

EDJ 2010/251581

Tribunal Europeo de Derechos Humanos, sec. 1ª, S 9-12-2010, nº 35123/2005

Resumen

En el caso *URBANEK contra AUSTRIA*, el TEDH considera que no se ha producido la violación del art. 6,1 CEDH en cuanto se ha tratado de un procedimiento equitativo.

NORMATIVA ESTUDIADA

Conv. de 4 noviembre 1950. Convenio Europeo para la Protección Derechos Humanos y Libertades Fundamentales art.6.1

CLASIFICACIÓN POR CONCEPTOS JURÍDICOS

DERECHO A UN PROCESO JUSTO
PROCEDIMIENTO CONTRADICTORIO Y EQUITATIVO

FICHA TÉCNICA

Procedimiento:Procedimiento ante el TEDH

Legislación

Aplica art.6apa.1 de Conv. de 4 noviembre 1950. Convenio Europeo para la Protección Derechos Humanos y Libertades Fundamentales

Jurisprudencia

Citada en el mismo sentido por STC Pleno de 9 mayo 2012 (J2012/98372)

Bibliografía

Citada en "El marco constitucional de las tasas judiciales"

Sinópsis *Hechos*

En el momento de los hechos el interesado trabajaba como abogado, representando a la compañía H, contra la cual se presentan diversas acciones por insolvencia.

Así, el actor interpone acciones legales para solicitar el pago de sus honorarios, que se desestima, por lo que el actor recurre alegando que este fallo implica la violación de su derecho de acceso a un tribunal.

En noviembre de 2002 el tribunal de apelación desestima nuevamente su acción.

Tras varias instancias, en 2004 el tribunal supremo desestima su recurso, de manera que interpone nuevas acciones ante el tribunal constitucional, quien, en octubre de 2004 nuevamente rechaza su solicitud, emitiendo un fallo desfavorable.

Finalmente, en marzo de 2005, el caso llega ante el tribunal administrativo, quien un mes más tarde, desestima su acción, procediendo el interesado al pago de las costas de procedimiento.

Sobre la vulneración del art. 6,1 CEDH

El demandante se queja de que no ha podido disponer de un procedimiento equitativo en cuanto a las dificultades que se ha encontrado de ejecución del fallo favorable.

El Tribunal recuerda que, si el art. 6,1 obliga a los tribunales a motivar sus decisiones, esta obligación no se puede entender como exigencia de una respuesta detallada a cada argumento.

En consecuencia, el TEDH observa que las autoridades competentes deberían haber actuado con más diligencia para no perjudicar al interesado en cuanto al desarrollo del procedimiento.

En este caso, el Tribunal recuerda que ya ha juzgado en decisiones previas que la excesiva rigidez a la hora de aplicar las normas en relación al acceso a los tribunales, no puede suponer una privación del derecho reconocido según las exigencias del art. 6,1 CEDH, no encontrando ninguna razón para apartarse de esta conclusión, por lo que, en este caso, desestima la vulneración de esta disposición.

Opinión concordante de los jueces SPIELMANN, ROZAKIS Y MALINVERNI

VERSION OFICIAL EN INGLÉS

SENTENCIA

CASE OF URBANEK v. AUSTRIA

(Application no. 35123/05)

JUDGMENT

STRASBOURG

9 December 2010

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 *Urbanek v. Austria*,

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

Christos Rozakis, President,

Nina Vaji#,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, judges,

and Søren Nielsen, Section Registrar,

Having deliberated in private on 18 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 35123/05) 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 Max Urbanek ("the applicant"), on 29 September 2005.

2. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that the court fees imposed on him had been excessive and had thus violated his right of access to a court. He further complained of the lack of an effective remedy.

4. On 12 December 2007 the President of the First Section decided to communicate the complaint concerning access to a court to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1943 and lives in St Pölten.

6. At the material time the applicant, who has retired in the meantime, was a practising lawyer. For many years he represented company H., which traded in cars. In 2001 insolvency proceedings were commenced before the St Pölten Regional Court (Landesgericht) in respect of company H.

7. In these proceedings the applicant asserted claims totalling 2,453,283.23 euros (EUR). The liquidator only acknowledged claims in the amount of EUR 47,908.79 and refused to admit the remaining claim of EUR 2,405,374.44 to the insolvency proceedings. According to the Government, the liquidator acknowledged the applicant's claims insofar as they related to services rendered to the insolvent company H. He rejected the remainder of the applicant's claim as it related to services rendered to other entities within the group of companies.

A. Proceedings under section 110 of the Insolvency Act

8. The applicant brought proceedings under section 110 of the Insolvency Act (Konkursordnung) before the St Pölten Regional Court, requesting a declaratory decision that he was entitled to claim EUR 2,405,374.44 from the company's assets. He estimated the amount in dispute (Streitwert), which serves as the basis for calculating court fees, lawyers' fees and other procedural costs, at EUR 36,000. Apparently this amount was what he expected to obtain as his quota in the insolvency proceedings. On the basis of this estimated amount in dispute, the applicant paid court fees of EUR 551.

9. By decision of 15 October 2002 the St Pölten Regional Court, of its own motion, fixed the amount in dispute at EUR 2,405,374.44, holding that the claim was of a pecuniary nature and could not therefore be the subject of an estimate.

10. The applicant appealed claiming, inter alia, that the fixing of the amount in dispute violated his right of access to a court. He argued that since the liquidator had contested his claim, he had no choice other than to request a declaratory decision under section 110 of the Insolvency Act in order to participate in the insolvency proceedings, in which he could at best hope to obtain a small percentage of the overall amount claimed. It was excessive to take the overall amount claimed as the amount in dispute, because the ensuing court

fees would exceed the amount he could realistically expect to obtain. The contested decision therefore prevented him in practice from pursuing his claims.

11. On 29 November 2002 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal. It referred to its own established case-law and to the Supreme Court's case-law which confirmed the view that in proceedings under section 110 of the Insolvency Act the amount the claimant wished to assert in the insolvency proceedings had to be taken as the amount in dispute, without regard to the quota likely to be obtained.

12. On 21 January 2004 the Supreme Court rejected the extraordinary appeal on points of law lodged by the applicant, without examining the merits.

13. At some later stage the applicant and the liquidator agreed to suspend the proceedings, apparently in order to reach an out-of-court settlement. On 21 July 2009 the liquidator, noting that it had not been possible to resolve the matter, requested the St. Pölten Regional Court to resume the proceedings. A hearing took place on 15 February 2010. The proceedings are currently still pending.

B. The proceedings relating to the imposition of court fees

14. On 9 March 2004 the costs officer (Kostenbeamter) of the St Pölten Regional Court ordered the applicant to pay court fees of EUR 29,829.50 pursuant to section 32 of the Court fees act (see paragraph 22 below).

15. Subsequently, the applicant filed an application for rectification. He claimed that EUR 36,000 and not EUR 2,405,374.44 should be taken as the basis for calculating the court fees. He repeated his argument that the request for a declaratory decision under section 110 of the Insolvency Act had been aimed solely at establishing whether he was entitled to participate in the insolvency proceedings, in which he could at best expect to obtain a small percentage of the overall amount claimed. The court had therefore wrongly found that the claim at issue was of a pecuniary nature and that the amount in dispute should be equal to the amount claimed.

16. By decision of 10 May 2004 the President of the St Pölten Regional Court dismissed the applicant's request for rectification, stating that the costs officer was bound by the decision of 15 October 2002 which had fixed the amount in dispute.

17. The applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof), in which he repeated his allegation that the fixing of the amount in dispute and the ensuing costs order violated his right of access to a court.

18. On 13 October 2004 the Constitutional Court dismissed the applicant's complaint for lack of prospects of success.

19. On 17 March 2005 the Administrative Court (Verwaltungsgerichtshof) dismissed the applicant's complaint as being unfounded. It referred to its established case-law according to which, in proceedings concerning a pecuniary claim, the amount of the claim was to be taken as the amount in dispute. Consequently, there was no scope for an assessment of the amount in dispute by the claimant. The court noted that this case-law also applied to proceedings under section 110 of the Insolvency Act. Again referring to its established case-law, the Administrative Court confirmed that the costs officer and the President of the Regional Court were bound by the decision of 15 October 2002 which had fixed the amount in dispute.

20. The decision was served on the applicant on 11 April 2005. The applicant paid the court fees in their entirety on 13 April 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Court Fees Act

21. The Court Fees Act (Gerichtsgbührengesetz) deals with court fees in civil proceedings. According to section 14 of that Act, the amount in dispute serves as the basis for calculation of the court fees, unless otherwise provided.

22. Under Section 32 of the Court Fees Act, court fees are fixed as a lump sum depending on the value in dispute. For an amount in dispute exceeding EUR 363,360 they are fixed at 1.2% of the amount in dispute, plus EUR 1,509, for first-instance proceedings.

The detailed table for court fees for civil proceedings at first instance as in force at the material time reads as follows:

amount in dispute court fee

up to 150 euro 17 euro

above 150 euro up to 360 euro 34 euro

above 360 euro up to 730 euro 47 euro

above 730 euro up to 2,180 euro 79 euro

above 2,180 euro up to 3,630 euro 127 euro

above 3,630 euro up to 7,270 euro 233 euro

above 7,270 euro up to 36,340 euro 551 euro

above 36,340 euro up to 72,670 euro 1,082 euro

above 72,670 euro up to 145,350 euro 2,165 euro

above 145,350 euro up to 218,020 euro 3,249 euro

above 218,020 euro up to 290,690 euro 4,332 euro

above 290,690 euro up to 363,360 euro 5,415 euro

above 363,360 euro 1,2% of the amount in dispute

plus 1,509 euro

2. Insolvency Act

23. A creditor who wishes to participate in the proceedings must register his claims, indicating the facts and evidence on which they are based and their ranking (section 103). A claim is deemed to be established if the trustee in bankruptcy or liquidator has acknowledged it and no other creditor has contested it.

24. If a claim is contested, the creditor has to bring an action under section 110 of the Insolvency Act which, in so far as material, reads as follows:

"Creditors whose claims continue to be contested as to their accuracy and ranking may seek have them established... by means of a complaint directed against all the contesting parties."

25. According to the Supreme Court's case-law (see, as a leading case, 8Ob288/99g, judgment of 8 June 2000), the amount in dispute for the purposes of an action under section 110 of the Insolvency Act is the amount of the claim which the creditor seeks to have admitted in the insolvency proceedings. In the above-mentioned case, the Supreme Court dealt with the claimant's argument that it would be more appropriate to make an estimate of the amount in dispute. The court noted that as a general rule there was no scope for making an estimate of the amount in dispute where the subject of the action for a declaratory decision was a pecuniary claim. The question of whether a claim was recoverable or not was not material for fixing the amount in dispute, and in that respect there was no difference between proceedings under section 110 of the Insolvency Act and other civil proceedings. Moreover, an action under section 110 also had effects outside the insolvency proceedings.

26. Regarding the costs of proceedings concerning the admission of claims, section 112 of the Insolvency Act provides as follows:

"The procedural costs are to be met from the estate in so far as the trustee in bankruptcy or liquidator has participated in the contesting of claims. The court may, however, require the trustee or liquidator to repay the procedural costs to the estate if he or she has contested claims or conducted the proceedings in a vexatious manner."

3. Code of Civil Procedure

27. Legal aid can be obtained under Article 63 § 1 of the Code of Civil Procedure (Zivilprozeßordnung) which, in so far as relevant, provides as follows:

"Natural persons who are a party to proceedings shall be granted full or partial legal aid to the extent that they are unable to pay the cost of participating in the proceedings without adverse effects on their capacity to meet necessary expenditure, and the intended action or defence is not manifestly vexatious or without prospects of success. Necessary expenditure shall be taken to mean the expenditure required to provide the person concerned and his or her dependants with a basic standard of living."

28. Section 64 § 1 of the Code of Civil Procedure enumerates the costs which can be covered by legal aid:

"Legal aid in respect of a specific set of proceedings may cover... the following:

(1) provisional exemption from:

(a) court fees..."

4. Judicial Collection Act

29. Regarding the collection of court fees, section 9 of the Judicial Collection Act (Gerichtliches Einbringungsgesetz), in so far as material, provides:

"(1) A request for extension of the time-limit for payment, or for payment in instalments, may be granted if collection would cause particular hardship to the person concerned..."

(2) A request for fees and costs to be reduced may be granted if their collection would cause particular hardship to the person concerned..."

THE LAW

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

30. The applicant complained of a violation of his right of access to a court. He relied on Article 6 § 1 of the Convention which, in its relevant part, states:

"In the determination of his civil rights and obligations... everyone is entitled to a fair... hearing... by (a)... tribunal..."

A. Admissibility

31. The Government asserted that Austrian law provided a number of instruments which would have allowed the applicant to obtain exemption from or a considerable reduction in the court fees at issue. They mentioned the following three possibilities.

32. First, the applicant could have applied for legal aid, which could also cover exemption from the payment of court fees. Second, section 9 § 2 of the Judicial Collection Act allowed for retroactive exemption from a payment obligation already incurred if collection of the fee would cause particular hardship to the person concerned. This instrument was, moreover, a flexible one as it allowed either full or partial exemption from payment of the fee. Third, section 9 § 1 of the Judicial Collection Act allowed for respite from court fees if the immediate collection of the fee would cause particular hardship to the person concerned. Respite could be granted either in the form of a complete deferral or in the form of payment in interest-free instalments. Applications had to be determined in legal proceedings by the President of the Regional Court of Appeal, with an appeal lying against that decision to the Constitutional Court and the Administrative Court. The Government observed that the applicant had failed to make use of any of these possibilities and had therefore failed to exhaust domestic remedies.

33. The applicant contested the Government's submissions. He pointed out that although legal aid could cover exemption from court fees, such exemption was only temporary and could be revoked within three years of termination of the proceedings if the financial situation of the party concerned had changed. Regarding the possibilities under section 9 §§ 1 and 2 of the Judicial Collection Act, the applicant claimed that he did not qualify for application of this provision. He referred to the case-law of the Administrative Court, arguing that it only accepted in cases of default of payment that the collection of court fees would cause special hardship.

34. The Court reiterates that where there is a choice of remedies open to an applicant, Article 35 § 1 of the Convention must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Hilal v. the United Kingdom* (dec.), no. 45276/99, 8 February 2000). Where the applicant has made a reasonable choice of one remedy available, the Court does not normally require the use of further remedies (*ibid.*).

35. In the present case the applicant submitted his complaint concerning the alleged violation of his right of access to a court in two sets of proceedings. In the proceedings under section 110 of the Insolvency Act he argued that taking the amount of his claim as the amount in dispute which formed the basis for the calculation of court fees had been excessive. He repeated that argument in the proceedings in which the court fees were fixed.

36. The Government argued that the applicant could and should have made use of further possibilities namely requesting legal aid under Article 63 § 1 of the Code of Civil Procedure and/or requesting respite or exemption from the payment of court fees pursuant to section 9 §§ 1 and 2 of the Judicial Collection Act. The Court considers that these issues are closely related to the substance of the case and should therefore be examined together with the merits.

37. Consequently, the Court joins the Government's objection of non exhaustion to the merits.

38. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

39. The applicant asserted that, although the activity of the civil courts was not dependent on payment of the court fees, the fees became due from the beginning of the proceedings and were collected in parallel proceedings. Given that the amount in dispute was also decisive for any further court fees and in particular for the lawyers' fees, the risk of eventually having to meet the very substantial overall costs had prevented him from having effective access to a court.

40. The applicant also contested the proportionality of the court fees in his case, pointing out that the action under section 110 of the Insolvency Act had been aimed solely at submitting a claim in the insolvency proceedings; he maintained that the fees at issue had been excessive in relation to the small quota he could expect to receive in the insolvency proceedings. This was all the more true since all procedural costs, including the lawyers' fees, also depended on the amount in dispute. As to the Government's argument that a successful action under section 110 of the Insolvency Act also provided the claimant with an enforceable claim valid for thirty years, the applicant stated that such a claim was worthless in a case like his where the debtor was a limited liability company which was liquidated in the insolvency proceedings.

41. The Government, referring to the Court's case-law, noted in the first place that the collection of court fees was not incompatible *per se* with the right of access to a court guaranteed by Article 6 § 1 of the Convention. They argued that the court fees imposed in the present case were proportionate for the following reasons.

42. First and foremost, the activity of the civil courts was not dependent on payment of the court fees. The court had to conduct the proceedings whether or not the claimant paid the court fees and even if the collection of the fees, which was dealt with in separate proceedings, remained unsuccessful. This feature distinguished the present case from the case of *Kreuz v. Poland* (no. 28249/95, § 66, ECHR 2001 VI). The Court, in finding a violation of the right of access to a court in that case, attached weight to the fact that the failure to pay the court fees had resulted in the applicant's case not being heard by a court.

43. The Government further argued that the imposition of court fees served legitimate aims, namely to contribute to the financing of the judicial system and to prevent claimants from addressing the court without real necessity or in an abusive manner.

44. Contrary to the applicant's assertion, the amount of the court fees due in the present case, although substantial, had not been excessive. It was usual for the court fees to be related to the amount claimed. In the present case, they amounted to 1.26% of the claim asserted by the applicant. Turning to the applicant's argument that insolvency proceedings should be treated differently as he could only expect to obtain a small proportion of the amount claimed, the Government argued that there was no fundamental difference between insolvency proceedings and ordinary civil proceedings. Claimants in the latter could not generally expect to receive the full amount claimed either. The method of calculation which the applicant seemed to be proposing for insolvency proceedings, which entailed leaving it to the claimant to make an estimate of the quota and to take that estimate as the basis for calculation of the court fees, was not practicable either.

45. The Government added that the applicant's argument disregarded the fact that an action under section 110 of the Insolvency Act, if allowed, not only enabled the claimant to participate in the insolvency proceedings but also provided him with an enforceable claim valid for thirty years. In the case of a limited liability company that claim also allowed him to proceed against any person liable for the company's debts.

46. Lastly, the Government drew attention to the specific nature of proceedings under section 110 of the Insolvency Act, pointing out that such an action need only be brought where the trustee in bankruptcy or liquidator refused to admit a claim. However, the trustee or liquidator was obliged to make an objective assessment, and in the event of vexatious refusal of a claim he had to bear the procedural costs of the admission proceedings, pursuant to section 112 of the Insolvency Act. This principle ensured that a debtor was not required to have recourse to the proceedings under section 110 of the Insolvency Act to obtain the admission of his claim if it was supported by sufficient evidence. In the present case, the liquidator had acknowledged the applicant's claim in part as it related to services rendered to the insolvent company H., while he had rejected the remainder of the applicant's claim as it related to services rendered to other entities within the group of companies.

2. The Court's assessment

(a) Principles deriving from the Court's case-law

47. The Court has held on many occasions that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in paragraph 1 of Article 6. The fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated. And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts (see, among many other authorities, *Golder v. the United Kingdom*, 21 January 1975, §§ 34 in fine and 35-36, Series A no. 18; *Z. and Others v. the United Kingdom* [GC], no. 29392/95, §§ 91-93, ECHR 2001-V; and *Kreuz*, cited above, § 52).

48. However, this right is not absolute, but may be subject to limitations. The Court has ruled that, guaranteeing to litigants an effective right of access to a court for the determination of their "civil rights and obligations", Article 6 § 1 leaves to the State a free choice of the means to be used towards this end, but while the Contracting States enjoy a certain margin of appreciation in that respect, the final decision as to the observance of the Convention's requirements rests with the Court (see *Golder and Z. and Others*, *ibid.*; *mutatis mutandis*, *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; and *Kreuz*, cited above, § 53).

49. The Court must be satisfied that the limitations applied did not restrict or reduce the access afforded to the applicant in such a way or to such an extent that the very essence of that right was impaired (see *Kreuz*, cited above, § 54).

50. Furthermore, the Court stresses that a limitation will not be compatible with Article 6 § 1 unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (*ibid.*, § 55).

51. In the *Kreuz* judgment (cited above), applying these principles in the particular context of a restriction on access to a court on account of the imposition of court fees, the Court held as follows:

"59. Having regard to the aforementioned statement of principles established by its case-law, the Court once again recalls that it has never ruled out the possibility that the interests of the fair administration of justice may justify imposing a financial restriction on the individual's access to a court (see paragraph 54 above and, in particular, *Tolstoy-Miloslavsky*, cited above, pp. 80-81, §§ 61 et seq.).

Furthermore, the Court considers that while under Article 6 § 1 fulfilment of the obligation to secure an effective right of access to a court does not mean merely the absence of an interference but may require taking various forms of positive action on the part of the State, neither an unqualified right to obtain free legal aid from the State in a civil dispute, nor a right to free proceedings in civil matters can be inferred from that provision (see, *mutatis mutandis*, *Airey*, cited above, p. 14, §§ 25-26).

60. The Court accordingly holds that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention.

It reiterates, however, that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material

in determining whether or not a person enjoyed his right of access and had "a... hearing by (a) tribunal" (see Tolstoy-Miloslavsky, cited above, and Ait Mouhoub, cited above, pp. 80-81, § 63 et seq., and p. 3228, § 57, respectively)."

(b) Application of the above principles to the present case

52. Applying the criteria set out above, the Court has found a violation of the right to access to a court in a number of cases. It has held for instance that the imposition of very substantial fees, resulting in the respective applicants' desisting from the claim and the case not being heard by a court, impaired the very essence of their right of access to a court (see Kreuz, cited above, § 66; Jedamski and Jedamska v. Poland, no. 73547/01, § 66, 26 July 2005; and Weissman and Others v. Romania, no. 63945/00, §§ 38-40, ECHR 2006 VII (extracts); these three cases concerned excessive court fees imposed at the initial stage of the proceedings; in addition, see Kniat v. Poland, no. 71731/01, § 46, 26 July 2005, regarding the imposition of excessive court fees at the appeal stage).

53. Accordingly, the Court must determine whether, in the circumstances of the present case, the court fee actually charged resulted in the applicant's desisting from his claim and the case not being heard by the courts. Furthermore the Court will take into account whether the fee in itself was disproportionate or impaired the very essence of the applicant's right of access to a court.

54. The applicant sought to have claims of EUR 2,405,374.44 admitted in the insolvency proceedings, which were contested by the liquidator. Consequently, he was obliged to bring proceedings under section 110 of the Insolvency Act. In these proceedings, court fees of EUR 29,829.50 were imposed on him, calculated according to the Court Fees Act as a percentage of the of 1.2% of the amount in dispute plus a lump sum of EUR 1,509 (see paragraph 22 above).

55. The Court sees a number of factors distinguishing the present case from cases in which it has found a violation of the applicant's right of access to a court under Article 6 § 1 on account of the imposition of excessive court fees (see, for instance, Kreuz, cited above, § 66, and the other cases cited in paragraph 52 above).

56. In the first place the Court notes that in the Austrian legal system the activity of the courts is not dependent on the payment of court fees. It is not in dispute between the parties that the court had to conduct the proceedings under section 110 of the Insolvency Act irrespective of whether or not the applicant paid the court fees at issue. The proceedings are in fact pending and the dispute can and will be determined by the Austrian courts. It follows that the applicant does have access to court.

57. Second, the Court notes that the applicant did not argue that he was unable to pay the court fees at issue but asserted that the fees were disproportionate to the quota he could expect to receive. In his assertion the fixing of the court fees in relation to the amount of the claims he sought to have admitted in the insolvency proceedings had in itself been excessive. The Court reiterates that the requirement to pay fees to civil courts in connection with claims they are asked to determine is not incompatible per se with Article 6 § 1 of the Convention (see Kreuz, cited above, § 60). Moreover, the Court sees nothing unusual in a system in which court fees for pecuniary claims are dependent on the amount in dispute.

58. In contrast, the applicant claimed that the court fees at issue should rather have been fixed in relation to the quota likely to be obtained in the insolvency proceedings. When dealing with the applicant's argument the domestic courts referred to the Supreme Court's established case-law, according to which there was no scope for making an estimate of the value in dispute where a pecuniary claim was at stake, as was the case with an action under section 110 of the Insolvency Act. The question whether a claim was recoverable was not considered to be material. In particular, the Supreme Court had found in that connection that there was no difference between proceedings under section 110 of the Insolvency Act and other civil proceedings.

59. The Court considers that the applicant's argument is based on speculation, namely that the court fees in the proceedings under Section 110 of the Insolvency Act risked exceeding the quota he might finally obtain in the insolvency proceedings. Moreover, as the domestic courts rightly pointed out, the risk that a claimant has to pay fees which exceed the award finally made by the courts is not confined to claims made in the context of insolvency proceedings. In fact, such a situation may also occur in other civil proceedings. In the Court's view such a risk cannot in itself invalidate a system linking court fees to the amount in dispute. In addition, the Court considers that the system proposed by the applicant does not appear practicable.

60. The Court reiterates that it is not its task to substitute itself for the competent domestic authorities in determining the most appropriate means of regulating access to justice, or to assess the facts which led the courts to adopt one decision rather than another. The Court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see Tolstoy Miloslavsky, cited above, § 59, and Kreuz, cited above, § 56).

61. In the present case, the Court finds that it falls within the State's margin of appreciation to establish its court fees system in such a way as to link court fees for pecuniary claims to the amount in dispute. It does not see reasons of principle to distinguish the proceedings under section 110 of the Insolvency Act here at issue from other civil proceedings.

62. However, it remains to be examined whether the court fee system at issue is sufficiently flexible in the circumstances. In that connection the Government argued that the applicant had a number of possibilities at his disposal in order to obtain full or partial exemption from or a reduction in the court fees. For his part, the applicant argued that fixing court fees in relation to the amount in dispute was disproportionate as not only the court fees for the introduction of proceedings under section 110 of the Insolvency Act but all court fees for the further conduct of these proceedings would be calculated on the same basis.

63. The Court notes that the Government's argument is similar to their objection as to the exhaustion of domestic remedies, which the Court has joined to the merits of the case. It is undisputed that the applicant was able to pay the initial court fees. However, as

the Court has already noted, the proceedings at issue are still pending. The possibilities set out by the Government for obtaining either exemption from or reduction of court fees could thus become relevant in the further course of the proceedings. The Court notes that these possibilities include an exemption from court fees under the legal aid system set out in Article 63 § 1 of the Code of Civil Procedure. The applicant pointed out that this exemption is only provisional and may be revoked if the party's financial situation changed. The Court notes that consequently revocation will not occur if the litigant continues to qualify for legal aid.

64. Turning to the possibilities under section 9 §§ 1 and 2 of the Judicial Collection Act, namely the full or partial exemption from the payment of court fees or respite from court fees in case the collection of the fee would cause particular hardship to the person concerned, the court notes that these measures also contribute to a certain degree of flexibility. As the applicant himself has pointed out, these measures may be applied where a litigant is in default of payment and such payment would constitute particular hardship for him. In sum, the Court finds that the court fee system at issue ensures a sufficient degree of flexibility.

65. Having regard to all the above considerations, in particular the fact that the conduct of the proceeding did not depend on the payment of court fees (see, e contrario, Kreuz, § 66), that the system linking court fees for pecuniary claims to the amount in dispute does not in itself appear disproportionate and that the system here at issue provides for a certain degree of flexibility, the Court finds that the very essence of the applicant's right of access to a court has not been impaired in the present case.

66. In the light of this conclusion it is not necessary to decide on the Government's objection of non-exhaustion.

67. In sum, the Court finds that here has been no violation of Article 6 § 1 of the Convention EDL 1979/3822 .

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

68. The applicant also alleged a violation of 13, which provides:

"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."

69. The Court finds that this complaint is closely linked to the complaint under Article 6 § 1 and must therefore also be declared admissible.

70. The Court reiterates that where the right claimed is a civil right, the role of Article 6 § 1 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by those of Article 6 § 1 (see Brualla Gómez de la Torre v. Spain, 19 December 1997, § 41, Reports of Judgments and Decisions 1997-VIII). Consequently, it is unnecessary to rule on this complaint.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Joins the Government's objection of non-exhaustion to the merits of the case;
2. Declares the application admissible;
3. Holds that it is not necessary to decide on the Government's objection of non-exhaustion;
4. Holds that there has been no violation of Article 6 § 1 of the Convention;
5. Holds that it is not necessary to determine whether there has been a violation of Article 13 of the Convention;

Done in English, and notified in writing on 9 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Christos Rozakis

Registrar President

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

C.L.R.

S.N.

CONCURRING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES ROZAKIS AND MALINVERNI

1. It was with the greatest hesitation that I voted for a non-violation of Article 6 § 1 of the Convention. I did so out of a sense of discipline and respect for the Court's case-law, accepting that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention (see Kreuz v. Poland, no. 28249/95, § 60, ECHR 2001 VI). I am personally of a different opinion. As a matter of principle, access to courts should be free of charge because the administration of justice is a public service.

2. The Court has adopted a more lenient approach in the past. Indeed, it transpires from the Court's case-law that "the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access and had 'a... hearing by (a) tribunal'" (see Kreuz, cited above, § 60, with further references).

3. In the recent Grand Chamber judgment *Perdigão v. Portugal* [GC], no. 24768/06, 16 November 2010, the Court found a violation of Article 1 of Protocol No. 1 concerning disproportionate court fees. The Court characterised the fees imposed in that case as an excessive

burden which upset the fair balance which must be struck between the general interest of the community and the fundamental rights of the individual (see *Perdigão*, cited above, § 78).

4. The present case has similarities with *Perdigão*, *ibid.*, notwithstanding the fact that the applicant only brought complaints under Article 6 § 1 and 13 of the Convention.

5. The applicant, who was a practising lawyer at the time, actually paid the court fees at issue (see paragraph 20 of the judgment). However, his argument was not that he was unable to do so but that the fees were disproportionate to the quota he could expect to receive (paragraph 57). In the applicant's assertion the fixing of the court fees in relation to the amount of the claims he sought to have admitted to the insolvency proceedings had in itself been excessive (*ibid.*). This was all the more true, in his submission, as not only the court fee for introducing an action under section 110 of the Insolvency Act but also the court fees for the further conduct of the proceedings, and the lawyers' fees, would be calculated on the basis of that amount in dispute. He argued that, instead, they should have been fixed in relation to the quota likely to be obtained (paragraph 58).

6. As the Court noted in paragraph 58 of the judgment, when dealing with the applicant's argument the domestic courts mainly referred to the Supreme Court's established case-law, according to which there was no scope for making an estimate of the value in dispute where a pecuniary claim was at stake, as was the case with an action under section 110 of the Insolvency Act. The question whether the claim was recoverable was not considered to be material. In particular, the Supreme Court had found in that connection that there was no difference between proceedings under section 110 of the Insolvency Act and other civil proceedings.

7. It is true that States enjoy a margin of appreciation when establishing and applying any system regulating access to court, including the system for the imposition of court fees. However, it is for the Court to make a final decision as to the observance of the Convention requirements (see the case law cited in paragraph 48 of the judgment).

8. I would like to stress the importance of securing to a person "effective" access to a court. The courts observed that the applicant's claim was of a pecuniary nature and that it was thus justified to take the amount of the claims asserted as the amount in dispute, which served as the basis for calculation of the court fees. They did not address in any detail the applicant's argument that linking the court fees to the amount in dispute was disproportionate in the particular context of insolvency proceedings, as he was not seeking payment of the sum at issue through the action under section 110 of the Insolvency Act but was merely seeking admission to the insolvency proceedings.

9. The Government pointed out that a successful action under section 110 of the Insolvency Act would not only entitle the claimant to participate in the insolvency proceedings but would also provide him with an enforceable claim valid for thirty years. However, I doubt the practical usefulness of such entitlement in the circumstances of the present case, where the debtor was a limited liability company. Finally, regarding the Government's argument that the courts could order the trustee in bankruptcy or the liquidator to bear the costs of the proceedings in the event of a vexatious refusal of the claim, in accordance with section 112 of the Insolvency Act, I would like to emphasise that this occurs only in exceptional cases; as a general rule, the costs of the proceedings are met from the estate (see paragraph 26 of the judgment).

10. Turning to the phase of the proceedings in which the court fees were imposed, I note that the fees were due at the initial stage of the proceedings. The Government stressed that the activity of the courts was not dependent on the payment of court fees. However, I note that the court fees became due following the Administrative Court's decision of 17 March 2005. Had the applicant failed to pay the fees, enforcement measures would have been taken against him.

11. In so far as the Government argued that the applicant had had a number of possibilities at his disposal in order to obtain full or partial exemption from or a reduction in the court fees, but had failed to make use of any of these, I would like to make the following observations.

12. As regards the possibility of requesting legal aid under Article 63 § 1 of the Code of Civil Procedure, which may include provisional exemption from court fees (paragraph 63 of the judgment), I note that legal aid is to be granted only if the party is unable to meet the costs of the proceedings. However, the applicant, although asserting that the court fees were excessive, did not claim that he was actually unable to pay them. Indeed, he paid the court fees in their entirety (see paragraph 20). In addition, the applicant pointed out that exemption from court fees was only provisional and could be revoked if the party's financial situation changed.

13. Turning to the possibilities under section 9 §§ 1 and 2 of the Judicial Collection Act, namely full or partial exemption from the payment of court fees or respite from court fees in cases where the collection of the fee would cause particular hardship to the person concerned (paragraph 64 of the judgment), I observe that the Government merely referred to the text of the law. They did not refer to any specific decision showing that a person in the applicant's situation could benefit from exemption or respite from court fees. In contrast, the applicant referred to the case-law of the Administrative Court, which only accepted in cases of default of payment that the collection of court fees would cause special hardship. As the applicant had actually been able to pay the fees, I fail to see how the measures foreseen in section 9 §§ 1 and 2 of the Judicial Collection Act could have provided effective relief in his case.

14. I would like further to observe that, although the imposition of the very substantial court fees did not prevent the applicant from pursuing his claim, it cannot be overlooked that their substantial amount deprived the proceedings to a large extent of their practical usefulness for the applicant. In that connection I reiterate that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Kreuz*, cited above, § 57, and *Airey v. Ireland*, 9 October 1979, Series A no. 32, § 24).