

In the case of *Ortenberg v. Austria**,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A**, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr C. Russo,
Mr A. Spielmann,
Mr R. Pekkanen,
Mr A.N. Loizou,
Sir John Freeland,

and also of Mr H. Petzold, Acting Registrar,

Having deliberated in private on 27 May and 25 October 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 33/1993/428/507. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12884/87) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mrs Margarete Ortenberg, on 10 September 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). The lawyer was given leave by the President to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included *ex officio*

Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr C. Russo, Mr N. Valticos, Mr R. Pekkanen, Mr A.N. Loizou and Sir John Freeland (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr A. Spielmann, substitute judge, replaced Mr Valticos, who was unable to take part in the further consideration of the case (Rules 22 paras. 1 and 2 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Deputy Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 25 February 1994. On 8 and 28 April the Commission provided him with various documents that he had sought on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 May 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr W. Okresek, Head of the International
Affairs Division, Department of the
Constitution, Federal Chancellery, Agent,
Mrs E. Bertagnoli, Human Rights Division,
Department of International Law,
Federal Ministry of Foreign Affairs, Adviser;

(b) for the Commission

Mr F. Ermacora, Delegate;

(c) for the applicant

Mr H. Blum, Rechtsanwalt, Counsel.

The Court heard addresses by Mr Okresek, Mr Ermacora and Mr Blum.

AS TO THE FACTS

I. The circumstances of the case

6. Mrs Ortenberg, an Austrian national, owns a house at Leonding, near Linz (Upper Austria).

A. The administrative proceedings

7. On 12 September 1980 Leonding District Council adopted a land-use plan (Flächenwidmungsplan) which designated as building land an area comprising five parcels (725/3-7) adjoining the applicant's property. On 30 January 1981 the council voted for a development plan (Bebauungsplan) authorising the construction of terrace houses on this land.

8. Subsequently the mayor of the town issued building permits to the owners of the parcels. Mrs Ortenberg lodged an appeal (Berufung) with the district council against all these decisions, challenging in particular the lawfulness of the land-use and development plans and

complaining of the substantial nuisance that would be caused to her by the proposed buildings. The council dismissed the appeal.

9. The applicant then lodged administrative complaints (Vorstellungen) with the Government of the Land of Upper Austria. In decisions (Bescheide) taken on 27 May (parcel 725/7), 8 July (parcel 725/6), 3 September (parcel 725/5), 14 October (parcel 725/4) and 22 October 1982 (parcel 725/3) the Land Government dismissed them, on the ground that there was no infringement of Mrs Ortenberg's personal rights as a neighbour that were laid down in sections 23(2) and 46(3) of the Building Regulations Act of the Land of Upper Austria 1976 (Oberösterreichische Bauordnung - see paragraph 15 below). The Land Government stated that, according to the experts, the nuisance caused by the noise, dust and smells would not exceed locally permitted levels and that the proposed buildings complied with the development plan.

B. The court proceedings

10. Mrs Ortenberg then applied to the Constitutional Court in respect of parcels 725/6 and 725/7, alleging that her constitutional rights had been infringed and that unlawful regulations (gesetzwidrige Verordnungen) had been applied.

Concurrently she lodged three appeals (Beschwerden) with the Administrative Court (in respect of parcels 725/3, 725/4 and 725/5). She complained that her personal rights as a neighbour had been infringed on account of nuisance caused by the building of a driveway adjoining her property - nuisance which had not been properly assessed by the experts - and also that certain building norms had not been complied with.

11. On 2 October 1985 the Constitutional Court, doubting whether the land-use and development plans complied with the Town and Country Planning Act of the Land of Upper Austria (Oberösterreichisches Raumordnungsgesetz), stayed the proceedings and decided to review the lawfulness of the plans. It indicated, among other things, that under the terms of the Act, reclassification of the green belt in question could only be envisaged if it served dominant public interests, which had not been so in the case before it.

On 3 December 1985 the Administrative Court also applied to the Constitutional Court, asking it to quash the regulations relating to the aforementioned plans, since they also applied to parcels 725/3, 725/4 and 725/5.

12. On 19 March 1986 the Constitutional Court joined all the relevant proceedings and in response to the reference by the Administrative Court held that the land-use and development plans were lawful. The court took the view that as the land adjoining the parcels in question, which was three times larger in area, had been designated as building land by Leonding District Council as early as 1971, the administrative authority had only slightly enlarged that designated area, and this was not contrary to the Town and Country Planning Act of the Land of Upper Austria.

At the same time, the court dismissed Mrs Ortenberg's own individual appeals on the grounds that there had been no breach of her constitutional rights and referred her to the Administrative Court (in respect of parcels 725/6 and 725/7).

13. The Administrative Court dismissed the applicant's appeals in judgments of 30 September (parcel 725/5) and 14 October 1986 (parcels 725/3 and 725/4), which contained the following reasons:

"...

As the neighbour has a personal right in public law to

compliance with the aforementioned provision [section 23(2) Building Regulations Act of the Land of Upper Austria 1976], a right to which regard must, as a matter of principle, be had in planning-application proceedings, ... the Court was required in the present case to consider whether the additional traffic brought about by the proposed development on the driveway to be constructed along the boundary of the applicant's property would cause the applicant considerable nuisance...

From the statements concerning noise in the observations (of 23 May 1982) of the Air Pollution Control Subdivision of the Office of the Upper Austrian Land Government it can be seen that the driveway from the garage to Zaubertal Road is 48 m long, that the average distance between the driveway and the applicant's house is about 25 m and that, if one assumes an average speed of 5 k.p.h., it takes approximately 35 seconds to get from the garage to the public highway ...

...

... In the light of the fact that during the proceedings the appellant did not make any concrete statements to counter the above conclusions of the expert, the Court cannot attach any material importance - within the meaning of section 42(2)(3)(b) and (c) of the Administrative Court Act, such as would lead to the challenged decision being quashed - either to the failure to measure the background noise level as the appellant had requested or to the alleged shortcomings in the medical expert's opinion, all the less as the appellant did not give any indication of why, if matters had been otherwise, the relevant authorities would have come to the conclusion that the - uncontestedly extremely light - motor traffic would entail considerable nuisance for the appellant on her property ...

The Court is precluded by the rule in section 41(1) of the Administrative Court Act prohibiting the raising of new matters in the Administrative Court from considering the appellant's contention that the assumption that an average of some 40 vehicle movements an hour during the daytime was considerably exaggerated.

...

Neither in her administrative complaint against this decision [of Leonding District Council] nor in her appeal did the appellant state in concrete terms in what way her complaints were justified, and accordingly, in the absence of any indication of the material importance of the alleged violation of procedural rules within the meaning of section 42(2)(3) of the Administrative Court Act, the complaint alleging a procedural irregularity (Verfahrensrüge) cannot justify setting aside the challenged decision.

...

Accordingly, the present appeal is ill-founded as a whole, and must be dismissed in accordance with section 42(1) of the Administrative Court Act.

..."

14. On 28 October 1986 the Administrative Court also dismissed Mrs Ortenberg's appeals in respect of parcels 725/6 and 725/7, submitted to it by the Constitutional Court, reiterating the reasons set out in its earlier judgments (see paragraph 13 above).

II. Relevant domestic law

A. The Building Regulations Act of the Land of Upper Austria

15. Two provisions of the Building Regulations Act of the Land of Upper Austria 1976 are relevant to the case:

Section 23

"(1) All parts of buildings must be designed and constructed in accordance with the latest technical knowledge in such a manner that the buildings meet the normal requirements of such buildings as regards safety, solidity, protection from fire, insulation (against sound and heat), health and hygiene, environmental protection and "Zivilisation", and that natural and architectural surroundings are not spoiled ..."

(2) In particular, all parts of buildings must be designed and constructed in such a manner as to avoid as far as possible any harmful effects on the environment. Harmful effects on the environment are those which are likely to cause ... considerable nuisance to the general public and, in particular, to users of the buildings and the neighbourhood, such as ... noise..."

Section 46

"(1) ...

(2) Neighbours may make objections to a grant of planning permission on the ground that the proposed development will infringe personal rights derived from either private law (private-law objections) or public law (public-law objections).

(3) Public-law objections by neighbours shall only be taken into consideration in planning-application proceedings if they are based on provisions of building law or of a land-use or development plan that serve not only the public interest but also the interests of the neighbourhood. Such provisions include, in particular, all those concerning the type of building, the uses to which the building land may be put, the site of the proposed development, distances from the boundaries of adjoining land and from neighbouring buildings, the height of buildings, light and ventilation and those dealing with health matters or the protection of the neighbourhood from air pollution."

B. The applications to the Constitutional Court

16. On an application (Beschwerde) the Constitutional Court will determine whether an administrative decision (Bescheid) has infringed a right guaranteed by the Constitution or has applied regulations (Verordnung) contrary to the law, a law contrary to the Constitution or an international treaty incompatible with Austrian law (Article 144 para. 1 of the Federal Constitution - Bundesverfassungsgesetz).

C. Applications to the Administrative Court

17. Under Article 130 of the Federal Constitution, the Administrative Court has jurisdiction to hear, inter alia, applications alleging that an administrative decision is unlawful.

Section 41(1) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz) reads as follows:

"In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42(2)(2) and (3)) ..., it must examine the contested decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

Under section 42(2) of the Act,

"The Administrative Court shall quash the impugned decision if it is unlawful

1. by reason of its content, [or]
2. because the respondent authority lacked jurisdiction, [or]
3. on account of a breach of procedural rules, in that

(a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or

(b) the facts require further investigation on an important point, or

(c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

18. Proceedings in the Administrative Court consist essentially of an exchange of written pleadings (section 36). If one of the parties so requests, the Administrative Court may hold an adversarial hearing, which in principle is held in public (sections 39 and 40).

19. If the court quashes the challenged decision, "the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law (Rechtsansicht)" (section 63(1)).

PROCEEDINGS BEFORE THE COMMISSION

20. Mrs Ortenberg applied to the Commission on 10 September 1986. Relying on Article 6 para. 1 (art. 6-1) of the Convention, she complained that she had not had access to a court with full jurisdiction or had a fair hearing. She also complained of an interference with her right of property as secured in Article 1 of Protocol No. 1 (P1-1).

21. On 29 June 1992 the Commission declared the application (no. 12884/87) admissible in respect of the complaint under Article 6 para. 1 (art. 6-1) and inadmissible as to the remainder. In its report of 14 May 1993 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) as regards both access to a court (by fifteen votes to one) and the fairness of the proceedings (unanimously). The full text of the Commission's opinion and of the two concurring opinions contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar. For practical reasons this annex will appear

only with the printed version of the judgment (volume 295-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

22. In their memorial the Government asked the Court to

"hold that Article 6 (art. 6) of the Convention does not apply to the present case, or alternatively hold that there has been no violation of the applicant's right to have her case determined by a tribunal or of her right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1) ...".

23. The applicant requested the Court

"1. to find that the decisions given by the Constitutional Court and the Administrative Court in the proceedings in the instant case relating to the construction of houses on land adjoining the property of the applicant ... violated

(a) her right to a hearing by a tribunal as required by Article 6 para. 1 (art. 6-1) of the Convention, for the determination of her civil rights;

(b) her right to a fair hearing as required by Article 6 para. 1 (art. 6-1) of the Convention; and

(c) her right to the peaceful enjoyment of her possessions, in accordance with Article 1 of Protocol No. 1 (P1-1) ...

2. to award the applicant appropriate compensation under Article 50 (art. 50) of the Convention, in the sum of 1,140,000 Austrian schillings, plus legal costs, and to order the Republic of Austria to pay this amount to the applicant ...".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

24. Mrs Ortenberg complained that she had not had access to a tribunal with full jurisdiction or had a fair and public hearing. She relied on Article 6 para. 1 (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 ..."

A. Applicability of Article 6 para. 1 (art. 6-1)

25. The Government considered that this provision did not apply in the present case. The right of neighbours to object to the granting of planning permission under section 46(3) of the Building Regulations Act of the Land of Upper Austria (see paragraph 15 above) was essentially a public-law right. It was designed to ensure compliance with legal provisions, in particular those for the protection of the environment. Furthermore, a grant of planning permission concerned the relationship between a public authority and an individual; it did not directly affect the owner of adjacent land.

26. Mrs Ortenberg, on the other hand, maintained that she had brought the proceedings in question in order to prevent any

infringement of her pecuniary rights and that the outcome of them had therefore had a direct bearing on her civil rights and obligations.

27. This was also in substance the opinion of the Commission.

28. The Court points out that Article 6 para. 1 (art. 6-1) applies where the subject-matter of an action is "pecuniary" in nature and is founded on an alleged infringement of rights which are likewise pecuniary (see the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40) or where its outcome is "decisive for private rights and obligations" (see the H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 20, para. 47).

It notes that section 46(2) of the Building Regulations Act of the Land of Upper Austria expressly provides that neighbours may object to the granting of planning permission by complaining that their personal rights will be infringed, which "may be derived from either private law (private-law objections) or public law (public-law objections)" (see paragraph 15 above).

In this instance the applicant relied on public law and alleged that the provisions of section 23(2) of the aforementioned Act (see paragraph 15 above) had not been complied with. In so doing, she nonetheless wished to avoid any infringement of her pecuniary rights, because she considered that the works on the land adjoining her property would jeopardise her enjoyment of it and would reduce its market value.

Having regard to the close link between the proceedings brought by Mrs Ortenberg and the consequences of their outcome for her property, the right in question was a "civil" one.

Accordingly, Article 6 para. 1 (art. 6-1) applies.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Right of access to a court

29. In the applicant's submission, neither the Constitutional Court nor the Administrative Court could be regarded as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1).

The Constitutional Court did not have any power to review questions of fact or of law and had confined itself to making a summary examination of the land-use and development plans.

The Administrative Court had wide powers to review questions of law but was bound by the administrative authorities' findings other than in cases of a material breach of the procedural rules laid down in section 42(2)(3) of the Administrative Court Act (see paragraph 17 above). That court was accordingly not empowered to take evidence directly or to establish the facts itself or to take account of new information. Furthermore, if it quashed an administrative decision, it could not substitute its own decision for that of the decision-making authority but always had to remit the case to it. In short, it only reviewed conformity with the law, and this could not be equated with full jurisdiction.

30. The Government, on the other hand, submitted that the Administrative Court had powers which, taken together with those of the Constitutional Court, afforded sufficient scope for the purposes of Article 6 para. 1 (art. 6-1). Under section 42(2)(3) of the Administrative Court Act, it had wide powers of review as regards both the establishment of the facts and the taking of evidence. In the instant case, just as in the *Zumtobel v. Austria* case (judgment of 21 September 1993, Series A no. 268-A), the Administrative Court had

accordingly reviewed the facts in detail. Moreover, if it quashed an administrative decision, the decision-making authority was bound by the Administrative Court's opinion (section 63(1) of the aforementioned Act - see paragraph 19 above).

31. The Court points out that under Article 6 para. 1 (art. 6-1) of the Convention it is necessary that decisions of administrative authorities which do not themselves satisfy the requirements of that Article should be subject to subsequent control by a "judicial body that has full jurisdiction" (see the *Albert and Le Compte v. Belgium* judgment of 10 February 1983, Series A no. 58, p. 16, para. 29).

32. The Constitutional Court is not such a body. In this instance it could only review the lawfulness of the land-use and development plans, and, on the Government's own admission, this did not enable it to consider all the facts of the case. It therefore did not have the competence required by Article 6 para. 1 (art. 6-1).

33. As for the Administrative Court's review, its scope must be assessed in the light of the fact that granting planning permission is not a matter exclusively within the discretion of the administrative authorities; it remains subject to the rules set out in sections 23 and 46 of the Building Regulations Act of the Land of Upper Austria (see paragraph 15 above). It was for the Administrative Court to satisfy itself that these provisions had been complied with. In this respect, the present case is distinguishable from the *Obermeier v. Austria* case (judgment of 28 June 1990, Series A no. 179) and more closely resembles the *Zumtobel* case (judgment previously cited).

34. Like the Commission, the Court notes that in its judgments of 1986 (see paragraph 13 above) the Administrative Court thoroughly examined the applicant's complaints point by point, without ever having to decline jurisdiction in replying to them. In particular, it looked in detail at whether the traffic on the driveway would amount to "considerable nuisance", before giving reasons for holding that there had been no breach of the procedural rules within the meaning of section 42(2)(3)(b) and (c) of the Administrative Court Act.

Regard being had to the fact that this was a decision taken by an administrative authority on grounds of expediency and to the nature of Mrs Ortenberg's complaints, the review by the Administrative Court fulfilled the requirements of Article 6 para. 1 (art. 6-1) in this instance.

2. Right to a fair hearing

35. The applicant further complained that she had not had a fair hearing.

36. The Constitutional Court is not in issue, as it was not a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1) for the purposes of this case (see paragraph 32 above).

37. The same is not true of the Administrative Court. However, the European Court notes, like the Government, that Mrs Ortenberg did not point to any feature that might cast doubt on the fairness of the proceedings in the case in that court.

3. Right to a public hearing

38. The applicant complained that the Administrative Court had not held a hearing.

39. The Court notes that this complaint was not raised before the Commission. It accordingly has no jurisdiction to consider it.

4. Conclusion

40. In sum, there has been no breach of Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

41. In her memorial Mrs Ortenberg also complained of a breach of her right of property, contrary to Article 1 of Protocol No. 1 (P1-1).

42. This complaint, having been declared inadmissible by the Commission on 29 June 1992 as being out of time (Articles 26 and 27 para. 3 of the Convention - see paragraph 21 above) (art. 26, art. 27-3), lies outside the scope of the case referred to the Court. That being so, the Court has no jurisdiction to entertain it.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention as regards access to a court;
2. Holds that there has been no breach of Article 6 para. 1 (art. 6-1) of the Convention as regards the fairness of the proceedings;
3. Holds that it has no jurisdiction to consider the complaint based on the lack of a hearing in the Administrative Court;
4. Holds that it has no jurisdiction to entertain the complaint raised under Article 1 of Protocol No. 1 (P1-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1994.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Acting Registrar