BGE 20000328_27353_95 vom 28. März 2000

Bundesgericht (BGE), 2000-03-28, FR

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FR: BGE 20000328_27353_95 du 28 mars 2000

IT: BGE 20000328_27353_95 del 28 marzo 2000

Erwägungen

E. 1

The case was referred to the Court by an Austrian national, Erich Kiefer ("the applicant") on 30 December 1998 pursuant to former Article 48 § 1 (e) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 27353/95) against Switzerland lodged by the applicant with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention, on 13 April 1995.

E. 2

The applicant is represented by Mr B. Gachnang, a lawyer practising in Lucerne in Switzerland. The Swiss Government are represented by their Agent, Mr Ph. Boillat.

E. 3

The case concerns the duration of the proceedings instituted by the applicant and whether they were terminated within a "reasonable time" as required by Article 6 § 1 of the Convention.

E. 4

On 31 March 1999 a Panel of the Grand Chamber decided, in accordance with Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 §6 of the Rules of Court, that the case should be dealt with by a Chamber constituted within one of the Sections of the Court. Subsequently, the President of the Court assigned the case to the Second Section. The Chamber constituted within the Section included ex officio Mr L. Wildhaber, the judge elected in respect of Switzerland (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court), and Mr M. Fischbach, Mr B. Conforti, Mr G. Bonello, Mrs V. Strá?nická, Mr P. Lorenzen and Mrs M. Tsatsa-Nikolovska (Rule 26 § 1 (b)).

E. 5

On 29 April 1999 the President invited the parties to submit memorials in the case (Rule 59 § 3). The applicant was further invited to submit his claim for just satisfaction under Article 41 of the Convention (Rule 60 § 1). The applicant filed his reply on 31 May 1999. The Government replied on 29 June 1999. The Austrian Government were invited on 7 February 2000 to state whether they wished to intervene in accordance with Article 36 of the Convention and Rule 61 of the Rules of Court. By letter of 25 February 2000 they replied that they did not wish to do so. AS TO THE FACTS

E. 6

The applicant is an Austrian citizen, born in 1946 and resident in Graz in Austria. He resided in Switzerland from 1979-1984, working as a lorry driver and paying contributions

to the Swiss social security insurance.

E. 7

In 1983 the applicant suffered an injury and became partly disabled. On 7 November 1985 he requested pension benefits from the Swiss Invalidity Insurance (Invalidenversicherung). As a result, the Invalidity Insurance Commission (Invalidenversicherungs-Kommission) was called upon to examine the case and the Swiss Compensation Office (Schweizerische Ausgleichskasse) to decide it. Based on ten medical reports issued between 1983 and 1987, the Compensation Office dismissed the applicant's request on 23 December 1987, as he was only partly hindered in exercising his profession as a lorry driver.

E. 8

On 28 January 1988 the applicant filed an appeal against this decision with the Federal Appeals Commission for Old Age, Survivors and Invalidity Insurance (Eidgenössische Rekurskommission für die Alters-, Hinterlassenen- und Invalidenversicherung), which, on 25 October 1988, considered that the previous decision was contradictory in respect of the applicant's ability to work. It upheld the applicant's appeal and referred the case back to the Compensation Office for renewed examination.

E. 9

Proceedings were resumed before the Compensation Office which obtained various medical opinions and other information. In 1989, various reports were filed by Austrian experts. Thus, on 20 January 1989 Dr. R., an internist, submitted a medical report. On 14 February 1989 Dr. W. replied to a medical questionnaire. The orthopaedist Dr. P. presented a report on 23 February 1989. A neurologist, Professor O., submitted a report on 26 May 1989. A second report was prepared by Dr. R. on 31 August 1989. The psychologist Dr. T. filed a report on 5 September 1989. A second report was filed by Dr. W. on 19 September 1989. Dr. P. submitted a second report on 16 October 1989. The radiologist Dr. G. transmitted his report on 31 October 1989. Finally, Dr. W. submitted his third report on 14 December 1989. On 7 February 1990 the Austrian orthopaedist Dr. L.-K. submitted another report. Meanwhile, in a letter dated 11 December 1989 the applicant requested the Austrian authorities to undertake a most thorough examination of his case by means of a further medical expert.

E. 10

Based on these various reports, Dr. M.-L., a Swiss specialist in labour medicine, submitted a report on 27 April 1990 in which he concluded that the applicant was not hindered in exercising his former profession as a lorry driver. Dr. S., a doctor employed by the Swiss Compensation Office, submitted a report on 16 June 1990 in which he agreed with Dr. M.-L.'s conclusions, while determining the applicant's ability to work as a lorry driver at 80 %, and at 100 % for other professions.

E. 11

The Invalidity Insurance Commission considered in its proposal of 19 July 1990 that the applicant had not sufficiently demonstrated his invalidity. The applicant was given the opportunity to reply thereto.

E. 12

Dr. S., who had meanwhile filed two further reports on 29 May and 16 June 1990, requested in a report of 4 November 1990 a further examination of the applicant which took place in Zurich on 23 May 1991. The Swiss orthopaedist Dr. Sta. filed a report on 28 November 1991 in which he concluded that the applicant was unable to work as a lorry driver, though he could be expected to work up to 50 % in certain other professions. Meanwhile, the Austrian orthopaedist Dr. L.-K. submitted a second report on 27 June 1991. In 1992 Dr. S., employed by the Compensation Office, submitted three reports: In his report of 25 January 1992, he disagreed with the conclusion that the applicant could not be expected to work at all. A report of 11 June 1992, complemented a previous report. Finally, in his report of 9 July 1992, he replied to a further question put to him by the Invalidity Insurance Commission.

E. 13

Further information was submitted by the Austrian pension authorities on 29 April and 4 September 1992, in particular that the applicant had not paid certain social security contributions in Austria in 1984 and 1985.

E. 14

On 30 October 1992 the applicant was issued a preliminary decision (Vorbescheid) according to which he had not been insured when the injury had occurred for which reason a formal condition for granting an invalidity pension had not been met. The applicant was granted a time-limit of 30 days to reply. Following the applicant's request for a prolongation of one month, his submissions in reply were filed on 4 January 1993.

E. 15

On 7 April 1993 the Compensation Office dismissed the applicant's request for pension benefits as he had not been insured at the time concerned. On 10 May 1993 he filed an appeal against this decision which was dismissed by the Federal Appeals Commission for Old Age, Survivors and Invalidity Insurance on 21 February 1994.

E. 16

On 5 April 1994 the applicant filed an administrative law appeal in which he stated, inter alia : "It is surprising that the authorities required nearly 10 years to determine that (the applicant) had lacked the quality of an insured person on 7 April 1984. At least the Federal Appeals Commission determined in § 4 of its decision that there was an invalidity. Now we are faced with the situation that an invalid person has been held off for nearly ten years and has been called to submit to examinations, although he is apparently not even insured. The decision of 23 December 1987 refused to grant a pension on the grounds that there was no invalidity, without even dealing with the allegedly missing insurance quality. The conduct of the authorities, and in particular the result of this conduct, breaches good faith and must be described as arbitrary. ... The fact that the applicant has been refused status as an insured person ten years after it was allegedly found missing amounts to a breach of good faith, it is arbitrary and breaches the principle of equality emanating from Section 4 of the Federal Constitution."

E. 17

The administrative law appeal was dismissed on 18 November 1994 by the Federal Insurance Court (Eidgenössisches Versicherungsgericht), the decision being served on 25 November 1994. PROCEEDINGS BEFORE THE COMMISSION

E. 18

The applicant applied to the Commission on 13 April 1995, complaining under Article 6 § 1 about the length of social security proceedings.

E. 19

The Commission declared the application admissible on 16 April 1998. In its report of 21 October 1998 (former Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 § 1. Erwägungen AS TO THE LAW I. THE GOVERNMENT'S PRELIMINARY OBJECTION

E. 20

As they had done before the Commission, the Government maintained before the Court that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. During the entire proceedings he never raised in substance before the domestic authorities the complaint of the length of the proceedings. For instance, in respect of the Swiss Compensation Office he would have had the possibility effectively to file such a complaint to the higher authority. The Federal Insurance Court would also have been competent to examine a complaint about the length of the proceedings. The mere fact that the applicant, who was represented by a lawyer, filed an administrative law appeal before this court did not suffice. He should have complained, with reference to Article 6 of the Convention or the corresponding Section 4 of the Federal Constitution, of the length of the proceedings. By failing to do so he denied the domestic authorities the possibility to examine his complaint. On the whole, the applicant was only interested in an examination of the substantial conditions of his pension, at one stage even requesting the Austrian authorities to undertake a thorough investigation.

E. 21

In its decision on the admissibility of the application, the Commission dismissed the objection on the ground that the applicant had sufficiently raised the complaint before the Federal Insurance Court.

E. 22

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring their case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It is not sufficient that applications have been made to the appropriate domestic courts and that use has been made of remedies designed to challenge decisions already given. It normally also requires that the complaints intended to be made subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements laid down in domestic law (see the Cardot v. France judgment of 19 March 1991, Series A, no. 200, p. 18, § 34).

E. 23

Turning to the circumstances of the present case, the Court notes that in his administrative law appeal before the Federal Insurance Court the applicant complained, inter alia , of a period lasting "nearly ten years" which the authorities had required to determine that he

lacked the quality of an insured person, and that he was now faced with a situation where "(he had) been held off for nearly ten years". He concluded by complaining that this refusal after ten years breached good faith and was arbitrary (see paragraph 16 above). In view thereof, the Court considers that the applicant sufficiently raised in substance before the domestic authorities the complaint he is now raising before the Court. Consequently, the Court, like the Commission, dismisses the Government's preliminary objection. II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

E. 24

The applicant complained of the length of the civil proceedings which he had instituted before the Swiss social insurance authorities. He alleged a violation of Article 6 § 1 of the Convention which provides: "In the determination of his civil rights and obligations..., everyone is entitled to a... hearing within a reasonable time by [a] ... tribunal..."

E. 25

The Government contested that submission on the ground that the case was complex and the applicant contributed to the length of the proceedings. A. Period to be taken into consideration

E. 26

The relevant period began on 28 January 1988 when the applicant contested the administrative decision refusing him a pension (see the König v. Germany judgment of 28 June 1978, Series A, no. 27, § 31). It ended on 25 November 1994 when the final decision of the Federal Insurance Court was served on the applicant.

E. 27

It therefore lasted 6 years, 9 months and 28 days in three instances. B. Reasonableness of the length of the proceedings

E. 28

According to the Court's case-law, the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the authorities dealing with the case. On the latter point, what is at stake for the applicant in the litigation has to be taken into account in certain cases (see among other authorities the Pélissier et Sassi v. France judgment of 25 March 1999, to be published in Reports of Judgments and Decisions 1999, § 67, and the Duclos v. France judgment of 17 December 1996, Reports 1996-VI, p. 2180, § 55).

E. 29

The Government argued that the procedures before the Federal Appeals Commission were conducted in 1988 within nine months, and in 1993/94 within 9½ months; the Federal Insurance Court required less than eight months to give its decision. In the Government's view, the case was unusually complex in view of numerous medical opinions and as investigations had to be carried out in Austria. The authorities - in particular the Compensation Office - could not be blamed for any inactivity. Even if this authority required four and a half months to give its decision a second time, it could not have decided more speedily. The Office was called upon first to examine the conditions of invalidity, and only later whether the conditions of insurance had been met. Already in the first set of

proceedings before the Office, it was confronted with ten medical opinions. On the other hand, the applicant himself did not appear preoccupied by the length of the proceedings. Indeed, in a letter dated 11 December 1989 he requested the authorities to order the most thorough examination by another medical expert. The Government submit that during five years after his accident he obtained a salary, and that he obtained a pension from the Austrian authorities.

E. 30

The applicant submitted that the proceedings at issue affected his livelihood to a considerable extent. While the authorities examined the more complex question as to whether he was incapacitated or not, they failed to examine at the same time the significantly simpler question as to whether he was insured. They had sufficient information at their disposal to reach a conclusion.

E. 31

Turning to the circumstances of the present case, the Court recalls that after suffering an injury the applicant became partly disabled, and what was at stake for him were pension benefits intended to compensate his disablement and loss of working capacity. Under these circumstances the Court finds that expedition was called for.

E. 32

It is true that the Government have argued the complexity of the case. The Court notes, however, that the applicant's request for pension benefits was dismissed by the Swiss authorities as he had not been insured at the time concerned. Even if the case might have been of some complexity, the Court does not find that this can reasonably explain the length of the proceedings lasting over 6 years and 9 months.

E. 33

The applicant himself contributed only to a minor extent to the length of the proceedings when he requested a prolongation of the time-limit of one month before filing his observations on 4 January 1993.

E. 34

As regards the authorities' conduct of the proceedings, the main delay relates to the proceedings before the Federal Compensation Office between 25 October 1988 and 7 April 1993, lasting approximately 4½ years. During this period, numerous medical reports and other information was filed, although these often consisted of only a few pages or even a few lines. The Court has had particular regard to the period from 27 April 1990, when Dr. M.-L.'s report was filed, until 7 April 1993, i.e., a period of approximately three years. During this time, 2 reports were filed by Drs Sta. and L.-K., and seven reports by Dr. S. The invalidity Insurance Commission filed a proposal on 19 July 1990, and a preliminary decision was given on 30 October 1992. The applicant filed submissions on both. Moreover, the Austrian authorities submitted further information, namely that the applicant had not paid social security contributions in 1984 and 1985. In the Court's opinion, this delay cannot be considered reasonable. The applicant's case had been referred back to the Compensation Office for a new decision. Moreover, the Office was in fact dealing a second time with the same case which it had already considered in some depth in previous proceedings.

E. 35

Having regard to the delays imputable to the State, the overall duration of the proceedings and what was at stake for the applicant, the Court concludes that the "reasonable time" requirement was not satisfied. There has accordingly been a breach of Article 6 § 1 of the Convention. III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

E. 36

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

E. 37

The applicant claimed 2,280 Swiss Francs (CHF) for pecuniary damage resulting from various medical examinations required after the accident in 1983. He furthermore claimed non-pecuniary damage amounting to 90,000 CHF in view of the delays in the proceedings.

E. 38

The Government saw no connection between the pecuniary damage alleged and the conduct of the Swiss authorities. In respect of the non-pecuniary damage, the Government asked the Court to rule that a finding of a violation constituted sufficient just satisfaction.

E. 39

The Court perceives no causal link between the breach of Article 6 § 1 and the alleged pecuniary damage. There is, therefore, no ground for any award under this head. In respect of non-pecuniary damage alleged, the Court, making an assessment on an equitable basis, awards the applicant 5,000 CHF under this head. B. Costs and expenses

E. 40

The applicant also claimed 4,964 CHF for lawyer's costs in the domestic proceedings, and 8,911.90 CHF for the proceedings in Strasbourg.

E. 41

The Government considered in respect of the domestic proceedings that only the costs before the Federal Insurance Court, amounting to 500 CHF, should be reimbursed. In respect of the proceedings in Strasbourg, the Government regarded the sum of 5,000 CHF as being adequate.

E. 42

The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, the Bladet Tromsø and Stensaas judgment of 20 May 1999, to be published in Reports 1999, § 80). The Court finds the applicant's costs claim for the Strasbourg proceedings excessive and, making an assessment on an equitable basis, awards him 5,000 CHF under this head. As to the costs of the domestic proceedings, the Court finds that the length of the proceedings before the Compensation Office may have increased his costs and that the costs of the proceedings before the Federal Insurance Court, in which he complained of the length of the proceedings, were necessarily incurred to obtain redress for

the duration of the proceedings complained of. Deciding on an equitable basis, the Court awards the applicant 1,000 CHF under his head.

E. 43

In sum, the Court awards the applicant the sum of 6,000 CHF for legal costs. C. Default interest

E. 44

According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum. Entscheid FOR THESE REASONS, THE COURT UNANIMOUSLY 1. Dismisses the Government's preliminary objection; 2. Holds that there has been a violation of Article 6 § 1 of the Convention; 3. Holds that the respondent State is to pay the applicant, within three months, 5,000 (five thousand) Swiss Francs for non-pecuniary damage, and 6,000 (six thousand) Swiss Francs in respect of legal costs; 4. Holds that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement; 5. Dismisses the remainder of the applicant's claim for just satisfaction. Done in English, then sent as a certified copy on 28 March 2000, according to Rule 77 §§ 2 and 3 of the Rules of Court. Erik Fribergh Registrar Marc Fischbach President

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