CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30160/96
by Georg PALLANICH
against Austria

The European Court of Human Rights (Third Section) sitting on 16 March 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, J*udges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 4 January 1996 by Georg PALLANICH against Austria and registered on 9 February 1996 under file no. 30160/96;

Having regard to the Commission's decision, of 11 September 1997, to communicate the application;

Having regard to the observations submitted by the respondent Government on 18 November 1997, the observations in reply submitted by the applicant on 21 January 1998 and the Government's further observations of 2 March 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian national, born in 1944 and residing in Prague. Before the Court he is represented by Mr. Bernhauser, a lawyer practising in Vienna.

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

A. Particular circumstances of the case

On 17 May 1991 the Walserberg Customs Office (*Zollamt*) opened criminal proceedings against the applicant under the Tax Offences Act (*Finanzstrafgesetz*) concerning charges of attempted smuggling and heard him as a suspect.

On 23 May 1991 the Customs Office transmitted the information (*Strafanzeige*) to the Criminal Department of the Salzburg Customs Office.

On 19 June 1991 the Criminal Department of the Salzburg Customs Office, in summary proceedings, issued a penal order (*Strafverfügung*) against the applicant finding him guilty of attempted smuggling in that he had, on 17 May 1991, when crossing the border between Germany and Austria in his car, failed to declare various goods with a total value of Austrian schillings (ATS) 13,742. The Customs Office imposed a fine of ATS 3,500 on the applicant and, in case of default, two days' imprisonment. Further, it ordered the forfeiture of the sum of ATS 13,742 which had been deposited as a security for the goods concerned.

On 26 July 1991 the applicant filed an objection (*Einspruch*) against the penal order. Thereupon, the Criminal Department of the Salzburg Customs Office, after having carried out investigations, fixed 9 October 1991 as the date for hearing the applicant's case and informed the applicant’s counsel accordingly.

On 9 October the Criminal Department of the Salzburg Customs Office held the hearing. Neither the applicant nor his counsel appeared.

On 11 November 1991 the Criminal Department of the Salzburg Customs Office, noting that the applicant had, without an excuse, failed to appear at the hearing, convicted him of attempted smuggling imposing a fine of ATS 3.500, with two days' imprisonment in case of default. It also upheld the forfeiture of the sum which had been deposited as a security for the goods concerned.

On 14 January 1992 the applicant filed an appeal with the Salzburg Regional Directorate of Finance (*Finanzlandesdirektion*). He submitted, in particular, that he had not declared the goods in question to the customs authorities since he had not intended to import them to Austria. The country of destination was rather Czechoslovakia and the goods were, therefore, only for transit in Austria.

On 8 June 1995 the Criminal Department of the Salzburg Regional Directorate of Finance dismissed the applicant's appeal.

This decision was served on the applicant's counsel on 5 July 1995.

B. Relevant domestic law

General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*)

Under S. 73 the authorities are obliged to give a decision on any request or appeal of a party within six months of its receipt, unless the law provides otherwise. If the decision is not served on the party within this time-limit, the party may file an application for the transfer of jurisdiction (*Devolutionsantrag*) with the competent superior authority. The application is to be dismissed if the delay was not exclusively caused by the authority's fault. The superior authority itself has to decide within six months from receipt of the application.

Federal Constitution (*Bundes-Verfassungsgesetz*)

Article 132 of the Federal Constitution provides for an application against the administration's failure to decide (*Säumnisbeschwerde*). Anyone who is, as a party, entitled to request a decision in administrative proceedings, may file an application about the authorities' failure to give a decision. Such an application does not lie in administrative criminal proceedings, except in private prosecution proceedings and in proceedings on tax offences.

Administrative Court Act (*Verwaltungsgerichtshofgesetz*)

S. 27 provides that an application against the administration's failure to decide may only be lodged, if the highest authority, before which the case could be brought either upon an appeal or by way of an application for transfer of jurisdiction, has been seized by the party concerned and has failed to decide on the merits within six months. The time-limit starts to run from the day on which the authority with which the request for a decision on the merits has to be lodged has received the request.

S. 36 § 2 provides that the Administrative Court, in preliminary proceedings, has to request the authority concerned to issue a decision within a time-limit of up to three months or to explain why a breach of its obligation to give a decision has not occurred. The time-limit may be extended once, if the authority proves that there are reasons which make it impossible to issue the decision in time. If the authority gives the decision within the time-limit, the Administrative Court discontinues the proceedings.

S. 42 § 4 deals with the judgment of the Administrative Court in proceedings relating to an application against the administration's failure to decide. The Administrative Court may limit its judgment to a finding on the main legal issues and request the authority to give its decision on the basis of this legal view within a time-limit of up to eight weeks. If the Administrative Court does not avail itself of this possibility or if the authority fails to give a decision, the Administrative Court decides on the merits.

COMPLAINT

The applicant complains under Article 6 of the Convention about the length of the criminal proceedings against him.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 4 January 1996 and registered on 9 February 1996.

On 11 September 1997, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 18 November 1997. The applicant replied on 21 January 1998. The Government submitted further observations on 2 March 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant complains under Article 6 of the Convention about the length of the criminal proceedings against him.

Article 6 § 1, so far as relevant, reads as follows.

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ... ."

The Government submit that the applicant failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. Referring to two decisions of the Commission, the Government argue that the applicant should have filed an application against the administration's failure to decide with the Administrative Court in accordance with Article 132 of the Federal Constitution in conjunction with S. 27 of the Administrative Court Act. Further the Government argue that the Regional Directorate of Finance is, in criminal proceedings under the Tax Offences Act, the highest authority within the meaning of S. 27 of the Administrative Court Act. In particular, there is no appeal to the Ministry of Finance and the Tax Offences Act does not provide for a transfer of jurisdiction to the Ministry of Finance in case the Regional Directorate fails to decide.

The applicant denies that he could have lodged an application to the Administrative Court under Article 132 of the Federal Constitution. He submits in particular that such an application only lies where the highest authority fails to decide. He argues that the Regional Directorate of Finance is subordinate to the Federal Ministry of Finance and is, therefore, not the highest authority within the meaning of the above provision.

The Court recalls that under Article 35 § 1 of the Convention it "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law". Article 35 § 1 requires the exhaustion of remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. The burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (see Eur. Court HR, Akdivar and Others v. Turkey judgment of 16 September 1996, Reports 1996-IV, pp. 1210-11, §§ 66-68).

An application against the administration's failure to decide under Article 132 of the Austrian Federal Constitution enables a party to administrative proceedings to challenge the failure of the highest authority competent in the proceedings at issue to give a decision within the statutory six months' time-limit. The Administrative Court then sets a time-limit of up to three months which may be renewed once. If the authority fails to issue a decision within the time-limit the Administrative Court may either limit its judgment to a decision on the main legal issues and request the authority to give a decision based on its legal view within a maximum time-limit of eight weeks or it may immediately give a judgment on the merits of the case.

In sum, an application against the administration's failure to decide enables the person concerned to speed up the proceedings to a certain extent. However, it cannot give rise to any finding as regards the length of the proceedings as a whole, nor can it give rise to redress, for example compensation or reduction of sentence, for any unreasonable delay to that point (see *mutatis mutandis* Eckle v. Germany jugdment of 15 July 1982, Series A no. 51, pp. 30-33, §§ 66-70).

In this context, the Court also recalls that the Commission generally found that measures available to an individual which might speed up the proceedings are matters which fall to be considered in the context of the merits of an application relating to the length of proceedings, rather than relating to the exhaustion of domestic remedies (No. 11269/84, Dec. 14.4.88, D.R. 56, p. 115 at p. 126 with further references). The case-law relied on by the Government does not warrant another conclusion. The Court notes that in the first case, relating to the length of proceedings concerning a claim for return of expropriated property, the Commission, though stating that an application to the Administrative Court against the administration's failure to decide appeared to be an adequate remedy in this context, did not base its finding of non-exhaustion of domestic remedies exclusively on the failure to file such an application (no.19343/92, Stolz v. Austria, Dec. 6.9.95, unpublished). In the second case, relating to proceedings for granting a trading authority licence the Commission explicitly left open the question whether such an application constituted an effective remedy in the circumstances of the case, as it found the application inadmissible on other grounds (No. 22475/93, Kristavcnik-Reutterer v. Austria, Dec. 10.9.96, unpublished).

In conclusion, the Court considers that an application against the administration's failure to decide under Article 132 of the Austrian Federal Constitution would not have provided effective and sufficient redress as to the alleged unreasonable duration of the criminal proceedings against the applicant. It was, therefore, not an effective remedy which the applicant was required to exhaust according to Article 35 § 1 of the Convention.

According to the applicant the length of the criminal proceedings against him exceeded the "reasonable time" requirement of Article 6 § 1 of the Convention. The Government do not contest this.

The Court notes that the criminal proceedings against the applicant were opened on 17 May 1991 by the Salzburg Customs Office. The appeal decision by the Salzburg Regional Directorate of Finance was served on the applicant on 5 July 1995. The proceedings, thus, lasted four years and one and a half months.

The Court considers, in the light of the criteria established by the case-law on the question of "reasonable time" and having regard to all the information in its possession, that an examination of the merits of the complaint is required.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

S. Dollé
Registrar

N. Bratza
President