CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38185/97
by Alfred ALGE
against Austria

The European Court of Human Rights (Third Section), sitting on 10 April 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 1 October 1997 and registered on 9 October 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Austrian national, living in Lustenau. He is represented before the Court by Mr L. Weh, a lawyer practising in Bregenz.

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a farmer owning, *inter alia*, parcels of land which, by an ordinance (*Verordnung*) issued by the Vorarlberg Regional Government (*Landesregierung*), were registered as protected wetland in 1990 (Ordinance No. 1990/40 of the Regional Law Gazette).

On 24 July 1991 the applicant filed a request with the Vorarlberg Regional Government for an exemption permit (*Ausnahmebewilligung*) from the above ordinance in order to install a drainage system as he intended to cultivate and exploit his land.

On 2 August 1991 the Landscape Protection Officer (*Landschaftsschutzanwalt*), on 5 August 1991 the Landscape Protection Board (*Naturschau*) and on 29 August 1991 the Agricultural Chamber (*Landwirtschaftskammer*) submitted comments on the applicant's request which were communicated to the applicant on 6 September 1991. Only the opinion of the Agricultural Chamber was in favour of the applicant's request.

On 17 September, 1 October and 31 October 1991 the applicant filed observations with the Vorarlberg Regional Government.

On 20 November 1991 the opinion of an official expert for landscape protection (*Amtssachverständiger für Natur- und Landschaftsschutz*) was communicated to the applicant who, on 4 December 1991, filed his comments.

On 10 April 1992 the Vorarlberg Regional Government refused to grant an exemption permit.

On 27 May 1992 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*). The applicant complained, *inter alia*, that the ordinance on which the refusal of the exemption permit was base was unlawful.

On 14 June 1993 the Constitutional Court refused to deal with the case as it lacked any prospects of success, and transferred it to the Administrative Court (*Verwaltungsgerichtshof*).

On 29 November 1993 the applicant supplemented his complaint and requested the Administrative Court to hold a hearing and an on-site inspection, in the presence of a further expert to be appointed by the Administrative Court. As reason for his request he stated that such a hearing would show that the arguments given by the Regional Government in its decision were not correct.

On 4 January 1994 the Vorarlberg Regional Government submitted their comments on the applicant's complaint (*Gegenschrift*).

On 17 March 1997 the Administrative Court dismissed the applicant's complaint. It found that it had not been in dispute between the parties that the parcels of land at issue were subject to Ordinance No 1990/40. Accordingly, this land could only be used in the traditional manner. Cultivating, grazing, draining or using chemical fertilisers was prohibited. An exemption from these limitations could be granted if the interests of landscape protection were not seriously and permanently harmed and other interests, in particular agricultural ones, prevailed. Thus, if the interests of landscape protection were seriously and permanently harmed it was no longer necessary to consider the interests of agriculture. In refusing the request the authority had essentially relied on the report by the expert on landscape protection. This expert had explained in detail which animals and plants would have been endangered by the measures envisaged by the applicant. The report had been communicated to the applicant, who had been given the opportunity to react. The applicant, however, merely disputed the findings of the expert and failed to submit any scientifically valid argument. In such circumstances, the Administrative Court concluded, the authority's decision had neither been unreasonable, nor the proceedings defective. As regards the complaint that the ordinance had been unlawful, the Administrative Court found that in view of the fact that the Constitutional Court had declined to deal with the applicant's case for lack of prospect of success and that the applicant has not submitted any fresh arguments as regards the alleged unlawfulness of that ordinance, it did not see any reason to apply to the Constitutional Court for the opening of proceedings for the review of the lawfulness of the ordinance. The Administrative Court had neither held the requested hearing nor appointed the requested expert. It did not give any reasons why it considered that neither the hearing nor the appointment of a further expert was necessary.

On 1 April 1997 the decision was served upon the applicant's counsel.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention about the length of the proceedings and the lack of a hearing in the proceedings before the Administrative Court.

He also complains that the proceedings before the Administrative Court had been unfair. He complains in particular that the Administrative Court has not dealt sufficiently and properly with his complaint that the ordinance was unlawful after the Constitutional Court had declined to deal with this complaint and had transferred the case to the Administrative Court. Further, he complains that the Administrative Court did not appoint the further expert requested by him.

Lastly, the applicant complains that his right of access to a court as guaranteed by Article 6 § 1 has been violated because both the Constitutional Court and the Administrative Court had refused to examine the lawfulness of Ordinance No. 1990/40.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention about the length of the proceedings.

Article 6 § 1, insofar as relevant 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."

The Government do not contest the admissibility of this complaint and refrain from making further submissions. Also the applicant makes no further submissions on this point.

The Court considers, in the light of the parties' submissions, that the applicant's complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the case. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant further complains about the lack of a hearing in the proceedings before the Administrative Court even though he had requested a hearing to be held.

The Government do not contest the admissibility of this complaint and refrain from making further submissions. Also the applicant makes no further submissions on this point.

The Court considers, in the light of the parties' submissions, that the applicant's complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the case. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

3. The applicant also complains under Article 6 of the Convention that the proceedings before the Administrative Court had been unfair. He complains in particular that the Administrative Court has not dealt sufficiently and properly with his complaint that the ordinance was unlawful after the Constitutional Court had declined to deal with this complaint and had transferred the case to the Administrative Court. Further, he complains that the Administrative Court did not appoint the further expert requested by him.

a. The Court recalls that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (*Garcia Ruiz v. Spain*, judgment of 21 January 1999, ECHR 1999-I, § 28).

The Court recalls further that judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (*Garcia Ruiz*, *op.cit.*, § 26 with further references).

In the present case the applicant claims that the Administrative Court had not dealt appropriately and sufficiently with his complaint that the ordinance was unlawful. However, in its decision of 17 March 1997 the Administrative Court found that it did not see any reason to apply to the Constitutional Court for the opening of proceedings for the review of the lawfulness of the ordinance as the Constitutional Court had declined to deal

with the applicant's case and no fresh arguments as to the alleged unlawfulness of that ordinance had been submitted.

Thus, in the Court's view the Administrative Court has given an answer to the argument raised by the applicant which, *prima facie*, does not appear to be unreasonable. It is not the Court's task to determine whether this decision was correct.

b. As regards the complaint about the Administrative Court's failure to appoint a further expert, the Government submit that the question of how evidence is taken and assessed must generally be determined according to domestic law and it is essentially the competent domestic court which has to decide whether it is appropriate to hear a witness or not. In the present case the discretion granted to the Administrative Court in this respect was not exceeded. In the administrative proceedings before the Regional Government the applicant replied to the findings of the expert by giving certain arguments which were considered by the authority but found to be inconclusive. Thereupon, he requested in the proceedings before the Administrative Court that a further expert be heard and that an inspection of the site be carried out as this would show that the arguments of the authorities were not true. However, there is no general obligation of the Administrative Court to repeat the taking of evidence before administrative authorities and the applicant had not argued that the expert had committed mistakes in the evaluation of the central issues. Thus, the Administrative Court correctly assumed that the requested evidence had been irrelevant.

This is disputed by the applicant, who submits that the Regional Government had essentially taken over the report by its expert. Thus, it was in reality the expert himself who had taken the decision on the merits and he must, accordingly, enjoy the same guarantees of impartiality and independence as the tribunal itself. This issue must be distinguished from the question which the Government had commented on, namely if, in case an independent expert had submitted an acceptable report, an additional report had to be obtained. In the present case the expert used by the authority was a civil servant and, therefore, was not independent. It was also problematic that the same team of experts which had participated in the making of the ordinance also acted as experts in the proceedings on the exemption permit. It was for this reason that the Administrative Court should have appointed its own expert. However, it had failed to do so.

The Court recalls at the outset that the requirements inherent in the concept of a "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude when dealing with civil cases

concerning civil rights and obligations than they have when dealing with criminal cases (*Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 32; *Fidler v. Austria* (dec.), no. 28702/95, 23 February 1999, unreported).

The Court recalls further that as a general rule it is for the national courts, and in particular the courts of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce More specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the autonomous sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf (*Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89; *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). In respect of the witnesses on behalf of the accused, only exceptional circumstances could lead the Convention organs to conclude that a refusal to hear such witnesses violated Article 6 of the Convention (*Vidal*, op.cit., pp. 32-33, §§ 33-34; *Bricmont*, op.cit., p. 31, § 89).

In the present case the applicant had requested the Administrative Court to appoint a further expert who should prepare a report on the same questions as the report by the official expert who had acted in the administrative proceedings. The reason invoked in the proceedings before the Administrative Court was that this report should show that the arguments given by the Regional Government in its decision were not correct. The Administrative Court did not appoint an expert and dismissed the applicant's complaint.

It is true that the Administrative Court did not expressly dismiss the applicant's request, giving reasons for this decision and it is clearly preferable that a domestic court states its reasons for not entertaining a request for evidence. However, the Court finds no sufficient grounds to form the view that there were any special circumstances in the present case which could prompt the conclusion that the failure to appoint the expert concerned was incompatible with Article 6. The Court considers in particular that the applicant's request concerned the appointment of an additional expert after one expert had already given his report. The reasons why the applicant requested the appointment of this additional expert was not that the former expert's report was defective, but as he stated in his submissions to the Court, that the expert had the position of a civil servant which, in his view, called into question the expert's impartiality and that this expert had previously participated in the drafting of the ordinance itself. As regards the first argument the Court recalls that the mere fact that a person who was acting as expert in court proceedings was at the same time a civil servant was not sufficient to cast doubt on the impartiality of that person (*Brandstetter v. Austria*, judgment of 28 August 1991, Series A

no. 211, p. 21, § 44; *Ettl and Others v. Austria*, judgment of 23 April 1987, Series A no. 117, pp. 19-20, § 40). As regards the second argument the Court observes that it had been raised for the first time in the proceedings before the Court and that, under the relevant provisions of Austrian administrative procedural law, the applicant could - and should - have raised this matter in his complaint to the Administrative Court, as the participation of a biased expert may be a sufficient ground for quashing an administrative decision as being unlawful.

In sum, the Court finds that there is no appearance of a violation of the applicant's right to a fair hearing in respect of these complaints.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. Lastly, the applicant complains that his right of access to a court as guaranteed by Article 6 § 1 of the Convention has been violated because both the Constitutional Court and the Administrative Court had refused to examine the lawfulness of Ordinance No. 1990/40.

However, the Court observes that the applicant has raised this complaint for the first time in his observations of 10 August 2000, that is more than six months after the final decision was given by the Administrative Court.

It follows that this part of the application is introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints about the length of the proceeidngs and the lack of a public heairng;

Declares inadmissible the remainder of the application.

Vincent BERGER
Registrar

Georg RESS
President