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. 67950/01
by Stefan ROZSA
against Austria

The European Court of Human Rights (First Section), sitting on 6 April 2004 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mrs E. STEINER,
Mrs K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 9 January 2001,

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

The applicant, Mr Stefan Rozsa, is a German national who was born in 1945 and lives in St. Augustin. He was represented before the Court by Mr F. Kloevekorn, a lawyer practising in Bonn. The respondent Government were represented by their agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

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

On 20 February 1996 the applicant crossed the border between Hungary and Austria. A considerable amount of cigarettes which he had failed to declare to the customs authorities were found in his car. The cigarettes were seized and criminal proceedings were opened against him.

According to the Government, the applicant, when he was apprehended, was cautioned in writing that he could request a hearing of his case by a trial board (*Spruchsenat*). In case of simplified proceedings the request would have to be made in the objection against the provisional penal order (*Strafverfügung*), in other cases it could be made at any time before the start of the oral hearing.

On 13 March 1996 a provisional penal order was issued, finding the applicant guilty of attempted smuggling and attempted breach of the State's tobacco monopoly and imposing a fine on him. The order contained information stating that the applicant could file an objection against it and that he could request the further proceedings including the hearing to be held by a trial board.

The applicant lodged an objection (*Einspruch*). He did not request that his case be heard by a trial board.

On 4 December 1997 the Vienna Customs Office (*Hauptzollamt*), as tax offences authority of first instance, held a hearing.

On 26 February 1998 the Vienna Customs Office issued a penal order (*Straferkenntnis*), finding the applicant guilty of attempted smuggling and of attempted breach of the State's tobacco monopoly. It imposed a fine of 28,000 Austrian schillings (ATS) on him with twenty-eight days' imprisonment in default. Further, it ordered the forfeiture of the cigarettes. The penal order informed the applicant of his right to appeal within a month from its service. Further, it stated that the appeal would be examined by the Finance Directorate for Vienna, Lower Austria and Burgenland (*Finanzlandesdirektion*) as tax offences authority of second instance. If the appellant so requested, the hearing of the appeal would be held and the decision be taken by the Regional Finance Directorate's appeals board (*Berufungssenat*).

On 25 April 1998 the applicant appealed. However, he did not request that the appeal be heard by the appeals board.

On 18 September 2000 the Regional Finance Directorate, as tax offences authority of second instance, dismissed the applicant's appeal.

On 19 October 2000 the applicant, represented by counsel, requested the Constitutional Court (*Verfassungsgerichtshof*) to grant him legal aid for the purpose of filing a complaint against the Regional Finance Directorate's decision. As grounds for the complaint he submitted that none of the

authorities which had dealt with his case qualified as a tribunal within the meaning of Article 6 of the Convention, as both, the Customs Office and the Regional Finance Directorate, were purely administrative authorities. Moreover, the criminal proceedings against him had lasted unreasonably long.

On 23 October 2000 the Constitutional Court requested the applicant to supplement his legal aid request which the applicant did on 20 November 2000.

On 18 December 2000 the President of the Constitutional Court dismissed the applicant's request for legal aid on the ground that the complaint lacked prospects of success. He noted that there was no indication that the decision at issue was based on an unlawful provision or that the application of the law in the present case raised an issue of constitutional law. This decision was served on the applicant's counsel on 28 December 2000. The letter accompanying it informed the applicant that he remained free to lodge a complaint with the Constitutional Court within six weeks. If he wished to do so he had to be represented by counsel of his own choosing.

The applicant did not lodge a complaint with the Constitutional Court.

B. Relevant domestic law

1. Application against the administration's failure to decide

a. Federal Constitution

Under Article 130 of the Federal Constitution (*Bundes-verfassungsgesetz*) the Administrative Court decides, *inter alia*, on applications (*Beschwerden*) in which it is alleged that the administrative authorities have breached their duty to decide.

Article 132 of the Federal Constitution, in its relevant part, reads as follows:

> "An action for breach by the administrative authorities ... of the duty to decide can be lodged by anyone entitled as a party in administrative proceedings to enforce that duty. An action for breach of the duty to decide is inadmissible in administrative criminal proceedings, except private prosecutions and prosecutions in respect of tax offences."

b. General Administrative Procedure Act

Section 73 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. Its relevant part reads as follows:

> "(1) Subject to any contrary provision in the administrative regulations, the authorities must give a decision on applications by parties ... and appeals without unnecessary delay and at the latest six months after the application or appeal has been lodged.
>
> (2) If the decision is not served on the party within this time-limit, jurisdiction will be transferred to the competent superior authority upon the party's written request. ..."

In proceedings under the Tax Offences Act an application for transfer of jurisdiction to the superior authority is excluded.

c. Administrative Court Act

Section 27 of the Administrative Court Act (*Verwaltungsgerichtshof-gesetz*) relating to the application against the administration's failure to decide read as follows:

> "An application under Article 132 of the Federal Constitution for breach of the duty to decide (application against the administration's failure to decide) can be lodged only when the highest authority to which an application can be made in administrative proceedings, either by way of an appeal or an application for transfer of jurisdiction, ... has been applied to by a party and has not made a decision on the matter within six months. ..."

According to the Constitutional Court's judgment of 30 September 1989 (published in the official collection of that court's decisions, *VfSlg* 12167/89), the Administrative Court may receive applications against the administration's failure to decide under Article 132 of the Federal Constitution, taken in conjunction with section 27 of the Administrative Court Act, also where an authority of first instance has failed to give a decision within the statutory six-month time-limit, provided that no other remedy (such as a request for a transfer of jurisdiction) lies against the failure to decide (see *Basic v. Austria*, no. 29800/96, § 27, ECHR 2001-I).

2. Criminal proceedings before the tax authorities

The competence of the tax authorities as regards proceedings relating to tax offences and the conduct of these proceedings are regulated in the Tax Offences Act (*Finanzstrafgesetz*). The relevant provisions, as in force at the material time, contained the following rules.

Pursuant to section 58 § 1 (a) of the Tax Offences Act, the Customs Office, as a tax offences authority of first instance, is competent to conduct the proceedings concerning *inter alia* smuggling or breach of monopoly regulations. According to section 58 § 2 a trial board shall hold the hearing and give the decision where the relevant value exceeds a certain amount. As to other offences, it is up to the defendant to request a decision by the trial board. In case of so-called simplified proceedings such a request shall be made in the objection against the provisional penal order.

Pursuant to section 62 § 1 an appeal will be decided upon by the Finance Directorate as tax offences authority of second instance. According to

section 62 § 2 an appeals board shall hold the hearing and give the decision on the appeal, if it is directed against the decision of a trial board or if the appellant so requests.

Section 66 regulates the organisation of the trial boards and the appeals boards. Its paragraph 1 provides that their members are not bound by any instructions. According to its paragraph 2, the trial boards consist of three members: a judge as chairperson, one member of the senior service of the tax authorities and one lay member. The appeals boards consist of four members: a judge as chairperson, one member of the senior service of the tax authorities and two lay members.

Pursuant to section 67 members of the above boards are appointed by the Federal President upon nomination by the Federal Government. Their term of office is six years.

Section 68 provides that each Regional Finance Directorate has to fix, for one year in advance, the number of trial boards and appeals boards, their chairpersons and members and the sequence in which members have to step in if a member is unable to sit. Each Regional Finance Directorate also has to allocate the business of the trial boards and the appeals boards for one year in advance.

Meanwhile, on 1 January 2003, a reform encompassing the appeal procedures in all tax matters has entered into force BGBl. (Federal Official Gazette) no. 97/2000. A new body, the Independent Finance Panel (*Unabhängiger Finanzsenat*) has been created to hear appeals. As to proceedings relating to tax offences, the provisions on trial boards have not changed, whereas the appeals board is now part of the Independent Finance Panel and its composition has changed: it consists of one of the Presidents of the Independent Finance Panel, one full-time member of the latter and two lay members. The term of office of the President and the other full-time members of the Independent Finance Panel is indefinite.

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention about the length of the criminal proceedings against him.

2. Furthermore, the applicant complains under Article 6 § 1 that none of the authorities dealing with his case qualified as a tribunal. He submits in particular that both, the Customs Office and the Regional Finance Directorate, are administrative bodies.

THE LAW

The applicant raises complaints under Article 6 § 1 of the Convention, which, so far as material, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by an independent and impartial tribunal ..."

1. The applicant's first complaint relates to the length of the proceedings, which began on 20 February 1996 and ended on 28 December 2000 when the Constitutional Court's judgment was served. They therefore lasted four years, ten months and eight days.

The Government, referring to *Basic v. Austria* (no. 29800/96, ECHR 2001-I) contended that the applicant had failed to exhaust domestic remedies as he did not lodge an application against the administration's failure to decide with the Administrative Court, pursuant to Article 132 of the Federal Constitution. The applicant contested this view.

The Court observes that *Basic v. Austria* also related to proceedings concerning tax offences. In that case the Court found that an application against the administration's failure to decide constitutes an effective remedy (cited above, § 38). Moreover, it noted that in proceedings in which the possibility to request a transfer of jurisdiction to the higher authority (see above, relevant domestic law, Section 73 of the General Administrative Procedure Act) is excluded, an application under Article 132 of the Federal Consitution lies not only where the "highest" authority fails to decide within the statutory time limit, but also where a lower authority does so (*ibid*., § 39).

The Court sees no reason to deviate from this view in the present case. Therefore, the applicant could and should have lodged an application under Article 132 of the Federal Constitution, both, as regards delays caused by the first instance and by the second instance authority.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. The applicant's second complaint is that he did not have access to court as neither the Customs Office nor the Regional Finance Directorate dealing with his case qualified as a tribunal.

Again, the Government submitted that the applicant had failed to exhaust domestic remedies. They asserted that he should have brought his complaint before the Constitutional Court despite the refusal to grant him legal aid. That refusal was based on a summary assessment of the prospects of success of the applicant's complaint, in which he had only stated that the Customs Office and the Regional Finance Directorate did not qualify as tribunals, but had failed to indicate why he did not request that his case be heard by a trial board and an appeals board or why a hearing before these bodies would not

meet the requirements of Article 6. Moreover, he had failed to lodge a complaint with the Administrative Court.

As to the merits of the complaint, the Government conceded that both, the Customs Office and the Regional Finance Directorate, were administrative authorities. However, pursuant to Sections 58 § 2 and 62 § 2 of the Tax Offences Act, the applicant could have requested a decision by a trial board and, subsequently, by an appeals board. Having regard to the provisions of the Tax Offences Act on the composition of trial boards and appeals boards, the Government asserted that these bodies qualified as tribunals within the meaning of Article 6 § 1 of the Convention.

In sum, the applicant could have had access to a tribunal in the proceedings complained of. However, despite the fact that he had been duly informed of this possibility, he had failed to request that his case to be dealt with by the trial board and, subsequently, the appeals board.

The applicant contested the Government's argument that he had failed to exhaust domestic remedies, asserting in particular that he could not be expected to bring his case before the Constitutional Court despite its refusal to grant him legal aid. Moreover, he claimed that he had not been duly informed of the possibility to lodge a complaint with the Administrative Court.

Further, the applicant asserted that the information about available remedies included in the Customs Office's decision of 26 February 1998 did not suffice to make it clear that he had to request a hearing by an appeals board if he wanted to have his case dealt with by a tribunal. He could, therefore, not have validly waived his right to have his case heard by a court.

The Court reiterates that pursuant to Article 35 § 1 of the Convention it can only deal with a matter after all domestic remedies have been exhausted.

The Government argued that the applicant should have brought his complaint before the Constitutional Court despite the refusal to grant him legal aid. The Court notes that an applicant has to be legally represented in proceedings before the Consitutional Court. In the present case, the president of the Constitutional Court refused the applicant's request for legal aid on the ground that a complaint lacked prospects of success. In the light of this decision, the applicant did not lodge a complaint. It is true however, as the Government pointed out, that the applicant, when outlining the complaint he wished to bring, only submitted that the Custom's Office and the Regional Finance Directorate did not qualify as tribunals, but failed to indicate why he did not request that his case be heard by a trial board or an appeals board. It could therefore be argued that a complaint, if substantiated properly, might nevertheless have had prospects of success.

Moreover, the Government pointed out that the applicant did not lodge a complaint with the Administrative Court. In the Court's view it is open to

doubt whether such a complaint would have offered reasonable prospects of success as the case concerned an issue of constitutional law, namely the question of access to court in proceedings concerning tax offences.

However, the Court considers that is not called upon to decide whether the applicant has exhausted domestic remedies as the complaint is, in any case, inadmissible for the following reasons.

The Court notes that under the Tax Offences Act, the tax offences at issue were dealt with by the Customs Office as the authority of first instance and subsequently by the Regional Finance Directorate, as the authority of second instance. These two bodies are undoubtedly administrative authorities. In this connection, the Court reiterates that it is not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities provided that there is a possibility of review by a court that satisfies the requirements of Article 6 § 1 (*Baischer*, cited above, § 23 with a reference to *Malige v. France* judgment of 23 September 1998, *Reports* 1998-VII, p. 2937, § 45).

In the present case, the applicant had the possibility to bring his case before the trial board at the Customs Office or the appeals board at the Regional Finance Directorate. The Court will, therefore, examine whether these bodies qualified as “tribunals” within the meaning of Article 6 § 1 of the Convention.

According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 § 1 itself (see, as a recent authority, *Baischer v. Austria*, no. 32381/96, § 23, 20 December 2001 with a reference to *Belilos v. Switzerland*, judgment of 29 April 1988, Series A no. 132, p. 29, § 64).

The Court observes that, pursuant to Section 66 § 2 of the Tax Offences Act the trial board consisted of three members, namely a trained judge as chairperson, a member of the senior service of the tax authorities and one lay member. The appeals board consisted of four members: a judge as chairperson, one member of the senior service of the tax authorities and two lay members. The boards' members were elected for a term of six years and were not bound by any instructions. Moreover, Section 68 of the Tax Offences Act, provides that the number and composition of trial boards and appeal boards is fixed in advance for one year, as is the allocation of business to them.

Having regard to its case-law relating to comparable bodies, the Court considers that the trial board and the appeals board have to be regarded as tribunals within the meaning of Article 6 § 1 (see for instance, *Stallinger*

and Kuso v. Austria, judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-II, p. 677, § 37, concerning land reform boards; *Baischer*, cited above, § 25, concerning the Independent Administrative Panel).

The Court notes that the applicant has not submitted any arguments to the contrary. He simply alleged that he had not been sufficiently informed of the possibility to bring the case before a trial board or an appeals board. However, the provisional penal order of 13 March 1996 contained information that the applicant could, in his objection, request that the case be heard by a trial board. He failed to do so. Thus, the Vienna Customs Office decided on the case as first instance authority. Its decision of 26 February 1998 again informed the applicant of his right to appeal and that he could request that the appeal hearing be held and the decision be taken by the Regional Finance Directorate's appeals board.

The Court finds that the applicant could have been expected to seek clarification if the information provided by the authorities did not appear sufficently clear to him. However, he did not do so nor did he submit any arguments as to why he was prevented from requesting a hearing by a trial board or an appeals board when, in his request for legal aid, he outlined the complaint he wished to bring before the Constitutional Court.

In these circumstances, the Court finds that the applicant had access to court but failed to avail himself of this possibility.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President