

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

FIRST SECTION

DECISION

Application no. 34729/08
Johann WEINZINGER
against Austria

The European Court of Human Rights (First Section), sitting on 27 November 2012 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Nina Vajić,
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 18 July 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 Weinzinger, is an Austrian national who was born in 1950 and lives in Katsdorf. He is represented before the Court by Mr B. Scharmuller, a lawyer practising in Linz.

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

A. The circumstances of the case

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

4. The applicant worked for the V. company as head of the customs duties department from 1999 to 2001.

5. In 1999 and 2000 the Linz Main Customs Office (*Hauptzollamt*) carried out inspections at three subsidiary companies owned by the V. Company because it suspected irregularities in connection with the payment of customs duties.

6. By letters dated 30 June 2000 and 5 February 2001, the Main Customs Office notified the applicant that criminal proceedings for financial offences had been instituted against him on suspicion of negligent evasion of customs and import duties. As the applicant was responsible for the customs declarations of the V. company and its subsidiaries, the proceedings were directed against him. The applicant was asked to submit written statements within two weeks.

7. The applicant gave information in an oral statement and had his lawyer submit two written statements, that included the applications to discontinue the proceedings, on 31 July 2000 and 19 February 2001. The Main Customs Office did not respond to these statements.

8. By a letter dated 15 April 2008 the applicant was summoned to a hearing before the Linz and Wels Main Customs Office as the criminal authority of first instance in financial matters (*Zollamt Linz Wels als Finanztrafbehörde I. Instanz*). The subject matter concerned the alleged financial criminal offences notified to the applicant on 30 June 2000 and 5 February 2001.

9. The hearing was held on 15 May 2008 before the panel dealing with the case (*Spruchsenat beim Zollamt Linz Wels als Organ* des *Zollamtes Linz als Finanzstrafbehörde I. Instanz*). Certain of the customs duties the applicant was charged with having negligently evaded were found to be time-barred. As regards the remainder of the charges, the panel decided to discontinue the proceedings having found that the applicant had neither acted negligently nor against the law. The decision was served on the applicant's counsel on 17 June 2008.

B. Relevant domestic law

1. Application against the administration's failure to decide

(a) Federal Constitution

10. Under Article 130 of the Federal Constitution (*Bundes-verfassungsgesetz*), the Administrative Court rules on, *inter alia*,

applications (*Beschwerden*) in which it is alleged that the administrative authorities have breached their duty to decide.

11. 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

12. 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 not possible.

(c) Administrative Court Act

13. Section 27 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), relating to applications against the administration's failure to decide reads 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 ..."

14. According to a judgment of the Constitutional Court of 30 September 1989 (published in the official collection of that court's decisions, *VfSlg* 12167/89), the Administrative Court may also 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, 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

15. The competence of the tax authorities as regards proceedings relating to tax offences and the conduct of these proceedings are regulated by the Tax Offences Act (*Finanzstrafgesetz*).

16. Section 57 of the Tax Offences Act, as in force at the relevant time, stated that proceedings regarding tax offences had to be conducted by the authorities *proprio motu* and that evidence on behalf of the defendant had to be taken into consideration as much as evidence against the defendant. It further stated that defendants not represented by counsel had to be properly advised and supported by the tax authority conducting the proceedings.

17. On 1 January 2008 an amended section 57 of the Tax Offences Act entered into force that added a new paragraph 6 stating that proceedings regarding tax offences had to be conducted speedily and without any unnecessary delays and had to be terminated within a reasonable time. It further introduced a remedy against delays of the first-instance authority in deciding: the defendant could lodge an application with the chairman/chairwoman of the competent appeal panel of the Independent Finance Panel (*Unabhängiger Finanzsenat*) for the setting of a reasonable time-limit for the first instance tax authority to proceed.

COMPLAINT

18. The applicant complained under Article 6 of the Convention that the proceedings had not been concluded within a reasonable time, especially since the proceedings had remained at a standstill for seven years.

THE LAW

19. The applicant complained of the length of the tax proceedings conducted against him and relied in this context on Article 6, which reads, in so far as relevant, as follows:

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

20. The Government maintained that the applicant had failed to exhaust domestic remedies. In particular, the Government argued that the applicant had failed to lodge an application against the administration's failure to decide with the Administrative Court pursuant to Article 132 of the Federal Constitution. Further, the Government, referring to the *Basic* case, the *Pallanich* case and the *Rozsa* case (see *Basic v. Austria*, no. 29800/96, ECHR 2001-I; *Pallanich v. Austria*, no. 30160/96, 30 January 2001; and

Rozsa v. Austria (dec.), no. 67950/01, 6 April 2004), contended that the Court had previously found that an application against the administration's failure to decide constituted an effective and sufficient remedy for preventing procedural delays.

21. The Government also stated that even though the law did not provide for a statutory time-limit for the authority in the proceedings at issue to render its decision, it was nevertheless required to conduct the proceedings as regards offences under the Tax Offences Act expeditiously and without unnecessary delays. In this context, the Government referred to paragraph 6 of section 57 of the Tax Offences Act (see paragraph 17 above). Thus, if the respondent authority, as in the present case, failed to render its decision in a reasonable time, a party could apply to the Administrative Court pursuant to Article 132 of the Federal Constitution.

22. The applicant contested the Government's argument that he had failed to exhaust domestic remedies. He stated that in proceedings in relation to tax offences it was not for the defendant to ensure that the proceedings were conducted speedily. He further argued that because the law did not provide for a statutory time-limit by which the authority had to render its decision, an application under Article 132 of the Federal Constitution would have been futile.

23. The Court notes that the proceedings at issue began on 30 June 2000 and on 5 February 2001 respectively and both ended on 17 June 2008, when the applicant was informed of the panel's decision to discontinue the proceedings. They thus had an overall duration of almost eight years and seven years and more than four months respectively.

24. However, the question arises whether the applicant could have made use of an application against the administration's failure to decide pursuant to Article 132 of the Federal Constitution. In this regard, the Court observes that in *Basic v. Austria*, a case that also related to proceedings concerning tax offences, it found that an application pursuant to Article 132 of the Federal Constitution constituted an effective remedy (see *Basic*, cited above, § 38).

25. With regard to the parties' observations, the Court notes that when the Government refers to a statutory duty of the authority to conduct proceedings concerning tax offences expeditiously and without unnecessary delay under paragraph 6 of section 57 of the Tax Offences Act, it must be kept in mind that that paragraph only entered into force on 1 January 2008 and was therefore without any relevance for the greater part of the proceedings in relation to the applicant. However, the Court takes note of the Austrian authorities' general obligation to decide within six months upon a request by a party in administrative proceedings (see *Basic*, cited above, § 36; *Pallanich*, cited above, § 29; and paragraph 12 above). The Court can therefore not agree with the applicant's argument that without a

specific statutory time-limit for the authority at issue to render its decision, an application against its failure to decide would haven been futile.

26. Overall, the Court sees no reason to deviate from its prior view on the effectiveness of the remedy of an application against the administration's failure to decide pursuant to Article 132 of the Federal Constitution in preventing undue delays in proceedings regarding tax offences.

27. It follows that the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for failure to exhaust domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President