

Prof. Maria Eder, LL.D
Associate Professor
University of Salzburg, Austria

UDK: 341.1:347.426.4](436)

COMPENSATION CLAIMS FOR IMPRISONMENT ON REMAND

Summary

According to the Austrian Compensation (Criminal Proceeding) Act 2005, which came into force on the 1st January 2005, the compensation for illegal acts performed by legal institutions is widened and the proceeding is improved and simplified. After the Court of Human Rights declared that the old law violated Art 6 European Convention, this new Act meets the requirements of this Convention and also includes the compensation for non-pecuniary damages. Exclusions and limitations of the compensation are reduced, too.

Key Words: Claim for compensation, compensation procedure, European Court on Human Rights, illegal or unjustified detention, lack of public hearing, presumption of innocence, pecuniary and non-pecuniary damages.

The new Austrian Compensation (Criminal Proceeding) Act 2005 is an example to what extent the national legislation was influenced by decisions of the European Court on Human Rights. Violations of Article 6 of the European Convention by Austrian Compensation (Criminal Proceeding) Act 1969 concerning the lack of public hearing and the public delivery of decisions and the presumption of innocence led to a completely new Austrian Compensation (Criminal Proceeding) Act 2005, that came into force on the 1st January 2005. This act meets the requirements of the European Convention and widens the measure of compensation for illegal detention done by legal institutions, including also compensation of non-pecuniary damages. The whole procedure is ameliorated and accelerated. The new compensation procedure beginning with the request at the Financial Authorities can be followed by a proceeding at the Civil Courts, which makes it easier for the injured person to get a just compensation. In case of financial difficulties even an advocate free of charge can be granted.

A. Violation of Article 6 of the European Convention on Human Rights

The Austrian Compensation (Criminal Proceedings) Act 1969, BGBl 1969/270, which provided the right to compensation under section 2 § 1

(a) especially for any detention on remand, where this detention was applied illegally („illegal detention“) or

(b) where the injured party has been placed in detention or remanded in custody by a domestic court on suspicion of having committed an offence making him liable to criminal prosecution in Austria...and is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested... (“unjustified detention”) or

(c) where the injured person was convicted and after a resumption...acquitted or otherwise freed from prosecution or newly convicted to a milder punishment...” (“case of resumption”).

The illegal detention can be a violation of Article 5 § 5 of the European Convention on Human Rights or Article 7 of the Austrian Federal Convention for the Protection of Personal Freedom 1988 and in these cases of violation the compensation for pecuniary and non-pecuniary damages is granted. In the case of unjustified detention or resumption the court which acquitted the person had to decide also about the compensation claim. This decision – as a part of the proceeding – need not be made public. It has to be handed over to the detained or convicted person personally.

The cases of Szücs and Werner (1997), Asam Rushiti (2000) and Lamanna (2001) were brought to the European Court on Human Rights (ECHR) complaining that the Compensation Act 1969 violates Article 6 of the European Convention on Human Rights, which under Austrian law has the force of constitutional law, precisely the lack of public hearing and the public delivery (Article 6 § 1) and the principle of presumption of innocence (Article 6 § 2) .

1. Violation of Article 6 § 1: Lack of public hearing and public delivery

According to the European Court on Human Rights (ECHR) the Austrian Compensation (Criminal Proceedings) Act 1969 violated Art 6 of the European Convention: In the Lamanna, Rushiti, Szücs and Werner Cases the applicants complained about the lack of a public hearing and the lack of any public pronouncement of the decisions in the proceedings relating to their compensation claim for detention on remand.

They relied on Art 6 § 1 of the Convention which provides: “In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing...by [a]...tribunal...Judgment shall be pronounced publicly...”

ИЗГРАДЊА ПРАВНОГ СИСТЕМА РЕПУБЛИКЕ СРБИЈЕ

Even Article 90 § 1 of the Austrian Federal Constitution provides public oral hearings: “Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law”.

In these cases the European Court (ECHR) pointed out that the applicant is entitled to a public hearing, the guarantee to a fair trial, or public delivery of judgments, which constitutes a fundamental principle of Article 6 § 1 of the European Convention. In the Rushiti, Szücs and Werner Cases there had been no public delivery of the decisions and no public hearing. In the Lamanna Case the court declared that although the first instance did not deliver the decision publicly as it was dependent on his acquittal becoming final, there was no violation of Article 6 § 1 because the Supreme Court’s judgement was delivered publicly. That means that one public delivery, would fulfil this provision.

2. Violation of Article 6 § 2: The presumption of innocence

In the Lamanna, Rushiti, Szücs and Werner Cases the claim for compensation for detention was negated, in other words the applicant were not entitled to compensation for their detention under section 2 § 1 b of the Compensation (Criminal Proceedings) Act 1969, on the ground that the suspicion concerning them had not been dispelled.

The Section 2 § 1 b of the Compensation (Criminal Proceedings) Act 1969 read as follows:

“(1) A right to compensation arises:...

(b) where the injured party has been placed in detention or remanded in custody by a domestic court on suspicion of having committed an offence making him liable to criminal prosecution in Austria...and is subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence has been dispelled or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested;...”.

The court which acquits the person must decide whether these provisions for the conditions have been satisfied or not. This decision has to be handed over to the detained or convicted person personally and to the public prosecutor. These persons may appeal against the decision to a higher court within two weeks (section 6 § 4 and 5 of Compensation Act 1969).

The jurisdiction of Courts of Appeal in Austria held consistently that suspicion must be dispelled sufficiently to establish that the detained person is

not punishable, and cannot be prosecuted, on account of the conduct in respect of which his detention was ordered. Where that remains only doubtful, suspicion is not dispelled within the meaning of section 2 § 1 b of the Act. Jurisdiction in Austria has always differentiated between the “dispelling of suspicion”, in the sense of being cleared from suspicion without doubt and the use of the “benefit of the doubt” (“in dubio pro reo”), where suspicions remains still doubtful. In this case there is no compensation.

Example: Asam Rushiti Case: The applicant was suspected of attempted murder, aggravated robbery and the unlawful possession of a weapon. The Jury Court (Geschworenengericht) at Salzburg’s Regional Court acquitted the applicant of all charges against him. The acquittal is founded on the jury’s verdict. According of the jury’s deliberations (Niederschrift), the jury found in dubio pro reo, that the applicants defence in the murder case could not be refuted and that the accused did not have the intention to commit a robbery. Following his acquittal the applicant was released. The compensation claim was dismissed, referring to section 2 (1) b of the 1969 Act the court found that there had been a reasonable suspicion against the applicant, which had not been dispelled. In other words, they had the opinion that the evidence did not suffice to find Asan Rushiti guilty of the charges brought against him .

The European Court declared, that dismissing his compensation claim on the ground that the suspicion against him had not been dissipated violated the presumption of innocence laid down in Article 6 § 2 of the European Convention, which is worded as follows: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

The European Court decided also that once an acquittal has become final – be it an acquittal giving the accused the “benefit of the doubt“ (“in dubio pro reo”) in accordance with Art 6 § 2 – the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence .

The courts dealing with the compensation proceedings expressed the view that there was a continuing suspicion against the injured person (applicant) and, thus, casting doubt on his innocence. This has been a violation of Article 6 § 2 of the European Convention. In other words only a verdict of guilt as a result of a fair and formal criminal proceeding can proof the guilt, all other decisions means innocence .

Summing up: If an acquittal has become final any suspicion of guilt in the following compensation proceedings violate Article 6 § 2 of the European Convention.

ИЗГРАДЊА ПРАВНОГ СИСТЕМА РЕПУБЛИКЕ СРБИЈЕ

3. Consequences of the declared violations of the European Convention

a) Satisfaction of pecuniary damages or cost and expenses

Art 41 of the European 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.”

In the prescribed cases generally the claims for costs and expenses incurred in the domestic proceedings were refunded in an equitable basis and the convention proceedings in full.

As to non-pecuniary damage, the European Court considered it sufficiently compensated by the finding of violations of Article 6 §§ 1 and 2.

b) Influence on the national law

The declared violations of the Convention influenced at first the jurisdiction and interpretation of the law in Austria.

So the Austrian Supreme Court declared regarding the obligation of a public hearing and public delivery, that this must not take place in all instances, if it takes place in one – e.g. the Court of Appeal– this is enough .

Further the Supreme Court of Austria interpreted Article 2 § 1 b of the Act 1969 regarding the presumption of innocence according to the European Court’s decision . The compensation claim has to be renewed but without proofing if the suspicion was dispelled. This new interpretation even against the Act 1969 (“contra legem”) showed that an amendment was required. In the discussion about it a complete new reform in favor of persons unlawfully held in detention or custody was created. This was the Austrian Compensation (Criminal Proceedings) Act 2005, BGBl I 2004/ 125, which came into force on the 1st January 2005.

B. Austrian Compensation (Criminal Proceedings) Act 2005

1. Introduction

This reform included:

Amelioration of the position of the injured person

Standardization and acceleration of the procedure

Compensation of pecuniary and also non-pecuniary damages

a) Amelioration of the position of the injured person

The position of the injured person (applicant) was ameliorated: this means after an acquittal there is no more the obligation to dispell the suspicion. In cases of dismissal there is statuated a „differentiated discretion“ that comply with the European Convention .

b) Standardization and acceleration of the procedure regarding the compensation

The whole procedure dealing with compensation matters was completely renewed. The procedure was taken from the Criminal Courts and given in the hands of Civil Courts. There are two important steps to accelerate the process. At first the applicant demand the Financial Authority („Finanzprokuratur“) as a representative of the state to compensate the damages as result of the detention within the period of three months („Aufforderungsverfahren“). If the compensation is negated or partly negated the injured person can claim his compensation at a Civil Court.

c) Non-pecuniary damages

In future the injured person can claim apart the pecuniary damages also non-pecuniary damages as a result for being in detention.

2. Liability of the Federal Government for damages that arise for persons on ground of detention on remand

The Federal Government is made liable for damages that arise for persons because of detention on remand or conviction. This includes pretrial detention, detention concerning extradition and any imprisonment on ground of conviction or execution of preventive measures against dangerous perpetrators with expection of disciplinary measures.

3. The claim for compensation (Section 2)

Compensation is given to a person for illegal detention through official judicial authorities or decisions of a Criminal Court of Austria (litera 1),

in case of unjustified detention: where a person was taken into custody or held in detention on ground of having committed a criminal offence and was subsequently acquitted by an Criminal Court of Austria or otherwise freed from prosecution (litera 2)

or in case of resumption, where the injured person was convicted and after a resumption or renewal of the procedure or abolishment of the conviction

ИЗГРАДЊА ПРАВНОГ СИСТЕМА РЕПУБЛИКЕ СРБИЈЕ

was acquitted or otherwise freed from prosecution or newly convicted to a milder punishment or release of preventive measures (litera 3).

Illegal detentions through official judicial authorities regarding the criminal procedure are for example violations of basic or constitutional rights as Art 5 § 5 of the European Convention and Art 7 of the Convention for Protection of Personal Freedom (1988) on the constitutional level, and any violations of the criminal procedure (StPO) and other provisions (StVG, StGB) in this regard. This includes violations of substantial and formal procedural law; e.g. no substantial suspicion for a detention on remand, no danger of flight or to commit a criminal act or to cover the act. Violation of formal procedural law as e.g. to exceed the statutory time of 48 hours until the decision about the detention or to omit the trial about detention.

If the illegal detention is a violation of basic rights or constitutional law like Art 5 § 5 of the European Convention or Art 7 of the Convention for Protection of Personal Freedom (1988) a full compensation without exclusions is granted (section 3 § 3 and section 4 § 2).

In case of unjustified detention, where a person was taken into custody or held in detention on ground of having committed a criminal offence and was subsequently acquitted by an Criminal Court of Austria or otherwise freed from prosecution. An acquittal is given, if substantial law is not fulfilled and also if the evidence is not enough to prove the guilt of the accused person. („benefit of the doubt“ or „in dubio pro reo“). To be „otherwise freed from prosecution“ could include any kind of a final dismissal .

In the case of resumption, where a conviction by Austrian Courts has become final and this decision has been overruled by a new procedure and the person was acquitted or convicted and a lighter sanction was imposed.

The compensation for illegal or unjustified detentions include generally all damages linked to the unjustified conviction and did not exist before conviction. This includes for example not only cost for criminal procedure and cost for the defense but also loss of earnings because of loss of employment caused by the detention.

4. Exclusion, limitation or restriction of compensation (section 3 and 4)

Section 3 and 4 statute all the circumstances of exclusion, limitation or restriction of the compensation. Some provisions lead to exclusion of the compensation and because these restrictions differentiate between the kind of detention, it is important to clarify at first place if the compensation is on ground of illegal or unjustified detention or resumption.

In case of illegal detention that dealt with violation of Article 5 of the European Convention on Human Rights or Art 7 of the Convention for Protection of Personal Freedom (1988) the liability of the state can not be limited.

In case of unjustified detention exclusion and limitations are possible, as e.g. if the detention is given credit to the following arrest (section 3 § 1 litera 3); in cases of procedural bars like a limitation of time, or if the person could not be prosecuted because he committed the act in an insane condition (section 3 § 1 litera 4) or in the case of responsibility of the detained or convicted person, e.g. the suspicion was created by the accused person himself (section 4 § 1 litera 1). If the statement the accused person gave to the juridicial authorities was untrue the compensation can be restricted, unless the person was forced by police to do so or there is no causal link to the detention because of that. Furthermore, e.g. if the injured person did not take remedies or did not appear at the court when summoned.

The detained person has also the obligation to mitigate the damages for instance to look for a job if possible. In that case the onus of proof is given to the Financial Authority or the Civil Court.

5. Object of compensation (section 5)

The compensation includes pecuniary damages and non-pecuniary damages (section 5 § 1 and 2).

a) Pecuniary damages

The range of the compensation complies with the Austrian Civil Code (ABGB) and includes loss of earnings, cost and expenses for the defense, the proceeding and any essential measures to regain freedom. These expenses are given specially for the resumption proceeding but not for appellation to Higher Courts .

b) Non-pecuniary damages

Non-pecuniary damages are adequate compensations for the annoyance caused by the detention. Criteria of immaterial damages are the lenght and intensity of the detention and the personal circumstances for the person concerned: for example the psychophysical situation of the detained person, his sensibility, which may be shown for instance in fear of the future, sleeplessness, anxiety, sorrow, shock, traumas etc .

ИЗГРАДЊА ПРАВНОГ СИСТЕМА РЕПУБЛИКЕ СРБИЈЕ

The sum of money is calculated with the help of an index of damages for pain and suffering which includes light, medium and strong (bodily or mentally) pains.

The daily rate is measured as follows: for a light pain between 100 to 110 €, for a medium pain 150 to 200 €, for a strong pain 250 to 300 € and for an agonizing pain 350 to 700 €. The annoyance caused by a detention will be in most cases measured as a light pain and in a global sum.

6. Period of limitation

The claim for compensation is limited generally in a period of three years when the injured person knows about the provisions to have a title or within 10 years, if the provisions for a title are not known or the damages is the cause of a criminal offense committed intentionally and sanctioned with a penalty of more than one year (section 8). This period of limitation can be suspended.

7. Compensation Procedure

a) Request to the Financial Authorities

The injured person has to demand the Financial Authorities („Finanzprokuratur“) as representatives of the state to check the claim for compensation within a time of three months („Aufforderungsverfahren“). The Financial Authorities can then accept the demanded compensation or refuse it entirely or partly. Although an advocate is not obligatory the applicant can use legal assistance, which in case of financial problems can be provided free of charge (section 9).

b) Civil claim

If the claimed compensation is entirely or partly negated, the injured person can put a civil claim against the Federal Government. This civil process correspond the fair process clause, and offer a public hearing and publicly delivery of decisions pursuant Article 6 § 1 of the European Convention .

c) Jurisdiction

The jurisdiction lies on the Regional Civil Court (Landesgericht für Zivilsachen) and in the hand of a single judge (section 12 in connection with section 9 of the Official Liability Code). An advocate is obligatory and legal aid, in cause of financial problems, can be provided free of charge.

d) Reimbursement of the compensation by the acting authority

Generally it is the obligation of the Federal Government to compensate the damages created by the judicial authorities. In case these authorities have acted intentionally or negligently in a high grade, the state can demand a reimbursement (section 7) . The procedure is statuated in section 12 and contains a reference to the Official Liability Code.

**Проф. Марија Едер,
ванредни професор
Универзитет у Салцбургу, Аустрија**

**ЗАХТЕВИ ЗА КОМПЕНЗАЦИЈУ ЗБОГ ЛИШЕЊА
СЛОБОДЕ У СЛУЧАЈУ УКИДАЊА ОДЛУКЕ**

Апстракт

Аустријским законом о компензацији (Кривични поступак), који је ступио на снагу 1. 1. 2005. године могућност компензације за неуаконите акте правосудних институција је проширена, а процедура је унапређена и упрошћена. Након што је Европски суд за људска права утврдио да је стари закон противан одредби члана 6 Европске конвенције, новим законом испуњени су захтеви конвенције и, такође, обухваћена компензација за нематеријалне штете. Број искључења и ограничења могућности компензације такође је смањен.

