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. 54640/00
by Thomas R. SYLVESTER
against Austria

The European Court of Human Rights (First Section), sitting on 9 October 2003 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr E. FRIBERGH, *Section Registrar*

Having regard to the above application lodged on 23 August 1999,

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 Thomas R. Sylvester, is a national of the United States of America, who was born in 1953 and lives in Cincinnati, Ohio.

A. The circumstances of the case

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

In April 1994 the applicant married an Austrian citizen. The marriage was concluded in the United States of America and the couple set up their common residence in Michigan. On 11 September 1994, their daughter was born.

On 31 October 1995, after his wife had left the United States with their daughter without obtaining the applicant's consent and had set up her residence in Austria, he brought a petition for divorce in the Oakland Circuit Court (Michigan). He also introduced court proceedings in Austria requesting the return of his daughter under the 1980 Hague Convention on the Civil Aspects of Child Abduction.

On 2 November 1995 the applicant's wife brought a petition for divorce in the Graz District Civil Court.

On 16 April 1996 the Oakland Circuit Court confirmed a default decree of divorce issued in January 1996, noting that Mrs Sylvester had failed to comply with the requirements for setting aside the default. Further, it awarded the applicant sole custody over the couple's daughter and ordered that she should reside with him in case of her return.

On 5 June 1996 the applicant filed a request for recognition of the divorce decree with the Austrian Federal Ministry of Justice.

On 26 September 1996 the Federal Ministry of Justice refused to grant this request. Referring to section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act (*4. Durchführungsverordnung zum Ehegesetz*), it considered that a recognition of the divorce decree would be contrary to Austrian *ordre public* as the applicant's wife, being the defendant in the proceedings before the Oakland Circuit Court, had not been heard as she was considered to be in default, despite the fact that the applicant's petition for divorce had not been duly served on her.

Thereupon, on 15 November 1996 the applicant filed a complaint with the Administrative Court. The latter instituted preliminary proceedings on 25 November 1996.

On 9 January 1997 the Administrative Court received the observations of the Federal Ministry of Justice and, on 20 January 1997, it received the observations of Mrs Sylvester as a third party.

On 18 December 1998 the Administrative Court referred the case to the Constitutional Court requesting it to review the constitutionality of Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act.

It argued that Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which has constitutional rank in Austrian law, applied to the proceedings concerning the recognition of foreign divorce decrees as their outcome had a direct effect on the civil law relationship of the persons concerned. However, it was incompatible with that Article that the Federal Ministry of Justice, an administrative authority, decided upon the request for recognition. The subsequent control by the Administrative Court was not sufficient where the subject matter, such as family law relations, fell within the very core of the notion of "civil rights".

The Constitutional Court received the Administrative Court's request on 19 February 1999. The Administrative Court submitted three further requests raising the same issue, which were received by the Constitutional Court on 13 July, 21 October and 12 November 1999, respectively. The proceedings in these cases were joined to proceedings in the applicant's case.

On 4 February 2000 the Administrative Court supplemented its request in the applicant's case.

On 28 February 2001 it supplemented its requests in the three other cases.

On 16 June 2001 the Constitutional Court gave its judgment, finding that Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act was in conformity with the constitution.

The Constitutional Court noted firstly that the proceedings at issue did not concern the question whether the foreign courts had committed errors of fact or law, but only the question whether certain formal requirements, including the competence of the foreign courts, were complied with and whether a recognition was compatible with Austrian *ordre public*. Thus, the recognition of foreign divorce decrees was closely linked to the question whether they could be enforced in Austria. Referring to a number of decisions, in which the European Commission of Human Rights had found that Article 6 did not apply to enforcement proceedings, the Constitutional Court expressed doubts as to the applicability of Article 6.

Even assuming that Article 6 applied, the Constitutional Court, referring to the Court's *Zumtobel v. Austria* judgment (of 21 September 1993, Series A no. 268-A), held that that the Administrative Court's scope of review was sufficient, since proceedings concerning the recognition of foreign divorce decrees involved mainly questions of law. Where an assessment of facts was required, as for instance where the question arose whether an action had been duly served, the Administrative Court was empowered to review whether the administrative authority's assessment was correctly based on the contents of the file.

On 5 October 2001 the Administrative Court, having resumed its proceedings, dismissed the applicant's complaint. The decision was served on the applicant on 29 October 2001.

B. Relevant domestic law

Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act, as applicable at the material time, read as follows:

> "Decisions by which a marriage is declared null and void abroad, set aside, divorced with regard to the link or by maintaining that link or by which the existence or non-existence of a marriage between the parties is established abroad, shall be effective in Austria only if the Federal Minister of Justice or the body determined by him has held that the legal prerequisites for recognising that decision exist. In doing so, Section 328 of the German Code of Civil Procedure (*Reichs-Zivilprozessordnung*) shall be applied, *mutatis mutandis*, ... The finding shall be binding upon the courts and administrative authorities."

Section 328 of the German Code of Civil Prodecure, Imperial Law Gazette 6/1877, as amended by the Fourth Implementing Regulation to the Marriage Act excluded recognition of a judgment delivered by a foreign court *inter alia* if the courts of the foreign state at issue were not competent according to Austrian legal provisions or if the unsuccessful defendant was an Austrian national and had not entered an appearance, provided that the summons had neither been served on him or her in person in the state in question or through Austrian legal assistance.

Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act was rescinded with effect of 1 March 2001 by Article IV of the Parents and Child (Amendment) Act (*Kindschaftsrechts-Änderungsgesetz*) (Federal Law Gazette Vol I, No. 135/2000).

COMPLAINT

The applicant complained under Article 6 of the Convention about the length of the proceedings relating to his request for recognition of the divorce decree and custody decision delivered by the Oakland Circuit Court.

THE LAW

The applicant complained about the length of the above proceedings. He relied on Article 6 of the Convention which, so far 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 Government asserted that Article 6 did not apply to the proceedings for recognition of a foreign divorce decree. Such proceedings reflect the principle of sovereignty which allow a State to decide under which conditions a foreign decision shall have effect in its domestic legal order. Thus, they concern essentially a public-law issue.

Moreover, although there was a right to recognition if the requirements of Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act were met, this right was of a procedural rather than of a substantive nature. This procedural right was subordinate to the substantive right to dissolution of the marriage. The proceedings concerning recognition were akin to enforcement proceedings which, according to the Commission's case-law, did not generally fall under Article 6, unless they were capable of giving rise to a fresh determination of substantive matters. Although the Court had found more recently that the execution of a judgment had to be regarded as an integral part of the "trial" for the purposes of Article 6 (see, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510-11, § 40), it could not be inferred from this case-law that a new determination of the substantive right was at stake at the enforcement stage.

As to the duration of the proceedings, the Government submitted that it could still be considered as reasonable. The proceedings were complex in that they raised an issue of constitutional law. The Administrative Court thus, had to seize the Constitutional Court which joined the applicant's case to three other cases raising the same issue. No major periods of delay were attributable to the authorities.

The applicant contested the Government's view. He submitted that he sought recognition of his divorce but first and foremost of the custody decision also contained in the Oakland Circuit Court's decision of 16 April 1996. Consequently, the proceedings at issue were decisive for his "civil rights", in particular his custody rights concerning his daughter. Moreover, proceedings for the recognition of foreign decisions were akin to enforcement proceedings. Relying on *Hornsby v. Greece* (cited above), the applicant argued that Article 6 applied to enforcement proceedings.

In the applicant's assertion the duration of the proceedings was excessive. He contested that the proceedings were complex and asserts that, while no delay was attributable to him, there were lengthy periods of inactivity in the proceedings before the Administrative Court and the Constitutional Court.

The Court reiterates that for Article 6 § 1, in its "civil" limb, to be applicable there must be a dispute (*contestation*) over a "right" that can be said, at least on arguable grounds, to be recognised under domestic law. The dispute 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. Lastly, the right must be a "civil" right (see among many other authorities, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X).

In the present case, it is not in dispute that the applicant had a right under Section 24 § 1 of the Fourth Implementing Regulation to the Marriage Act to have the Oakland Circuit Court's decision of 16 April 1996 recognised provided that certain requirements were met. The recognition proceedings concerned the question whether or not the decision at issue was to be given effect in the Austrian legal order, thus determining the applicant's marital status and his parental rights. It follows, that the outcome of the proceedings was directly decisive for the applicant's civil rights.

The further arguments adduced by the Government do not lead to another result. The Court is not called upon to decide whether its jurisprudence in *Hornsby* (cited above) and subsequent cases (see, for instance *Immobilare Saffi v. Italy* [GC], no. 22774/93, § 63, ECHR 1999-V) which was developed in cases relating to the execution of a final, binding judicial decision given by the authorities of the Contracting State in proceedings attracting the guarantees of Article 6, can be applied in a case like the present one concerning the recognition of a foreign judicial decision. However, it reiterates that Article 6 was also considered to be applicable in proceedings to have a judgment of the ecclesiastical courts, concerning the annulment of a marriage, declared enforceable (see *Pellegrini v. Italy*, no. 30882/96, §§ 40-47, ECHR 2001-VIII). The Court sees no reason to reach a different conclusion in the present case.

In short, the Court finds that Article 6 applies to the proceedings at issue.

The Court considers, in the light of the criteria established by its case-law on the question of "reasonable time", and having regard to all the material 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.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President