

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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No public hearing – a violation of Art. 6 para. 1 ECHR

Austrian Constitutional Court
Judgement from June 12th, 2006
B 260/05, VfSlg. 17.855

Facts of the case

On 18 March 2004, the complainant bought the plot of land, registered as N° 998 of the cadaster community *Dietmanns* N° 21005, comprising 0,8738 hectares. With its notification of 21 June 2004, the Real Property Transactions Authority, responsible for *Waidhofen an der Thaya*, denied its approval for the transaction. The subsequent appeal against this notification was lodged with the Lower Austrian Regional Real Property Transactions Commission, including a formally expressed request to hold a public hearing in this case. The appeal was eventually dismissed, whereby this decision was based on the argument that the primary goal of the Lower Austrian Real Property Transactions law was not – as proposed by the complainant – the preservation or creation of viable farms, but instead their consolidation. In the eyes of the commission, aspects of consolidation, as found in the other interested buyer, prevailed over the complainant's arguments. No public hearing was held.

The complainant challenged this decision on the basis of Art. 144 B-VG, claiming a violation of her constitutionally guaranteed rights to equal treatment of all Austrian citizens, to freedom of land acquisition, to inviolability of property, to a fair trial before a lawful judge, to a public hearing before an impartial tribunal as put forth in Art. 6 para. 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) as well as the application of an unconstitutional law.

When reasoning the asserted violation of Art. 6 para. 1 ECHR, the complainant argued that against her explicit request and given the fact that next to a legal question also questions concerning the facts had been at issue, no public hearing had been held.

The Lower Austrian Regional Real Property Transactions Commission opposed these arguments in its refutation and put forth that it was not within the discretion of the commission to hold an oral and public hearing, asserting that there was no legal basis for such a hearing before the commission. Moreover, the commission argued, the facts of the case were clear, even when considering the complainant's appeal, and the sole question that remained for the case was of purely legal nature.

Relevant Provisions

Art. 6 ECHR – Right to a fair trial¹

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
..."

The Ruling of the Austrian Constitutional Court

The Austrian Constitutional Court found it to be beyond question that proceedings and decisions on the approval of land transfer fall within the core of "civil rights" (VfSlg. 16.402/2001).

Next, it put forth that according to the jurisprudence of the European Court of Human Rights (ECtHR) in *Jacobsson vs. Sweden* (ECtHR 19/2/1998, ÖJZ 1998, 935; similar in arguments, but finding a violation of Art. 6 ECHR: *Alge vs. Austria*, ECtHR 22/1/2004, ÖJZ 2004, 477) any proceeding subject to the requirements of Art. 6 ECHR before a court deciding as first and last instance at the same time contains a right to a public hearing, if not exceptional circumstances dispensed the court from doing so². The ruling then gives examples for such exceptional circumstances: clear and undisputed facts, sole existence of a legal question of simple nature, unambiguous waiver of the right to a public hearing, no question of public interest at discussion.

The Court then draws attention to the fact that the complainant had explicitly requested a public hearing – a request that the commission concerned had countered with the assertion that a public hearing would not be foreseen by the applicable law. Subsequently, the Austrian Constitutional Court clarifies that while the Lower Austrian Real Property Transactions Act of 1989 might not contain any provisions regulating the question of public hearings, Art. II para. 2 Nr. 17 of the EGVG (Introductory Law to the Acts on Administrative Procedure) provides for the application of the AVG, the Administrative Procedure Act, on proceedings

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- 1 The European Convention on Human Rights and Fundamental Freedoms was signed by Austria on 13 December 1957 and subsequently ratified on 3 September 1958, the same day it entered into force. With the Constitutional Law published in Federal Law Gazette 1964/59, the ECHR retroactively became part of Austrian constitutional law, making Austria to this point the only member state according this status to the Convention (see also Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, 3rd edition [2008] p. 16.)
 - 2 In *Fischer vs. Austria* (ECtHR 26 April 1995, Application no. 16922/90) found that Austria had violated Art. 6 ECHR by not holding a public hearing in the case of a businessman who had requested such hearing and whose case posed not only legal questions, but also important factual questions (para. 44).

concerning land transfer, thus serving as a basis for public hearings in § 39 para. 2 and § 40 et seq. of the Act.

Until the ruling at hand, the Austrian Constitutional Court held that the AVG did call for hearing public to the parties, but not to the general public (VfSlg. 6808/1972). However, it now also finds that nothing in the AVG prevents such a public hearing accessible for the general public (in this line: VfSlg. 16.894/2003).

Next the Austrian Constitutional Court dealt with the question whether the Lower Austrian Regional Real Property Transactions Commission's assumption of a clear set of facts in the present case had been legitimate or not. It was not. The Commission assumed the complainant had been a farmer within the definition of the Lower Austrian Real Property Transactions Act and that the sales contract had to be denied approval as the prognosis for the second interested buyer was better for the consolidation of a capable farming community as opposed to the preservation or consolidation of farm land. With this, the Court found, the Commission had already anticipated a possible result of a public hearing, as a hearing should serve to collect evidence and to discuss this evidence with the parties. At the time of the decision of the Commission, the facts of the case could not have been considered clear. Moreover, no exceptional circumstances were identified which could justify the omission of a public hearing.

For these reasons, the Austrian Constitutional Court found that the Lower Austrian Regional Real Property Transactions Commission had violated the complainant's right to a fair trial pursuant to Art. 6 para. 1 ECHR by not holding a public hearing.

Conclusion

The Austrian Constitutional Court is quite clear when it comes to the point of applying the guarantees of Art. 6 para. 1 ECHR to proceedings concerning the transfer of real property, a field of law keeping Austrian and European authorities and tribunals constantly busy. As Art. 6 para. 1 ECtHR ties its guarantees to the existence of "civil rights" in the dispute, it is now recognized, bearing the longstanding jurisprudence in mind, that the concept of "civil rights" comprises real property transfer law. However, in the future it will be necessary to take a second, if not closer, look at the question whether "civil rights" should not also cover legal matters such as asylum law or other areas, which up to now are excluded³ from the applicability of Art. 6 ECHR.

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3 The ECtHR has held in the past that asylum law, even though it might have enormous implications on the family and private life of an applicant as well as on his or her employment, does not fall under the scope of Art. 6 para. 1 ECHR.