AS TO THE ADMISSIBILITY OF

Application No. 13943/88
by A.K.
against Austria

The European Commission of Human Rights sitting in private on 9 May 1989, the following members being present:

MM. J.A. FROWEIN, Acting President
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. J. RAYMOND, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 27 March 1988 by A.K. against Austria and registered on 16 June 1988 under file No. 13943/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1919 and living in Vienna. He is represented by Mr. W-D. Arnold, a lawyer in Vienna.

The applicant owns a flat not exceeding 40m² in Salzburg. As the applicant is not permanently residing in Salzburg the local authorities consider his property to be a holiday flat (Ferienwohnung) for which the applicant is levied a night-lodging allowance in form of a special community tax (Ortstaxe). According to a notice of assessment of 3 July 1985 this tax amounted to 540 AS for the period of 1.1.1983 to 31.12.84. The applicant's complaints against this notice were rejected by the competent authorities. He then lodged a complaint with the Constitutional Court (Verfassungsgerichtshof). On 25 September 1986 this Court transferred the matter to the Administrative Court (Verwaltungsgerichtshof). It refused to consider the merits of the case, stating that the applicant disregarded its constant jurisprudence relating to the tax in question and to a comparable Tirolian regulation (Tiroler Aufenthaltsabgabegesetz). There was no appearance of a violation of constitutional rights and the complaint therefore offered no prospects of success.

On 13 November 1987 the Administrative Court dismissed the complaint as being unfounded. The decision was received by the

applicant's counsel on 11 January 1988. It states that in previous tax proceedings relating to the years 1979-1982 the applicant had declared that his permanent residence was elsewhere and that he occupied the flat in Salzburg only from time to time. As the applicant had refused to indicate about how long he used to stay in Salzburg the relevant information had been obtained from other persons including the caretaker (Hausmeisterin). According to these investigations the applicant spent about a month per year in his Salzburg flat. This estimation was also confirmed by the electricity consumption for the flat.

The Administrative Court pointed out that Section 1 (1) of the Community Tax Act - CTA (Ortstaxengesetz) authorises the communities in the Salzburg region to levy the tax in question by decision of the community council. According to Section 2 (1) CTA the tax is calculated on the basis of the number of overnight stays and shall take into account the communities' investments for tourism but not exceed a maximum of 7.50 AS per stay. Section 5 provides for certain exemptions. Section 4 obliges owners who rent their holiday flats to charge the tax to their guests and to pay it to the authorities the following months. Under Section 3 they are liable for the payment of the tax by their guests. Holiday flats are, according to Section 3, those flats which the owner does not occupy continuously for more than two months per year, and which are not rented out to other persons for continuous occupation. According to Section 4 the owner of a holiday flat not exceeding 40m², who does not live within the community, has to pay a lump sum tax corresponding to 90 overnight stays.

Insofar as the applicant argued that the lump sum regulation was discriminatory for various reasons the Administrative Court referred to the Constitutional Court's jurisprudence, according to which the principle of equality did not prohibit lump sum tax regulations which were justified in the interest of administrative economy. Furthermore it referred to a decision given by the Constitutional Court in a comparable matter relating to the Salzburg Visitor's Tax Act (Kurtaxengesetz). In that decision the

Constitutional Court had stated that a lump sum regulation concerning the visitor's tax for holiday flats was compatible with the Constitution. Furthermore, the Administrative Court referred to its own jurisprudence, according to which a lump sum regulation was of necessity based on an average of figures ascertained by experience and subject to a margin of fluctuation.

In view of the reference to these principles established in the jurisprudence, the Administrative Court considered that any differential treatment resulting from the application of the lump sum regulation was objectively justified.

Consequently, there was no violation of constitutional rights and no necessity to submit the case to the Constitutional Court as requested by the applicant.

Insofar as the applicant had also alleged a violation of non-constitutional, i.e. ordinary, law, the Administrative Court pointed out that the applicant had neither alleged nor shown that he lived more than two months continuously in Salzburg. Consequently it was justified to consider his property in Salzburg as being a holiday flat within the meaning of Section 4 CTA.

COMPLAINTS

The applicant submits that his obligation to pay community tax constitutes a discrimination compared with persons who reside in Salzburg. He points out that a flat owner who, e.g., rents his flat for 360 days per year to tourists and uses it only on the remaining five

days will have to pay community tax for 360 days plus the lump sum corresponding to 90 stays. Furthermore, an owner who spends nine continuous weeks in Salzburg does not have to pay the tax while an owner who can only spend less than two months there will have to pay tax corresponding to 90 days regardless of how many days he actually used his flat.

He alleges violations of Article 1 of Protocol No. 1 read together with Article 14 of the Convention and of Article 2 of Protocol No. 4.

He further invokes Article 8 of the Convention which he considers to be violated because of the investigations made by the authorities in respect of his use of his flat in Salzburg.

THE LAW

1. The applicant has mainly complained that as the owner of a flat in Salzburg he is being discriminated against in his right to the peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1) to the Convention.

Article 14 (Art. 14) provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission observes in this respect that it is not competent to examine in the abstract the compatibility of a legislative regulation with the Convention (Eur. Court H.R., Klass judgment of 6 September 1981, Series A no. 28, para. 33). The applicant has not shown that the imposition of community tax in the amount of 540 AS for the period of 1.1.1983 to 31.12.1984 discriminated against him personally as compared to any other flat owners in Salzburg. Insofar as owners who are permanently living in Salzburg do not have to pay such a tax, their situation is not comparable to that of the applicant who is living in Vienna.

Even if the application of the lump sum tax assessment in the applicant's case might have led to a differential treatment compared to holiday flat owners who can afford to live longer than two months in Salzburg, it has to be observed that it is likewise open to the applicant to live longer than two months in Salzburg. Furthermore, the question of whether or not a flat owner has to pay community tax is not determined by reference to any of the grounds listed in Article 14 (Art. 14) such as, for example, the person's origin, birth or other status. It is decided on the objective criterion of the actual duration of the occupation of the flat by its owner per year.

An examination by the Commission of this complaint as it has been submitted does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention and, in particular, in Article 1 of the Protocol No. 1 (P1-1) read together with Article 14 (Art. 14) of the Convention.

2. The Commission has examined the applicant's remaining complaints. Even assuming that the applicant has exhausted domestic remedies in this respect, it likewise finds that the remainder of the application does not disclose any appearance of a violation of the rights invoked by the applicant.

It follows that this part of the application is also

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (J.A. FROWEIN)