

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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No doubts about the appearance of independence and impartiality of the Carinthian Independent Administrative Panel

Austrian Constitutional Court
Judgement of June 20th, 2008
B 61/07

The Circumstances of the case

On 16th November 2005 the Völkermarkt District Administrative Authority (Bezirkshauptmannschaft) convicted the applicant under the Motor Vehicles Act ("Kraftfahrgesetz"). The appeal, which the applicant filed against this decision with the Carinthian Independent Administrative Panel, was dismissed on the merits on 20th November 2006. The applicant filed a complaint with the Austrian Constitutional Court. He alleged violations of his right to a fair trial as well as his right to be judged by the competent authority. In his opinion, the member of the Carinthian Independent Administrative Panel, dealing with his case, did not fulfill the requirements established in Art 6 § 1 ECHR. The applicant had doubts as to the "appearance of impartiality".

Relevant Constitutional Law

Art 6 § 1 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), which has the rank of an Austrian federal constitutional law, reads:

"Article 6 – Right to a fair trial

(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. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Art 129b Austrian Federal Constitution ("Bundes-Verfassungsgesetz", hereinafter B-VG) reads:

"Art 129b (1) The independent administrative tribunals consist of a Chairman, a Deputy Chairman, and the requisite number of other members. The Land Government appoints members for at least six years. No fewer than a quarter of the members have to be drawn from professional appointments in the Federation.

(2) The members of the independent administrative tribunals are not bound by any instructions in the performance of the tasks referred to them in accordance with Arts. 129a and 129b. Business shall be allocated in advance among members of the independent administrative tribunals for the period regulated by Land legislation; a matter devolving upon a member of an independent administrative tribunal in accordance with this allocation may only in case of his being prevented from the discharge of his responsibilities be removed from him at the ruling of the Chairman.

(3) Members of the independent administrative tribunals may before expiry of the period of appointment be removed from office only in the legally specified instances and only at the resolution of the independent administrative tribunal.

..."

The Court's Assessment

The legislature, who established the Independent Administrative Panels in 1988, wanted to create authorities which fulfilled the requirements of independent and impartial tribunals established in Art 5 and 6 ECHR.

According to the standing jurisdiction of the Constitutional Court, the Independent Administrative Panels, which could be regarded as "tribunals" within the meaning of Art 6 § 1 ECHR, shall not cast doubts about their independence and impartiality. The deciding factor is not just the personal impartiality, but the "appearance of impartiality" (eg VfSlg. 11.131/1986, 15.439/1999, 15.507/1999, 16.959/2003, 17.990/2006).

The Constitutional Court referred to the judgement of the European Court of Human Rights in the case of *Belilos v Switzerland* (Appl no 10328/83), ECHR 29. April 1988, in which the European Court of Human Rights held:

"Nonetheless, a number of considerations relating to the functions exercised and to internal organisation are relevant too; even appearances may be important ... In Lausanne the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.

In its earlier jurisdiction, the Constitutional Court found – in consequence of the jurisdiction of the European Court of Human Rights – a violation of Art 6 § 1 ECHR if the appointment of the member was limited and if there were special circumstances that cast doubts about the appearance of independence and impartiality of the Independent Administrative Panel (eg VfSlg. 17.990/2006).

In the present case, the Constitutional Court could not find a violation of Art 6 § 1 ECHR.

The members of the Carinthian Independent Administrative Panel are not bound by any instructions in the exercise of their functions (see Art 129b § 2 B-VG, Art 5 § 1 Carinthian Act on the Independent Administrative Panel ["Kärntner Verwaltungssenatsgesetz", hereinafter K-UVSG]); they are appointed for a term of six years and can only be displaced earlier for the reasons provided in Art 5 § 3 and 4 K-UVSG.

Due to the fact that the members of the Carinthian Independent Administrative Panel are not bound by any instructions, special reasons have to occur to cast doubts about their independence and impartiality.

The member of the Carinthian Independent Administrative Panel, which decided the present case, was appointed for a term of six years on 1st May 2003. Prior to his appointment he worked for the Provincial Government's Office at the department of environmental legal matters ("Amt der Kärntner Landesregierung, Abteilung für Rechtliche Angelegenheiten des Naturschutzes").

The District Administrative Authorities are subordinated to the Provincial Governor, who is the head of the Provincial Government's Office. They decide matters of the indirect federal as well as the land's administration. For that reason, the Völkermarkt District Administrative Authority, which convicted the applicant, was bound by instructions of the Carinthian Provincial Governor if he decided on violations of the Motor Vehicles Act.

The member of the Carinthian Independent Administrative Panel which dealt with the present case did not work for the Völkermarkt District Administrative Authority prior to his appointment. His prior work for the Provincial Government's Office does not cast doubts as to his independence and impartiality. Furthermore, the member of the Carinthian Independent Administrative Panel decided on an appeal about the Motor Vehicles Act, a matter on which he did not decide prior to his appointment.

Because of these circumstances, the Constitutional Court had no doubts as to the appearance of independence and impartiality of the member of the Carinthian Independent Administrative Panel. The court held that there was no violation of Art 6 § 1 ECHR and that the decision did not violate any other fundamental right relied on the applicant. Consequently the Constitutional Court dismissed the application.

Note

The present case, in which the Constitutional Court did not find a violation of Art 6 § 1 ECHR, is in accord with his earlier jurisdiction (eg VfSlg. 11.131/1986, 15.439/1999, 15.507/1999, 16.959/2003, 17.990/2006). In the court's opinion, the deciding factor was that the member of the Carinthian Independent Administrative Panel, which dealt with the present case, did not cast doubts as to the appearance of independence and impartiality because of his prior work for the Provincial Government's Office.

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