



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

FIRST SECTION

CASE OF KLEIN v. AUSTRIA

(Application no. 57028/00)

JUDGMENT
(Just satisfaction)

STRASBOURG

25 September 2014

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 Klein v. Austria,

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

Isabelle Berro-Lefèvre, *President*,

Khanlar Hajiyeu,

Mirjana Lazarova Trajkovska,

Paulo Pinto de Albuquerque,

Linos-Alexandre Sicilianos,

Erik Møse, *judges*,

Ewald Wiederin, *ad hoc judge*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 57028/00) 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, Anton Klein (“the applicant”), on 25 January 2000.

2. Mrs. E. Steiner, the judge elected in respect of Austria, was unable to sit in the case. The Government accordingly appointed initially Mr H. Schäffer to sit as an *ad hoc* judge in her place and subsequently Mr E. Wiederin.

3. In a judgment delivered on 3 March 2011 (“the principal judgment”), the Court held that by depriving the applicant of all of his entitlements to a pension there had been a violation of Article 1 of Protocol No. 1 (Klein v. Austria, no. 57028/00, §§ 57-58, 3 March 2011).

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, within three months of the date on which the judgment became final, in accordance with Article 44 § 2 of the Convention, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, § 67, and point 3(b) of the operative provisions).

5. The applicant and the Government each filed observations.

THE LAW

6. 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

7. In respect of pecuniary damage, the applicant claimed:

(i) 535,030.38 euros (EUR) (which includes interest at the rate of 4% per annum) for the old-age pension payments he should have received from the pension fund from August 1997 until September 2011;

(ii) EUR 271,353.23 for “future” pension claims after September 2011, amounting to ten times a yearly pension (based on an average of EUR 1,938.23 per month, fourteen times per year).

He submitted a table of claims in support of his calculations.

8. The applicant further claimed non-pecuniary damage totalling EUR 228,977.51, consisting of EUR 1,000 per month plus interest at the rate of 4% per annum, from August 1995 until September 2011. He argued that his quality of life had been severely reduced because of the refusal to grant his pension.

9. Concerning the applicant’s claims for pecuniary damage, the Government pointed out that he had withdrawn from the legal profession on 23 January 1996, after bankruptcy proceedings had been instituted against him. Thereafter, he had ceased to contribute to the Vienna Chamber of Lawyers’ pension scheme. The arrears of his contributions would amount to approximately EUR 20,000. For reasons of fairness towards the other members of the pension scheme, any compensation payment would have to be limited to the amount the applicant had contributed to the pension fund. In any event, it would have to be limited to what the applicant would have received under the amended pension regulations in force since 2004. Under the amended regulations, withdrawal from the legal profession before reaching the age of retirement leads to a reduction of the basic pension to 84.04% (with a reduction of 0.4% for each missing month). In the applicant’s case, the accrued pension payments amounted to EUR 420,701.41 (including 4% compound interest).

10. The Government further submitted that it had to be taken into account that the Vienna Chamber of Lawyers had paid a total of EUR 362,588.44 (including 4% compound interest) to persons who had suffered damage because of the applicant’s criminal conduct. This payment was covered by an insurance the Chamber had concluded for such cases, as well as by an emergency fund. The Government argued that that amount

should be deducted from a just satisfaction award, leaving a maximum claim of EUR 38,000.

11. As regards the applicant's claims for non-pecuniary damage, the Government pointed out that just satisfaction, within the meaning of Article 41 of the Convention, was intended to redress a disadvantage suffered. However, in the instant case, only financial claims were at stake, and those could be fully redressed by subsequent payments.

12. The Court reiterates at the outset its conclusions in § 57 of the principal judgment, that the Austrian authorities had not struck a fair balance between the competing interests by completely depriving the applicant of all of his entitlements to a pension, after he had contributed to the pension scheme throughout his professional career. Thereby, an excessive individual burden had been placed on the applicant.

13. Turning to the applicant's arguments in respect of his claims for pecuniary damage, the Court considers that the damage does not consist of the monthly pension he would hypothetically have received if his pension claim had been granted, but rather of the amount which he contributed to the pension fund during his active career. The Court consequently does not consider it necessary to take into account "future" pension claims.

14. The Court rejects the Government's argument that any outstanding Chamber fees or the amount the Vienna Chamber of Lawyers had paid in damages to the applicant's clients should be deducted from the award for pecuniary damage. According to the information submitted by the Government, which was not disputed by the applicant, that payment was in fact covered by an insurance the Chamber had concluded for such cases, as well as by an emergency fund. The mentioned deduction would amount to an additional sanction against the applicant. Thus, the Court will not offset those claims against each other.

15. With the above considerations in mind, the Court awards the full amount of the accrued pension payments in accordance with the amended pension regulations in force since 2004 (see § 9 above) of EUR 420,701.41 to the applicant to cover any and all pecuniary damage.

16. The Court further accepts that the applicant must have suffered non-pecuniary damage as a result of the violation found, which cannot be compensated for by the mere finding of a violation. However, it considers the claims made by the applicant to be excessive. Having regard to the circumstances of the case, the Court awards the applicant the sum of EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

17. The applicant also claimed EUR 89,844.15 in respect of costs and expenses, including Turnover Tax. This sum consisted of the fees and

expenses of the applicant's counsel in the domestic proceedings, as well as in the Convention proceedings.

18. The Government found those claims to be excessive and considered a total amount of EUR 8,000 to be appropriate as regards procedural costs. They pointed out that a lump-sum payment for the costs of the first round of proceedings before the Administrative Court had already been paid to the applicant and could not be claimed again.

19. According to the Court's case-law, an applicant is entitled to the reimbursement of 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 (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress (see *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004, and *Hajnal v. Serbia*, no. 36937/06, § 154, 19 June 2012). In the present case, regard being had to the above criteria, the Court considers it reasonable to award the amount of EUR 10,000, covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

20. The Court considers it appropriate that the default interest rate 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,

1. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 420,701.41 (four hundred and twenty thousand seven hundred and one euros and forty one cents), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

2. *Holds*, unanimously,
- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wiederin is annexed to this judgment.

S.N.
I.B.L.

DISSENTING OPINION OF JUDGE WIEDERIN

I agree with the majority to focus on the applicant's contributions to the pension fund and to take them as a starting point for the calculation of pecuniary damage. However, to attribute to the applicant the total of his contributions results in an excessive and therefore unjust satisfaction. The majority fails to see that the applicant deliberately conducted actions which resulted in the expiration of all his titles, and they neglect that, due to the management costs of a pension system, even the average member of such a system cannot expect to get his contributions back in full measure.

Furthermore, I am convinced that the sum paid by the Vienna Chamber of Lawyers in damages to the victims of the applicant's embezzlements should be deducted from the award, at least insofar as it was covered by the emergency fund, which, just as the Chamber's pension fund, is a legal entity under public law.