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

FIRST SECTION

CASE OF KIENAST v. AUSTRIA

(Application no. 23379/94)

JUDGMENT

STRASBOURG

23 January 2003

FINAL

23/04/2003

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 Kienast v. Austria,

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

Mrs F. TULKENS, *President*,
Mr G. BONELLO,
Mr P. LORENZEN,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 19 December 2002,

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

PROCEDURE

1. The case originated in an application (no. 23379/94) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Franz Kienast ("the applicant"), on 27 January 1994.

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

3. The applicant alleged that the fact that two parcels of land owned by him had been united and the land register amended accordingly, infringed his property rights and that in the proceedings leading thereto he did not have a fair hearing before an independent and impartial tribunal and no effective remedy to complain about these violations of the Convention.

4. The application was declared admissible by the Commission on 22 April 1998 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Court decided that no hearing on the merits was required (Rule 59 § 2 in fine).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1943 and lives in Gross Gerungs (Austria).

8. The applicant is the owner of land in Loipersdorf (Styria), registered under file No. 154 of the Loipersdorf Land Register (*Grundbuch*). Before 23 September 1992 it comprised, inter alia, parcel No. 772/1 of 4231 square metres marked as garden (*Garten*) and in the middle of it parcel No. 66/2 of 401 square metres marked as building area (*Baufläche*). The borders of these parcels were recorded in the land tax register (*Grundsteuerkataster*).

9. On 28 November 1989 the Mayor of Loipersdorf informed the applicant that a new border register (*Grenzkataster*) for Loipersdorf was under preparation and that on this occasion some parcels of land had to be united. As the applicant's land was affected by this measure he was invited to give his consent on 7 December 1989 at the Town Hall.

10. On 1 December 1989 the applicant informed the Feldbach Surveyor's Office (*Vermessungsamt*) that he would not consent to a unification of any of the parcels belonging to him.

11. On 18 September 1992 the Feldbach Surveyor's Office submitted a certificate (*Anmeldungsbogen*) to the Feldbach District Court, the competent Land Register Court (*Grundbuchsgericht*), in which it requested that the unification (*Grundstücksvereinigung*) of the applicant's parcels No. 772/1 and No. 66/2, be entered in the land register.

12. On 23 September 1992 the District Court amended the land register as requested. It struck out parcel No. 66/2 of the land register and united the respective piece of land with parcel No. 772/1. On 29 October 1992 the applicant appealed against this decision.

13. On 26 January 1993 the Graz Regional Court rejected the applicant's appeal. The Regional Court found that the Surveyor's Office had issued the certificate of 18 September 1992 under Section 52 § 3 of the Surveying Act (*Vermessungsgesetz*). Under this provision, the consent of the owner of land to a unification of parcels was not necessary. The Surveyor's Office's certificate fulfilled the requirements of Section 12 § 1 of the Surveying Act, namely that the parcels concerned had the same owner and that no different financial burdens were placed on them. The further criterion for a unification of parcels, namely that the unification was advisable for

presenting in the map parcels which were put to the same use, could not be examined by the Land Register Courts. In this respect they were bound by the findings of the Surveyor's Office.

14. The applicant lodged a further appeal on points of law (*Revisionsrekurs*) with the Supreme Court. He submitted that the difference in treatment between owners of land which was registered in the border register and those whose land was registered in the land tax register was unconstitutional. There was no reason why unification of parcels only with regard to land registered in the border register was subject to the consent of its owner. Furthermore, the unification of his parcels violated his right to property in that it was impossible to divide them again and sell separately the former parcels No. 772/1 and No. 66/2 because the latter parcel would not meet the criterion of having a minimum surface necessary for creating a separate parcel.

15. On 29 June 1993 the Supreme Court dismissed the applicant's further appeal on points of law. This decision was served on the applicant on 5 August 1993. The Supreme Court found that the Land Register Courts had to amend the land register following a certificate of the Surveyor's Office if the land register did not disclose any elements which spoke against that measure. A certificate of a Surveyor's Office was therefore not a request to be examined by the courts but a formal statement about its official acts (*Amtshandlungen*). In this respect the Land Register Courts were bound by the certificate of the Surveyor's Offices. Changes made by the Surveyor's Office must lead to corresponding entries in the land register.

16. The Supreme Court also found that the difference in treatment between owners of land registered in the border register on the one hand and the land tax register on the other hand as regards the necessity of the owner's consent to the unification of parcels of land was justified. As the border register relied on technically more advanced methods of surveying than the previous land tax register it was more reliable and merited a higher degree of protection. At present the land tax register had only a transitory function until border registers had been drawn up for all municipalities. The Supreme Court further noted that a later partition of the parcels which had been united might not be possible in view of their size. However, this effect could not constitute an interference with the applicant's right to property because it was in accordance with the intentions of the legislator who wished to avoid the creation of parcels of land which were too small.

17. In the meantime, on 15 October 1992, the applicant had filed an appeal with the Federal Office of Weights, Measures and Surveying (*Bundesamt für Eich- und Vermessungswesen*) against the Feldbach Surveyor's Office's certificate (*Anmeldungsbogen*) and requested its annulment.

18. Since the Federal Office did not decide on the appeal, the applicant, on 16 August 1993 filed a request for transfer of jurisdiction to the superior

authority (*Devolutionsantrag*) with the Federal Minister for Economic Affairs (*Bundesminister für wirtschaftliche Angelegenheiten*). On 13 January 1994 the Minister rejected the applicant's request as he found that the six months' time-limit within which a decision has to be taken had not yet expired.

19. The applicant also had filed, on 15 October 1992, a request for a declaratory decision with the Feldbach Surveyor's Office. He argued that the certificate had been unlawful and requested the declaration that the conditions of Section 12 § 2 of the Surveying Act had not been met since he had not given his consent. The applicant submitted that he had promised his son to give him parcel No. 772/1. Because of the unification of the parcels he could no longer keep this promise. Instead a partition map by a surveyor had to be drawn up which involved considerable expenses. Therefore he had a legal interest in the declaratory decision requested.

20. Since the Surveyor's Office did not decide the applicant, on 22 April 1993, filed a request for transfer of jurisdiction with the Federal Office, requesting it to issue the declaratory decision. Thereupon, on 1 September 1993, the Federal Office granted the applicant's request for transfer of jurisdiction but rejected the applicant's request for a declaratory decision. The applicant filed an appeal with the Federal Minister for Economic Affairs.

21. At an unspecified date the applicant introduced a complaint with the Administrative Court (*Verwaltungsgerichtshof*) against the Minister's decision of 13 January 1994 and the Minister's inactivity in dealing with his appeal against the Federal Office's decision of 1 September 1993.

22. On 11 August 1994 the Administrative Court decided upon the applicant's complaint. It quashed the Minister's decision of 13 January 1994 as in its view the six months' time-limit had expired. As regards the appeal against the Federal Office's decision of 1 September 1993 it decided in the place of the Minister and dismissed the applicant's appeal as unfounded. In the present case the applicant's consent to the unification of the parcels had not been necessary under Section 52 of the Surveying Act. A request for a declaratory decision could therefore not relate to this element.

23. Meanwhile, on 1 March 1993 the applicant had also lodged a hierarchical complaint (*Aufsichtsbeschwerde*) against the Feldbach Surveyor's Office with the Federal Minister for Economic Affairs.

24. On 22 July 1993 the Minister reacted to the applicant's hierarchical complaint. He found that a certificate of the Surveyor's Office was an official document (*öffentliche Urkunde*) and not a decision (*Bescheid*) so that it could not be attacked by an administrative appeal (*Berufung*). Furthermore, the unification of the applicant's parcels No. 772/1 and 66/2 had been necessary for technical reasons in order to ensure a clear presentation of the borders of the applicant's land and to avoid an unclear and fragmented presentation of parcels in the border register.

II. RELEVANT DOMESTIC LAW

25. The Surveying Act of 1968, Federal Law Gazette No. 306/1968 (*Vermessungsgesetz* 1968, BGBl. 306/1968) regulates the surveying of land. According to Section 8 of this Act the borders of parcels of land have to be registered in a border register (*Grenzkataster*). This register is drawn up by the Surveyor's Office. In particular, the Surveyor's Office has to draw up maps for this purpose and to record the topographic marks (*Feldpunkte*) for identifying the borders. The purpose of the border register is to indicate with binding force the borders of land and to indicate the various types of land, their use and scope as well as features intended to facilitate a clear presentation of the parcel of land. The border register is distinct from the land register, which has the purpose of recording the ownership over land. It will replace the former land tax register, which until its replacement continues to exist (Section 52).

26. Under Section 12 of the Surveying Act unification of parcels of land is subject to the following conditions: the parcels must be situated in the same land register district (*Katastralgemeinde*) and must be adjacent; they must have the same owner and the same burdens (*Belastungen*) must encumber the parcels; the unification of the parcels must be in the interest of expediency of the administration and no objections of surveying technique (*vermessungstechnische Erwägungen*) must speak against it (Section 12 § 1). The Surveyor's Office has to notify the unification upon request of the owner or ex-officio with the owner's consent (Section 12 § 2).

27. With regard to land registered in the land tax register, Section 52 § 2 of the Surveying Act provides that for the preparation of the border register, the Surveyor's Office shall examine the size of parcels of land and the use to which they are put in land register districts or larger areas (*Riede*). If in the course of such an examination it appears that the unification of parcels of land is advisable for the purpose of depicting in the map parcels which are put to the same use and if the conditions of Section 12 § 1 are met these parcels can be united. In such a case the consent of the owner is not required (Section 52 § 3).

28. As regards parcels of land included in the land tax register, all single plots of land which belong to the same owner but are put to different use constitute different parcels. Newly created parcels of land included in the border register on the other hand are, as a rule, those parts of land belonging to a land register district which differ from the adjacent parts (only) in so far as they do not have the same owner and/or incumbrances. Parcels in the border register consist of one or several use zones (*Benützungsabschnitte*) according to the different use to which they are put. Which use zones belong to one parcel can be seen from the cadastral map (*Katastralmappe*) and the register of parcels (*Grundstücksverzeichnis*).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

29. In the Government's view the applicant has not exhausted domestic remedies as required by Article 35 of the Convention as he has failed to institute proceedings for the partition of the parcels which had been united. Since the unification of the two parcels concerned did not infringe his property rights or deprived him of the possibility to use his land he also could not claim to be the victim of an alleged violation of the Convention.

30. This is disputed by the applicant. In his view he has exhausted all domestic remedies at his disposal. The filing of a request for partition of the parcels which had been united could not be considered an effective remedy. He also had to be considered a victim of violation of the Convention within the meaning of Article 34. Before the unification of the parcels he could dispose of them separately, but he could no longer do so afterwards. It was immaterial that he remained the owner of the land and that he could put it to the same use as before.

31. The Court recalls that the Commission, in its decision on admissibility of 22 April 1998 found that the question whether or not the applicant should have requested the partition of the land in order to exhaust domestic remedies and whether he could claim to be a victim of an alleged violation of the Convention were so closely connected to the merits of the application that the application could not be declared inadmissible on these grounds.

32. The Court finds that the question of whether the applicant may claim to be a victim of an alleged violation of the Convention or whether he should have taken further legal steps are questions which cannot be separated from the considerations on the merits of the application. In this respect the Court observes that the extent to which the applicant was affected in his legal position by the measures complained of is a matter which has to be examined primarily in the context of the applicability of Article 6 of the Convention to these proceedings.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

33. The applicant complains under Article 6 of the Convention that he had no fair hearing as regards the unification of his parcels of land.

34. Article 6 § 1 of the Convention, insofar as relevant to the case, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35. The Government submit that Article 6 § 1 of the Convention is not applicable in the present case as the proceedings for the unification of the parcels of the former land tax register did not determine the applicant's civil rights or obligations. For the preparation of the new border register the Feldbach Surveyor's Office had carried out an investigation according to which on the applicant's land the former building area on parcel No. 66/2 no longer existed in nature. However, in its vicinity, on parcel No. 772/1, two buildings had been erected. Since the situation in nature therefore no longer corresponded to the presentation in the map, the two parcels were united and the newly established building areas were depicted in their actual shape and position as areas dedicated to the same use. This had been necessary for reaching the aims of the new border register, namely to show in a reliable manner the size of the parcels of land and the use to which they are put. The unification of the parcels therefor merely constituted an administrative measure, comparable, for instance, to the change of the numbering of a parcel and it neither affected the applicant's right to use his possession nor his contractual relations to third persons nor did it restrict his business activities. In any event Article 6 § 1 has been complied with because the applicant did have access to the ordinary courts which considered his appeals against the Land Register Court's decision.

36. The applicant submits that Article 6 § 1 of the Convention was applicable to the proceedings at issue because the unification of the parcels had considerably affected his position as owner of the land since he could no longer dispose separately of the two parcels. He had already promised his son to transfer to him ownership over parcel No. 772/1, a promise which he no longer could keep, or could only fulfil after having made considerable expenses for procedures for the partition of the parcels. Furthermore, there has been a violation of Article 6 because the scope of review by the Austrian courts had not been sufficient to meet the requirements of this provision.

37. The Court must first consider whether the proceedings complained of involved a determination of the applicant's “civil rights” within the meaning of Article 6 § 1 of the Convention.

38. The applicability of Article 6 depends on whether there was a dispute over (civil) "right and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law, and, if so whether this "right" was of a "civil" character within the meaning of Article 6 § 1 (Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, pp. 20-21, §§ 45-49). Article 6 § 1 only applies if the "right" is "civil" in character (Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 14, § 32). The "dispute" must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous

connections or remote consequences not being sufficient to bring Article 6 § 1 into play (Allan Jacobson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 19, §§ 66-67; Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A, p. 17, § 44; Balmer-Schafroth and Others v. Switzerland, 26 August 1997, Reports 1997-IV, p. 1357, § 32, Le Calvez v. France, 29 July 1998, Reports 1998-V, p. 1899, § 56, *Mennitto v. Italy* [GC] no. 33804/96, 5 October 2000, §§ 23-27).

39. Although the term dispute ("contestation") should not be construed in a too formalistic manner, such a dispute, nevertheless, must be of a genuine and serious nature. Just as the Convention guarantees rights that are not theoretical and illusory but practical and effective, an applicant has to show that a dispute in respect of which he or she relies on Article 6 § 1 of the Convention must relate to an issue where he or she is genuinely affected by the outcome of the dispute (see Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, § 32; Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, § 46). Thus, the applicant must show that there is something at stake for him or her in the proceedings complained of.

40. In the present case, two parcels of land belonging to the applicant were united into one single parcel when a new border register was drawn up which replaced a previous register. The new register recorded the borders of the applicant's parcel and indicated the use to which the land was put according to the situation in nature.

41. The Court finds, and this is not in dispute between the parties, that this measure did not deprive the applicant of his right of ownership of the land.

42. The parties also agree that the unification of the parcels did not affect the use to which the land could be put in accordance with the law in force. The applicant claims, however, that there were factual repercussions, as he could no longer dispose of these parcels separately. He had promised to give to his son the (old) parcel No. 772/1 - apparently without transferring at the same time ownership over the old parcel No. 66/2 - but as a consequence of the unification of the parcels he could no longer keep this promise. The Court observes that parcel No. 66/2 is situated in the middle of parcel No. 772/1 and is completely surrounded by the latter. There is no building erected on parcel No. 66/2 but two buildings are erected on parcel No. 772/1, one of them partly reaching into parcel No. 66/2. It seems that at the time when these buildings were erected by the then owner, no distinction had been made between the two parcels. Given that one of the buildings is situated on both parcels, it appears quite artificial to maintain that these parcels, as recorded in the former land tax register, could be used in a completely independent way. It is true that the parties have not ruled out that in theory the two parcels could be separated again. The Supreme Court, however, in its judgment of 29 June 1993 has pointed out that such a

measure, because of practical obstacles, might not be possible in view of their size. On the basis of this decision and the decision of the Regional Court and the situation under Austrian law as presented therein, the Court is not persuaded that there is an arguably genuine and serious issue to be determined in these proceedings.

43. In these circumstances the Court finds that the dispute between the applicant and the Surveyor's Office was not a genuine and serious one as it concerned neither the existence of a civil right - the applicant's position as owner of the land had never been called into question - nor the scope and manner of its exercise. Accordingly, Article 6 § 1 does not apply to the proceedings complained of by the applicant and the applicant cannot rely on this provision in this instance.

44. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

45. The applicant complains that the unification of the parcels of land violated his right to property. He invokes Article 1 of Protocol No. 1 which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. The applicant submits that the unification of the parcels of land concerned violated his right to property because he can no longer dispose separately of the former parcels No. 772/1 and No. 66/2.

47. The Government submit that the unification of the parcels concerned neither deprived the applicant of his property rights over the land nor has the possibility to use his land been affected in any way. He remained its owner and could put it to the same use as before.

48. The Court recalls that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three

rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principles enunciated in the first rule (Allan Jacobsson v. Sweden judgment of 23 October 1989, Series A no. 163, § 53; *Jokela v. Finland*, no. 28856//95, § 44, 21 May 2002).

49. Having regard to its above findings under Article 6 § 1 of the Convention, the Court finds that the unification of the two parcels neither amounted to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1, nor constituted a measure of control of the use of property to be examined under the second paragraph of Article 1, nor interfered with the rights guaranteed in the first sentence of the first paragraph of Article 1.

50. The applicant remained the owner of the parcels of land and he could use them for the same purposes as he could do before. As regards the alleged impossibility to dispose of the parcels separately, the Court has already found that this impossibility was not so much a consequence of the Surveyor's Office decision to unite the parcels but rather a consequence of the location of the parcels and the manner in which they had been used in the past.

51. Accordingly there is no breach of the applicant's right to peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

52. Lastly the applicant complains under Article 13 of the Convention that he had no effective remedy to complain about the unification of the parcels.

53. Article 13 of the Convention reads as follows:

> "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."

54. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, § 54). Moreover, the Court found that the criteria for considering a claim as "arguable" cannot be construed differently from the criteria applied when declaring claims "manifestly ill-founded", thus rejecting the Commission's interpretation of that term according to which there may be claims which are arguable notwithstanding the fact that the corresponding substantive complaint has been declared "manifestly ill-founded" (Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A

no. 172, § 33). However, the mere fact that a corresponding substantive complaint has been declared admissible does not necessarily mean that the claim under Article 13 is arguable. Whether that is so has to be determined in the light of the particular facts and the nature of the legal issues raised.

55. In the present case the Court finds that the nature of the corresponding substantive claim must be taken into account. In this respect the Court notes in particular that it has found above that Article 6 of the Convention is not applicable as the dispute has not been a genuine and serious one and had regard to this element when finding no violation of Article 1 Protocol no. 1.

56. In such circumstances the Court finds that the applicant had no arguable claim in respect of a violation of the Convention. There has thus been no violation of Article 13.

57. As a result of the above conclusions the Court does not find it necessary to rule on the Government's preliminary objections.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 of the Convention;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1;

3. *Holds* that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 23 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Françoise TULKENS
President