights and obligations. He further claimed that the outcome of the reinstatement proceedings had a considerable effect on the outcome of the main proceedings, and thus on the substance of his claim. He observed that by rejecting his observations on his opponent's appeal against the refusal to reinstate him – his opponent – in the main proceedings as inadmissible, his right to equality of arms had been violated.

19. The Court notes that the main issue of the present application is the applicability of Article 6 of the Convention to proceedings concerning the reinstatement of a party in civil proceedings.

B. The Court's assessment

1. General principles

20. As regards interlocutory or ancillary proceedings to main proceedings determining a civil right or obligation, the Court has in recent years developed principles in relation to different proceedings at issue.

21. In the context of interim measures, the Court noted in its judgment in the case of *Micallef* that the exclusion of interim measures from the ambit of Article 6 was no longer justified by the fact that they do not in principle determine civil rights and obligations (see *Micallef v. Malta* [GC], no. 17056/06, §§ 79-80, ECHR 2009). However, it considered that not all interim measures determined such rights and obligations, and the applicability of Article 6 would depend on whether certain conditions were fulfilled. First, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention. Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure could be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 was applicable (ibid., §§ 84-85). The Court found that in that case Article 6 was applicable because the purpose of the injunction was to determine, albeit for a limited period, the same right as the one being contested in the main set of proceedings, and which was immediately enforceable (ibid., § 87, see also

Pekárny a cukrárny Klatovy, a.s., v. the Czech Republic, nos. 12266/07, 40059/07, 36038/09 and 47155/09, § 64, 12 January 2012). Subsequently, in the *Kübler* case the Court also ruled that Article 6 was applicable to an interim measure which, while not provisionally ruling on the merits of the main proceedings, had a "direct effect on the civil right at stake" (see *Kübler v. Germany*, no. 32715/06, § 48, 13 January 2011 ; see as further examples *Central Mediterranean Development Corporation Limited v. Malta* (no. 2), no. 18544/08, §§ 21-23, 22 November 2011, concerning the question of applicability of Article 6 to procedural decisions and stay of execution proceedings, and *Mercieca and Others v. Malta*, no. 21974/07, §§ 34-35, 14 June 2011, concerning interlocutory appeal proceedings).

22. Turning to another set of proceedings, the Court has previously found that Article 6 is not applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by final decision (see *Sablon v. Belgium*, no. 36445/97, § 86, 10 April 2001, and *Korda v. Slovenia*, no. 25195/02, §§ 36-37, 30 November 2006). The Court has established in this context that such proceedings may comprise two phases: the first phase consists of assessing whether the conditions exist to justify reopening the proceedings, *inter alia,* the existence of new developments. In the affirmative, the proceedings enter a second phase: a new global examination of the main proceedings in the light of all the facts, including the new ones. If at the outset the main proceedings concerned "civil rights or obligations" within the meaning of Article 6, they still concern them in the reopened main proceedings and Article 6 applies to the reopened proceedings (see again *Sablon*, cited above, §§ 87-88). However, the Court has also accepted that in exceptional and specific circumstances, Article 6 may apply to reopening proceedings where those proceedings were the only legal means of seeking redress in respect of civil claims, and their outcome was thus held to be decisive for the applicant's civil rights and obligations (see *Melis v. Greece*, no. 30604/07, §§ 18-20, 22 July 2010).

23. As concerns the present reinstatement proceedings, the jurisprudence in *O. and A.K. v. Austria* (no. 13202/87, Commission decision of 15 March 1990) is not comparable to the present case since it concerns a complaint regarding access to court, which requires examination of the proceedings from a different angle. However, in *Motion Pictures Guarantors Ltd v. Serbia* (no. 28353/06, § 26, 8 June 2010) the Court considered that the proceedings concerning the applicant's request for procedural reinstatement were directly decisive for his ability to have the merits of his civil claim determined by a tribunal and, as such, fell within the scope of Article 6 § 1 of the Convention.

24. The Court thus concludes that, in accordance with its jurisprudence, Article 6 § 1 of the Convention, while in principle not applicable to reinstatement proceedings, exceptionally applies to those proceedings,

insofar as they are directly decisive for an applicant's ability to have the merits of his or her civil claim determined by a tribunal.

2. Application of those principles to the present case

25. The Court reiterates that the applicant was heard in a first hearing on the merits of his civil action. The Regional Court then closed the hearing owing to the absence of the defendant. However, at the time of the defendant's reinstatement request, the main proceedings had not yet concluded with a final decision on the substance of the applicant's civil claim.

26. The purpose of the reinstatement proceedings was to clarify whether the defendant had a valid reason for his absence that allowed his reinstatement in the proceedings. Thus the right at stake in the reinstatement proceedings complained of was a purely procedural right and not a "civil" right. As the first element of the test developed by the Court in the *Micallef* case (cited above) is not complied with, it is not necessary to examine the second element, namely whether the decision given in the reinstatement proceedings could be considered determinative of a civil right.

27. It follows that Article 6 § 1 of the Convention is not applicable to the reinstatement proceedings at issue. Accordingly, the application is to be rejected as inadmissible *ratione materiae* within the meaning of Article 35 § 3 (a) and § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President