

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Administrative penal proceeding and remedy against administrative delay

Austrian Constitutional Court
Judgement of November 6th, 2008
G 86, 87/08

Facts of the case

The Austrian Constitutional Court had to decide on two complaints against rulings of the Independent Administrative Tribunal (Unabhängiger Verwaltungssenat [der Länder]). The first complaint was against the decision of the Independent Administrative Tribunal of Lower Austria (B 1323/07) concerning an offence of § 3 para. 1 in conjunction with § 28 para. 1 number 1 Law on the employment of foreigners ("Ausländerbeschäftigungsgesetz"). The second one was against the ruling of the Independent Administrative Tribunal of Upper Austria concerning an offence of the same ordinance (B 1817/07). Both applicants claimed (among others) a violation of their right to a fair proceeding within a reasonable time under Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) as a consequence the Administrative Penal proceeding period that was too long.

During the pendant procedure, the Constitutional Court raised concern that the word order "in which only the defendant has the right to appeal" in § 51 para. 7 Administrative Penal Act 1991¹ ("Verwaltungsstrafgesetz 1991", hereinafter VStG) might be unconstitutional and instituted a proceeding to investigate this word order ex officio.

Relevant provisions

§ 51 para. 7 VStG reads:

"Appeal

§ 51. (1) – (6) ...

(7) After expiry of a 15 months' period after an appeal has been served against a fine in a proceeding in which only the defendant has the right to

1 Federal Law Gazette No. 51/1991 as amended on Federal Law Gazette No. 158/1998.

appeal, the fine shall become ineffective by law; the proceeding shall be dismissed. The period of duration of a proceeding in the Constitutional Court, the Administrative Court or the Court of the European Communities shall not be included in this term."

§ 31 para. 3 VStG reads:

"Expiry by the statute of limitation

§ 31. (1) – (2) ...

(3) After expiry of a three years' period from the date mentioned in para 2 no more sentence may be imposed. A sentence must no more be enforced after the expiry of three years from the date it has become final. The period of duration of a proceeding in the Constitutional Court, the Administrative Court or the Court of the European Communities as well as periods during which the enforcement of the sentence has not been admissible, suspended, delayed or interrupted, shall not be included for purposes of counting the expiry for limitation of time."

§ 52b VStG reads:

"Obligation to decide

§ 52b. § 73 AVG (General Administrative Procedure Act) shall be applied only in matters of private prosecution and penal tax law of the Laender. The independent administrative panel of appeal of the Land where the subordinate authority is located has territorial jurisdiction."

Article 132 Federal Constitutional Law ("Bundes-Verfassungsgesetz"; hereinafter B-VG) reads:

"Art. 132. Complaint for breach of the onus to take a decision by administrative authorities including the independent administrative tribunals can be brought by the party who in administrative proceedings was entitled to claim fulfilment of that onus of decision. A complaint for breach of the onus to take a decision in administrative penal cases is inadmissible; this does not apply to private suits and to fiscal penal cases ."

Article 73 General Administrative Procedure Act („Allgemeines Verwaltungsverfahrensgesetz"; hereinafter AVG) reads:

"Obligation to decide

§ 73. (1) Unless provided differently in the administrative rules and regulations, the authorities are obligated to issue a ruling on submissions of parties (§ 8) and appeals without undue delay, however at the latest within six months after receipt. Provided that the legal provisions applicable result in different terms for the decision of combined proceedings (§ 39 para 2a), the term with the latest expiry date shall apply.

(2) In case the ruling is not issued within the term allowed for the decision, the party may request in writing that the higher authority having jurisdiction in the matter shall be in charge to take the decision; however, if an appeal against the ruling would be permitted to be filed with the independent administrative panel of appeals, the latter one shall be in charge of the decision (request for

transfer of jurisdiction). The request of transfer of jurisdiction shall be filed with the higher authority (the independent administrative panel of appeal). It shall be rejected if the delay is not mainly due to a fault of the authority.

(3) The deadline for the decision of the higher authority (the independent administrative panel of appeal) starts on the day on which the request for the transfer of jurisdiction is received."

Article 6 para. 1 ECHR reads:

"(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."

Article 13 ECHR reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Ruling of the Constitutional Court

Due to § 51 para. 7 VStG the fine shall become ineffective by law after expiry of a 15 months' period after an appeal has been served against a fine in a proceeding in which only the defendant has the right to appeal. After this period of time, the decision becomes ineffective by law and the Administrative penal proceeding has to be dismissed².

§ 51 para. 5 VStG as amended on Federal Law Gazette No. 299/1984 – the provision in subject before – excluded just private prosecution. The reason for excluding private prosecution was that in those cases the defendant could take a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG). Whereafter in all other proceedings the fine had become ineffective by law after expiry of a 15 months' period after an appeal has been served against a fine.

The Austrian Constitutional Court qualified the exclusion of private prosecution as constitutional, since the defendant has the possibility to take a request for transfer jurisdiction (§ 52b VStG in conjunction with § 73 AVG) and – if necessary – a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG). In all other administrative penal cases a request for transfer jurisdiction and a complaint of breach of the onus to take a decision are inadmissible (§ 52b VStG; Article 132 B-VG). In those cases, only § 31 para. 3 VStG extends cover against administrative's delay. According to § 31

2 See *Walter/Thienel*, *Verwaltungsverfahrensgesetze* II² (2000) § 51 VStG para. 29 ff.

para. 3 VStG, after expiry of a two years' period from the date of termination of the offence, or when the punishable behaviour ended, no more sentences may be imposed. As a result the Constitutional Court questions, if § 51 para. 7 VStG is in accordance with Article 13 in conjunction with Article 6 ECHR.

From the Constitutional Court's point of view, the right to an effective remedy requires legal remedies to expedite the proceedings or to control the proceedings consecutively³. The Constitutional Court agreed that a statutory maximum period of time such as § 51 para. 7 VStG would generally fulfill the requirements of Article 13 ECHR⁴. But as the period of fifteen months within which the authorities have to decide on appeals did apply just in cases, in which only the defendant has the right to appeal, § 51 para. 7 VStG did not ensure the standard of "effectiveness" of the purposes of Article 13 ECHR.

The federal government raised the objection that § 31 para. 3 VStG would guarantee an effective remedy against delays caused by the domestic authorities, since after an expiry of a three year period no more sentences might be imposed. If the proceeding exceeds the reasonable time requirement under Article 6 ECHR, the violation has to be considered in mitigation (§ 19 para. 2 VStG in conjunction with § 34 para. 2 VStG).⁵ Otherwise, the Constitutional Court will reverse the decision.⁶ The Constitutional Court did not agree with the federal government. Firstly § 31 para. 3 VStG could not prevent a violation under Article 6 ECHR without an effective remedy to expedite the proceeding required under Article 13 ECHR and further § 31 para. 3 VStG did not ensure that the written version of the appellate court's decision is submitted to the applicant within the period of three years.⁷

At least the Constitutional Court pointed out that the possibility of mitigation of punishment itself won't be up to standard under Article 13 ECHR. On the one hand, mitigation of a sentence assumes that authorities have to admit a violation under Article 6 ECHR; on the other hand, in cases of minimum sentence, a too long period of proceeding cannot be taken into account by determination of the penalty. Apart from that, the defendant cannot sue out of a decision in which the violation under Article 6 ECHR is expressed.

Therefore the Constitutional Court declared the word order „in which only the defendant has the right to appeal" in § 51 para. 7 VStG with regard to Article 13 in conjunction with Article 6 ECHR as unconstitutional and repealed this word order.

Assessment

In this jurisdiction, the Constitutional Court declares that the right to an effective remedy (Article 13 in conjunction with Article 6 ECHR) requires legal

3 Cp. *Kudla v Poland* (App no 30.210/96) ECHR 26 October 2000; *Scordino v Italy* (App no 36.813/97) ECHR 29 March 2006.

4 *Jancikova v Austria* (App no 56.483/00) ECHR 7 April 2005.

5 VwGH 29.1.2007, 2006/03/0155.

6 VfSlg. 17.854/2006.

7 *Jancikova v Austria* (App no 56.483/00) ECHR 7 April 2005.

remedies to expedite the proceedings or to control the proceedings consecutively. A maximum period of time – such as regularized in § 51 para. 7 VStG – can generally provide an effective remedy against a too long period of proceeding. But as this kind of remedy cannot be called upon as soon as the Administrative penal proceeding includes another person in addition to the defendant and (for example in contrast to private prosecution) a request for transfer jurisdiction (§ 73 AVG) or a complaint for breach of the onus to take a decision by the Administrative Court (Article 132 B-VG) is inadmissible, § 51 para 7 VStG does not offer sufficient legal protection.

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