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

FIRST SECTION

CASE OF NOWICKY v. AUSTRIA

(Application no. 34983/02)

JUDGMENT

STRASBOURG

24 February 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nowicky v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 1 February 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34983/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr W. Nowicky ("the applicant"), on 28 March 2002.

2. The applicant was represented by Schönherr OEG, a company of lawyers practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Departement at the Federal Ministry for Foreign Affairs.

3. On 21 October 2003 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

4. The applicant was born in 1937 and lives in Vienna.

5. On 28 June 1976 the applicant filed a request with the Federal Chancellor (*Bundeskanzler*) to examine a product developed by him, namely "Ukrain", a medicine for the treatment of cancer. The request was transmitted to the Ministry of Health and Environmental Protection (*Bundesministerium für Gesundheit und Umweltschutz*).

6. On 27 July 1981 the applicant requested the Minister for Health and Environmental Protection to authorise "Ukrain" under the Austrian pharmacopeia.

7. By letter of 14 August 1981 the Minister informed the applicant that, under the relevant legislation which was in force at that time, he did not meet the conditions to request such an authorisation as he was not in possession of a licence to produce the medicament in question.

8. On 29 August 1988 the applicant submitted a copy of his licence to produce "Ukrain" which had been issued on 15 May 1988.

9. On 31 August 1988 the then competent authority, namely the Federal Chancellor's Office (*Bundeskanzleramt*), ordered the Federal Institute for chemical and pharmacological examinations (FICP, *Bundesanstalt für chemische und pharmazeutische Untersuchungen*) and the Federal Institute for experimental pharmacological and balneological examinations (FICB, *Bundesstaatliche Anstalt für experimentell- pharmakologische und balneologische Untersuchungen)* to submit expert opinions.

10. On 23 December 1988 the FICB submitted an expert opinion. It noted that the documentation submitted by the applicant suffered from severe shortcomings. On 26 January 1989 the applicant was informed about the expert opinion and invited him to make the necessary amendments to his request within twelve months.

11. Between 1990 and 1995 the applicant submitted more documentation, which, however, was found to be insufficient in some twelve expert opinions issued by the FICB and the FICP.

12. On 1 February 1995 the applicant lodged an application against the administration's failure to decide (*Säumnisbeschwerde*) with the Administrative Court (*Verwaltungsgerichtshof).*

13. On 13 February 1995 the Administrative Court ordered the Federal Minister to decide upon the applicant's request, following which the then Federal Minister of Health and Consumer Protection (*Bundesminister für Gesundheit und Konsumentenschutz*) dismissed the applicant's request for authorisation on 2 June 1995. He found that the applicant had failed to establish the necessary quality, effectiveness and harmlessness of "Ukrain".

14. On 13 July 1995 the applicant filed a complaint with the Administrative Court. He complained *inter alia* about shortcomings in the proceedings in that the Federal Minister had not duly taken account of his arguments.

15. On 26 February 1996 the Administrative Court quashed the Federal Minister's decision and remitted the case. It found that the Federal Minister had not given sufficient reasons for his decision and had not duly taken account of the applicant's arguments.

16. Meanwhile, in July 1995 the applicant had submitted new documents to the Federal Minister. He had, in particular, altered the indication as to the type of cancer against which "Ukrain" should be used.

17. In two expert opinions of May and June 1996 the FICP and the FICB found that the documentation suffered from severe shortcomings and "Ukrain" should, therefore, not be authorised.

18. On 29 August 1996, 24 October 1996, 16 May 1997 and 17 and 23 July 1997 the applicant submitted further documentation including two opinions of private experts.

19. On 29 August 1997 the Federal Ministry appointed a further expert, E. who submitted his opinion on 25 November 1997. He found that "Ukrain" should not be authorised. On 8 January 1998 an expert opinion by the FICP came to the same conclusion.

20. In May and June 1998 the applicant commented on these opinions and submitted a further private expert opinion. This documentation was found to be still insufficient in an expert opinion submitted by E. on 13 August 1998.

21. After having discussed the matter with the Federal Ministry in April and May 1999, the applicant, on 12 May 1999 limited his request for authorisation of "Ukrain" to one particular type of cancer. In a meeting with an official of the Ministry on 19 May 1999 the applicant discussed a study scheme concerning a clinical test to be carried out in Moscow which, however, concerned another type of cancer than the one indicated in his request of 12 May 1999.

22. On 24 February 2000 the applicant requested the Federal Minister to indicate which documents were still missing. On 17 July 2000 the Federal Minister complied with this request and ordered the applicant to file his submissions by 15 January 2001.

23. Between 2000 and 2002 the applicant submitted more documentation, which, however, was found to be insufficient in nine expert opinions issued. During this time, namely on 3 August and on 7 December 2000, the applicant again altered the indications as to the types of cancer against which "Ukrain" should be used.

24. On 5 March 2001, the applicant limited his request to authorise "Ukrain" as a medicament to be used exclusively where the usual treatment had failed.

25. On 27 September 2001 the applicant lodged another application against the administration's failure to decide (*Säumnisbeschwerde*) with the Administrative Court.

26. On 18 February 2002 the Administrative Court dismissed the applicant's request. It noted that according to the Pharmaceutical Act (*Arzneimittelgesetz*), a decision concerning a request for authorisation should be issued within two years after the request had been lodged. In the present case, the applicant had filed his amended request for authorisation on 5 March 2001. His complaint about the administration's failure do decide was therefore premature.

27. On 25 April 2002 the Minister for Social Security and Generations (*Bundesminister für soziale Sicherheit und Generationen*) dismissed the applicant's request for authorisation.

28. On 7 June 2002 the applicant lodged a complaint with the Administrative Court. He submitted *inter alia* that the proceedings suffered from shortcomings in that the Federal Minister had not sufficiently investigated the facts. On 25 June 2002 the Administrative Court commenced preliminary proceedings. On 2 September 2002 and on 13 December 2002 the parties submitted their respective submissions.

29. The proceedings are currently pending before the Administrative Court.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained that none of the authorities dealing with his case is a tribunal within the meaning of Article 6 of the Convention.

31. The applicant further complained that the length of the proceedings was incompatible with the "reasonable time" requirement. In this respect he also relied on Article 6 § 1 of the Convention, which, as 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..."

A. Admissibility

1. Applicability of Article 6

32. The Government submitted that Article 6 was not applicable to the proceedings at issue. They submitted that the proceedings essentially concerned the evaluation of technical expert opinions and that an assessment of this kind, going beyond the usual judicial function, cannot be regarded as a "dispute" within the meaning of Article 6 § 1 of the Convention. In support of this argument they argued that according to the Court's case-law (*Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, Series A no. 101; *San Juan v. France* (dec.), no. 43956/98, ECHR 2002-III; *Eisenberg v. France* (dec.), no. 52237/99, 2 September 2003), proceedings for admission to a profession were not covered by Article 6 where they in essence concerned an assessment of the knowledge and experience required for carrying on the profession. The Government

argued that that position could be transposed to proceedings which essentially concern the examination of technical data.

33. The applicant contested the Government's arguments.

34. As to the question whether Article 6 is applicable to the proceedings at issue, the Court recalls at the outset that, where proceedings concern in essence the evaluation of knowledge and experience for carrying on a profession under a particular title, the safeguards in Article 6 cannot be taken as covering resulting disagreements (see *Van Marle and Others*, cited above, § 36*; San Juan* and *Eisenberg*, decisions, also cited above). The Court had in these cases regard to the fact that the kind of assessment made by the authorities was akin to a school or university examination and, therefore, far removed from the exercise of the normal judicial function.

35. These cases, however, differ essentially from the present case in that the proceedings at issue did not in any way concern the assessment of the applicant's competences but related to his request for a first-time authorisation of a pharmaceutical product. The Court observes that the very nature of such proceedings implies the assessment and evaluation of technical data. However, this is a common feature of many administrative proceedings and, in itself, does not prevent Article 6 from being applicable (see *Balmer-Schafroth and Others v. Switzerland*, judgment of 26 August 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1358, § 37).

36. The Court observes that, in a case concerning the prolongation of an authorisation to deal with a medicament, the Commission had found Article 6 to be applicable (see *Müller AG v. Switzerland*, no. 15269/89, Commission's report of 14 October 1991, unpublished).

37. The Court further considers that the proceedings at issue are similar to proceedings concerning the issuing of a licence, in that a commercial activity (namely the sale of a medicament) is subject to official supervision in the public interest. In comparable cases the Court found that the public law aspects inherent in such systems did not alter the private character of the requested activities (see, among others, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, pp 29-33, §§ 86-89 concerning a medical practitioner's activity; *Benthem v. the Netherlands*, judgement of 23 October 1985, Series A no. 97, pp. 14-16, §§ 32-36, relating to the a request for a licence for an installation for the delivery of liquid petroleum).

38. In the present case, the applicant holds a licence to produce the medicament "Ukrain". The sale of "Ukrain" is however subject to a further authorisation by the Federal Minister. The applicant has a right to be granted the authorisation at issue, provided that the requirements laid down in the Pharmaceutical Act are met. The question whether this was the case was in dispute between the authorities and the applicant.

39. In conclusion, the Court finds that Article 6 under its civil head applies to the proceedings at issue.

2. Complaint about lack of a tribunal

40. The applicant complained that none of the authorities dealing with his case is a tribunal within the meaning of Article 6 § 1 of the Convention.

41. The Court notes that the competent Federal Ministry which decided on the applicant's case is clearly an administrative authority. In this context the Court reiterates that it is not incompatible with Article 6 § 1 to confer the power to adjudicate on civil rights and obligations on administrative authorities, provided that their decisions are subject to subsequent control by a "tribunal" that has full jurisdiction. It therefore remains to be ascertained whether the Administrative Court's scope of review was sufficient. In the sphere of cases falling under the civil head of Article 6 the Court has occasionally answered this question in the negative (*Obermeier v. Austria*, judgment of 28 June 1990, Series A no. 179, p. 23, § 70). In other cases it has answered this question in the affirmative (see for instance, *Zumtobel v. Austria*, judgment of 21 September 1993, Series A no. 268-A, pp. 13-14, §§ 31-32; *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, p. 18, § 34). However, the Court has always examined this issue not in the abstract but on a case-to-case basis once the proceedings were terminated. As the proceedings in the present case are still pending before the Administrative Court, the applicant's complaint about lack of access to a tribunal is premature and must be rejected under 35 §§ 1 and 4 of the Convention.

3. Complaint about the length of the proceedings

42. The Government firstly argued that the applicant has not exhausted domestic remedies. They acknowledged that the applicant, in the course of the proceedings at issue, had filed twice an application against the authority's failure to decide. They argued, however, that the first application was lodged at a time when there had been no "dispute" within the meaning of Article 6 § 1 of the Convention. The second application was lodged at a time when the Federal Minister had not been defaulting. The Government concluded that the applicant had not made effective use of the domestic remedies available.

43. The applicant contested the Government's arguments.

44. As to the question whether the applicant has exhausted domestic remedies, the Court reiterates that an application under Article 132 of the Federal Constitution against the administration's failure to decide (*Säumnisbeschwerde*) constitutes, in principle, an effective remedy which has to be used in respect of complaints about the length of administrative proceedings (*Basic v. Austria*, no. 29800/96, §§ 39-40, ECHR 2001-I). In the present case, the applicant did make use of this remedy. He has, therefore, raised the "reasonable time" issue before the competent domestic authorities and invited them to accelerate the proceedings. In the Court's

view, a detailed examination as to whether the applicant could have made more efficient use of the remedy by using it at other stages of the proceedings, would overstretch the duties incumbent on an applicant pursuant to Article 35 § 1 of the Convention (see, *Wohlmeyer Bau GmbH v. Austria*, no. 20077/02, § 45, 8 July 2004). This is all the more so, as the applicant in the present case has made use of the remedy not only once but on two occasions, namely in February 1995 and again in September 2001. The Court further notes that the proceedings at issue have been pending before the Administrative Court for more than two years and four months, namely since 27 June 2002 and that an application under Article 132 of the Federal Constitution does not lie against delays caused by the Administrative Court.

45. In sum, the Court concludes that the applicant complied with his obligation to exhaust domestic remedies. Thus, the Government's objection on non-exhaustion has to be dismissed.

46. As to the period to be taken into consideration, the Government argued that the proceedings began on 2 June 1995, when the Federal Minister of Health and Consumer Protection dismissed the applicant's request for an authorisation of the medicament "Ukrain" under the Pharmaceutical Act. This is disputed by the applicant. In his view, the proceedings started when he filed his first request of an authorisation.

47. The Court reiterates that, in cases like the one at issue, in which an administrative authority's decision is a necessary preliminary for bringing the case before a tribunal, the relevant period does not start running when the request is lodged but only as soon as a "dispute" arises (see *König*, cited above, § 98; *Morscher v. Austria*, no. 54039/00, § 38, 5 February 2004). The Government argue that a dispute only arose on 2 June 1995, when the applicant's request for the authorisation of "Ukrain" was dismissed. However, the Court finds that 1 February 1995 should be taken as a starting point. At that date the applicant lodged an application against the Federal Minister's failure to decide on his application with the Administrative Court. The dispute in the present case effectively started on that date because the Federal Minister had failed to reply to his original application within the statutory time limit (see *G. H. v. Austria*, no. 31266/96, § 18, 3 October 2000, unreported). The proceedings are still pending before the Administrative Court. They have thus lasted until now for nine years and some ten months. The case has been brought before three levels of jurisdiction and was once remitted back.

48. The Court finds that the complaint about the length of the proceedings is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

49. The Government argued that the proceedings were complex namely in that their very nature necessitated the taking of several expert opinions and scientific research. Furthermore, in the course of the proceedings at issue the applicant altered his request for authorisation of the medicament at issue several times, which made it necessary to conduct further research. The preparation of the expert opinions was further complicated by the fact that the applicant submitted the requested documentation over a protracted period and sometimes even after the expiry of the time-limits set by the Federal Minister. The Austrian authorities conducted the proceedings expeditiously. The generous time-limits for the applicant's submissions had been set in the applicant's interest.

50. The applicant argued that the considerable length of the proceedings was attributable to the authorities. He pointed out in particular that according to the Pharmaceutical Act a decision concerning a request for authorisation should be issued within two years after the request had been lodged. He could not be blamed for having submitted as much documentation as he thought fit. The authorities should have decided on the basis of the submitted documentation within the statutory time-limit.

51. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

52. The Court notes that the proceedings have until now lasted more than nine years and ten months and are still pending before the Administrative Court.

53. The Court considers that the case was of considerable complexity, involving the taking of numerous expert opinions and requiring scientific research. The authorities further had to examine voluminous documentation submitted by the applicant. The Court further finds that the applicant contributed to some extent to the length of the proceedings in that he repeatedly altered the indication as to the type of cancer against which the medicament at issue should be used.

54. The Court observes, however, that substantial periods of inactivity, for which the Government have not submitted any satisfactory explanation, are attributable to the authorities. The Court notes that a period of 8 months elapsed between the submission of E.'s expert opinion on 13 August 1998 and the subsequent discussions between the applicant and the Federal Ministry. Another period of one year and some two months elapsed between 12 May 1999, when the applicant discussed his case with the Ministry, and

17 July 2000, when the Federal Minister indicated to the applicant which documents were still missing.

55. The Court finally notes that the case has currently been pending before the Administrative Court for more than two years and five months.

56. Having regard, in particular, to the overall duration and to the above mentioned delays attributable to the authorities, the Court considers that the length of the proceedings does not comply with the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

58. The applicant claimed 1.1 million euros (EUR) in respect of pecuniary damage out of which EUR 1 million for the profit he would have made from the sale of "Ukrain" and EUR 100,000 for the increased overall costs of the proceedings. The applicant did not claim compensation for non-pecuniary damage.

59. The Government contested the claim.

60. The Court does not discern any causal link between the violation found and the pecuniary damage resulting from the alleged loss of profit. It therefore makes no award under this head. It will deal with the claim for increased costs under the head of costs and expenses.

B. Costs and expenses

61. The applicant also claimed EUR 7,500 for the costs and expenses for the proceedings before the Court.

62. Noting that the applicant had not submitted a note of fees, the Government argued that they were prevented from making an assessment as to whether the costs had actually been incurred in the proceedings. In any case, they maintained that the claim was excessive.

63. As to the claim for increased costs of the domestic proceedings, the Court accepts that the excessive duration of the proceedings increased the overall costs incurred in the domestic proceedings (see *Bouilly v. France, (no. 1)* no. 38952/97, § 33, 7 December 1999). The Court therefore awards

on an equitable basis EUR 1,500 in this respect, plus any tax that may be chargeable on this amount.

64. As to the costs of the Convention proceedings, the Court notes that the applicant did not submit any bill of fees or any other supporting documents as required under Rule 60 of the Rules of Court. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Given the applicant's failure to submit the required documents, the Court is not in a position to make such an assessment. It therefore rejects the claim.

C. Default interest

65. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,500 (one thousand and five hundred euros) in respect of costs and expenses plus any tax that may be chargeable on that amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President