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. 30003/02
by Milenko STOJAKOVIC
against Austria

The European Court of Human Rights (First Section), sitting on 5 July 2005 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*

and Mr S. QUESADA, *Deputy Section Registrar*,

Having regard to the above application lodged on 7 August 2002 (as regards the recall and transfer proceedings) and on 8 April 2004 (as regards the disciplinary proceedings),

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 Milenko Stojakovic, is an Austrian national, who was born in 1944 and lives in Linz. He was represented before the Court by Mr M. Poduschka, a lawyer practising in Perg. The respondent Government were represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

A. The circumstances of the case

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

Since 1984 the applicant was the head of the Federal Bacteriological Serological Research Institute (*Bundesstaatiche bakteriologisch-serologische Untersuchungsanstalt*) in Linz. According to the activity profile submitted by the Government the tasks of the Institute involved

- carrying out of various examinations, namely examinations upon official request under the relevant Health Acts and bacteriological examinations of water quality;
- research, collection and transfer of data; assistance to the installation and maintenance of a notification system concerning certain infectious diseases; maintenance of a specific network on epidemiological diseases integrating EU and other international networks;
- participation in international scientific projects and studies
- provision of general information and advice, such as advice concerning prevention and transfer of infectious diseases and use of antibiotics;
- assistance by giving of expert advice in the elaboration of quality standards for microbiological laboratories, of national recommendations in the field of hygiene, medical microbiology and preventive medicine and of epidemic legislation;
- representation of the competent Ministry's department in national and international expert groups;

The applicant, as head of the Institute, was responsible for all tasks entrusted to it. Under S. 3 of the Civil Servants Act he was further responsible for certain matters concerning the regulation of its service, namely the arrangement of vacation and grant of special leave, and had the authority to issue decisions (*Bescheide*) in this regard.

1. Disciplinary proceedings

On 22 November 1999 the Disciplinary Commission at the Ministry for Work, Health and Social Affairs (*Disziplinarkommission beim Bundesministerium für Arbeit, Gesundheit und Soziales)* found the applicant guilty of having violated his professional duties under the Non-

Discrimination Act (*Bundes-Gleichbehandlungsgesetz*) and sentenced him to a fine of approximately 2,400 euros (EUR). It found that the applicant *inter alia* had made statements about some of his employees amounting to sexual harassment.

On 15 June 2000 the Senior Disciplinary Board at the Ministry for Public Service and Sport (*Disziplinaroberkommission beim Bundesministerium für öffentliche Leistung und Sport*) partly dismissed the applicant's appeal. It reduced the fine to approximately EUR 1,600.

On 20 September 2000 the applicant filed a complaint with the Administrative Court. He complained, in particular, that the Disciplinary Board had not duly taken into account his arguments that the disciplinary proceedings had to be seen in the context of the Ministry's restructuring programme and were aimed at obliging him to take early retirement.

On 4 September 2003 the Administrative Court dismissed the applicant's complaint.

The applicant did not file a complaint with the Constitutional Court (*Verfassungsgerichtshof*).

2. Transfer proceedings (Versetzung)

In the meantime, on 31 March 2000 the Federal Minister for Work, Health and Social Affairs recalled the applicant from his post with immediate effect (*Abberufung mit sofortiger Wirkung*) and transferred him to a post with a lower grade, namely a referee post at the Ministry for Work, Health and Social Affairs in Vienna.

Referring to the applicant's behaviour which was the subject of the pending disciplinary proceedings, she found that the applicant had violated his professional duties, and could no longer be trusted to perform the managerial duties as head of the Institute. She referred to S. 38 of the Civil Servants Act (*Beamten-Dienstrechtsgesetz, see domestic law part below*) according to which a transfer can be ordered *ex officio* in case of important official interest. At the same time she informed the applicant that the payment of the extra duty allowance (*Verwendungszulage*) granted to him as head of the Institute was to be discontinued as from 1 May 2000.

On 17 April 2000 the applicant filed an appeal and submitted that the disciplinary proceedings were still pending.

On 21 June 2000 the applicant, assisted by his counsel, filed further submissions. He submitted that the Federal Minister and the Disciplinary Commission had not made sufficient investigations for their findings and had placed his statements in the wrong context. He further contested that he had made one of the statements and requested to hear a witness in the context of an oral hearing. He finally argued that the Senior Disciplinary Board had partly granted his appeal and that the disciplinary proceedings were still pending. There were, therefore, no reasons for his transfer.

On 9 October 2000 the Appeals Commission (*Berufungskommission*) at the Ministry for Public Service and Sport dismissed the applicant's appeal without holding a hearing. It noted that the authority deciding on the transfer did not necessarily need to wait for the outcome of pending disciplinary proceedings but could itself assess whether a civil servant had violated his professional duties and whether such a violation requested a transfer. The applicant's arguments concerned mainly the question of his guilt, which was the subject of the disciplinary proceedings. It nevertheless examined and dismissed the applicant's arguments as to the alleged justifying context in which the statements had been made. It further acknowledged that it was in fact not clear whether the applicant had made one of the statements at issue. However, having regard to all other statements it confirmed the Federal Minister's finding that the applicant could no longer be trusted to perform the tasks of a head of the Institute. In particular that the applicant's unqualified behaviour had deepened the already existent conflicts and tensions at work, and there was, therefore, an important official interest which made his transfer to another post necessary.

On 6 December 2000 the applicant filed a complaint with the Constitutional Court. He complained about the lack of a hearing. Furthermore he alleged that the Appeals Commission had decided arbitrarily as it had not duly taken account of his arguments made in the disciplinary proceedings according to which the proceedings against him had to be seen in the context of the Ministry's restructuring programme and were aimed at obliging him to take early retirement.

On 26 November 2001 the Constitutional Court dismissed the applicant's complaint. Referring to its case-law it found that rights and obligations which resulted from an employment as a civil servant could not be considered as "civil rights" within the meaning of Article 6 of the Convention. It followed that Article 6 was not applicable to the applicant's case. It further found that there was no indication of arbitrariness in the proceedings at issue.

This decision was served on the applicant's counsel on 13 February 2002.

B. Relevant domestic law

1. Proceedings concerning the transfer of civil servants

Section 38 § 1 of the Civil Servants Act (*Beamten-Dienstrechtsgesetz*) defines the transfer (*Versetzung*) of a civil servant as permanent assignment to another department.

Under Section 40 § 2 the recall (*Abberufung*) of a civil servant is equivalent to a transfer *inter alia* when the new assignment has not at least the same grade as the former post.

According to Section 38 § 2 a transfer can be ordered *ex officio* in case of important official interest. § 3 provides that an important official interest exists in particular when there had been a final disciplinary conviction of the concerned civil servant and, having regard to the kind and gravity of the violation of professional duties, the further stay of the civil servant in his/her actual position is not any longer maintainable.

Under Section 38 § 7a the transfer is to be ordered by decision. The concerned civil servant can appeal against this decision. His appeal does not have suspensive effect on the decision.

S. 121 of the Salaries Act (*Gehaltsgesetz*) provides that a civil servant is entitled to an extra duties allowances (*Verwendungszulage*) if he permanently has a considerable level of responsibility for the accomplishment of tasks of general administration and if this level of responsibility exceeds the one which is normally connected with a position in an equal grade.

Pursuant to Section 41a § 6 an appeal will be decided upon by the Appeals Commission (*Berufungskommission*) established at the Ministry for Public Service and Sport (*Bundesministerium für öffentliche Leistung und Sport*).

Section 41a regulates the composition of the Appeals Commission. Its paragraph 3 provides that its chair and his/her substitute are judges, the other members legally trained civil servants whereof one half are representatives of the employer and the other half representatives of the employee. The members are appointed by the Federal President on a proposal of the Federal Government (*Bundesregierung*) or by the President of the National Assembly (*Nationalratspräsident*). Representatives of the employees are in principle nominated by the Union of Civil Servants (*Gewerkschaft Öffentlicher Dienst*) and, in case the Union makes no nomination within four weeks, by the Minister for Public Service and Sport.

The term of office is five years.

Section 41c provides that the Appeals Commission decides in formations (*Senate*) consisting of three members, the chair or his/her substitute, one civil servant representing the employer and one civil servant representing the employee. The civil servant representing the employer has to be employed at the Federal Ministry of the respective complainant.

The chair of the Appeals Commission has to fix, for one year in advance, the number of the formations, their members and the sequence in which members have to step in if a member is incapacitated. The chair further allocates business.

Section 41d § 1 provides that the Appeals Commission decides by majority of votes. Its paragraph 2 provides that the members of the Appeals Commission are not bound by any instructions in the exercise of their functions.

The Appeals Commission's decisions are not subject to an appeal to the Administrative Court.

They are, however, subject to an application (*Bescheidbeschwerde*) to the Constitutional Court.

2. Hearings before the Appeals Commission

Hearings before the Appeals Commission are governed by the Code of General Administrative Procedure *(Allgemeines Verwaltungs-verfahrensgesetz*). Article 40 § 1 of this Act provides as follows:

> "Oral hearings shall be held in the presence of all known parties and the necessary witnesses and experts...

It is the consistent practice of administrative authorities to hold oral hearings in camera unless the law provides otherwise, as it is commonly understood that the principle of publicity does not extend to administrative proceedings.

3. Complaint to the Constitutional Court

Article 144 § 1 of the Federal Constitution (*Bundes-Verfassungsgesetz*) provides that the Constitutional Court, on an application, will determine whether an administrative decision has infringed a right guaranteed by the Constitution or has applied an unlawful regulation, an unconstitutional law or an international treaty incompatible with Austrian law.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the alleged unfairness of the disciplinary proceedings against him. In particular, he submits that the Austrian authorities dismissed his requests for the taking of evidence relating to his argument that the disciplinary proceedings against him had to be seen in the context of the Ministry's restructuring programme and were aimed at obliging him to take early retirement. The applicant complains under Article 7 of the Convention that the relevant provisions of the Non-Discrimination Act were not sufficiently precise to serve as a basis for the disciplinary sanction imposed on him.

2. As to the proceedings relating to his recall from the post as head of the Institute and transfer to another post, the applicant complains under Article 6 about the lack of a public oral hearing by a tribunal. He further complains under Article 6 of the Convention that the above proceedings against him had been unfair in that his arguments, according to which the proceedings had to be seen in the context of the Ministry's restructuring

programme and were aimed at obliging him to take early retirement, had not been taken into account.

3. Finally, relying on Article 14 of the Convention, he complains about the financial burden the transfer places on him.

THE LAW

A. Disciplinary proceedings

The applicant complained under Article 6 of the Convention about the alleged unfairness of the disciplinary proceedings against him. He further complained under Article 7 of the Convention that the relevant provisions of the Non-Discrimination Act were not sufficiently precise to serve as a basis for his disciplinary conviction.

The Court notes, however, that the applicant failed to lodge a complaint with the Constitutional Court against the Senior Disciplinary Board's decision of 15 June 2000. He has therefore failed to exhaust domestic remedies.

It follows that these complaints must be rejected under Article 35 §§ 1 and 4 of the Convention.

B. Transfer proceedings

The applicant complained under Article 6 about the lack of a public oral hearing and about the alleged unfairness of the proceedings. Article 6 § 1, as far as relevant, reads a follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

1. Applicability of Article 6 § 1

Referring to the case Pellegrin (*Pellegrin v. France* [GC], no. 28541/95, §§ 64, 66, ECHR 1999-VIII), the Government argued that Article 6 does not apply to the impugned proceedings. They referred to the tasks of the Federal Bacteriological-Serological Research Institute as listed in its activity profile which they submitted. In particular they stressed the Institute's tasks as regards the maintenance of a notification system concerning certain infectious diseases, the Institute's assistance in the elaboration of the relevant legislation and recommendations, and the representation of the competent Ministry's department in national and international expert groups. They further pointed out the applicant's degree of responsibility as head of

the Institute and referred in particular to his authority to issue decisions (*Bescheide*) in accordance with Section 3 of the Civil Servants Act.

The applicant contested the Government's submissions. He asserted that his activity as head of the Federal Bacteriological-Serological Research Institute consisted mainly in the carrying out of medical examinations and that he had no participation in the exercise of public authority. He maintained that his responsibilities as head of the Institute were comparable of those of a director of a private institution.

In the Court's opinion, the question whether Article 6 is applicable to the proceedings at issue must be further examined together with the merits of the complaints under Article 6 of the Convention. Thus, the Court finds necessary to join this question to the merits of the case.

2. Compliance with Article 6 § 1

The Court finds that the applicant's complaints fall to be examined under the aspect of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.

The applicant first complains under Article 6 of the Convention that the proceedings had been unfair in that not all of his arguments had been duly taken into account by the domestic authorities.

Assuming that Article 6 is applicable to the proceedings at issue, the Court reiterates, that Article 6 does not lay down any rules on the way evidence should be assessed, which is therefore primarily a matter for regulation by national law and the national courts (see, amongst others, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no.140, p. 29, §§ 45-46). In the present case, the Court finds no indication that the domestic authorities, which issued reasoned decisions, applied the national law in an arbitrary or unfair way.

It is true that the applicant also complains about the lack of a public oral hearing before a tribunal.

In this respect the Government, referring to the relevant provisions of the Civil Servants Act concerning the composition of the Appeals Commission, asserted that this body qualifies as a tribunal within the meaning of Article 6 § 1 of the Convention.

Furthermore, the Government argued that the applicant had failed to request a public hearing before the Appeals Commission. Although the domestic law governing the proceedings at issue did not explicitly provide for public hearings, an interpretation of the relevant provisions in conformity with the Federal Constitution would nevertheless have obliged the Appeals Commission to hold one if this was required under Article 6 of the Convention. However, the applicant had waived his right to a public hearing. In any case, the relevant facts could be adequately established and determined on the basis of the case-file. The Government finally contended that the exclusion of the public was generally justified in employment

disputes between the authorities and civil servants. The absence of a public hearing was all the more justified in the present case as it concerned merely incidents of an intimate nature which happened within the applicant's Institute.

The applicant contested the Government's view. He submitted that two members of the Appeals Commission were civil servants who were bound by instructions from his former employer, the Ministry for Work, Health and Social Affairs and can, therefore, not be regarded as independent and autonomous.

The applicant contested that he had waived his right to a hearing. He argued that, in any way, the Appeals Commission should have held a hearing of its own motion in order to comply with the requirements of Article 6 § 1. Moreover, the applicant pointed out that even if a hearing had been held, it would not have been public pursuant to the relevant domestic law.

The Court finds, in the light of the parties' submissions, that the complaint raises issues of fact and law under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that the complaint about the lack of a public oral hearing is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

The applicant further complained about the financial burden the transfer places on him and relied on Article 14 of the Convention.

The Court recalls that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention, but that not every difference in treatment will amount to a violation of this provision. An issue will arise under Article 14 when it is demonstrated that States treat differently persons in analogous situations without providing an objective and reasonable justification, or when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV, § 44).

In the present case, neither the applicant's submissions nor the facts of the case show any discriminatory treatment in the enjoyment of the rights of the Convention.

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

Decides to join to the merits the question as to the applicability of Article 6 of the Convention to the proceedings at issue;

Declares admissible, without prejudging the merits, the applicant's complaint concerning the lack of a hearing in the proceedings concerning his recall and transfer;

Declares inadmissible the remainder of the application.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President