AS TO THE ADMISSIBILITY OF
SUR LA RECEVABILITÉ

Application No. 18168/91
by Dieter ALLESCH and Others
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 1 December 1993, the following members being present:

MM. A. WEITZEL, President
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS

Mr. H.C. KRÜGER, 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 19 April 1991 by Dieter ALLESCH and Others against Austria and registered on 6 May 1991 under file No. 18168/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the applicant, may be

summarised as follows.

All applicants are Austrian nationals and civil engineers by profession (a list of the applicants is attached as Appendix I). Before the Commission they are represented by Mrs. K. Rueprecht, a lawyer practising in Vienna.

A. Particular circumstances of the case

The applicants are members of the Federal Engineer Chamber (Bundes-Ingenieurkammer) and are affiliated compulsorily to its Pension Fund (Versorgungsfonds).

In 1989 the first to fifth applicants (Group A of the applicants) applied to the Committee of the Welfare Institution of the Federal Engineer Chamber (Kuratorium der Wohlfahrtseinrichtung der Bundes-Ingenieurkammer) to be exempted of the liability to contribute to the Pension Fund. They submitted that they were already compulsorily affiliated to a general Old Age Pension Scheme (gesetzliche Pflichtversicherung) as they were gainfully employed besides their professional activities as self-employed.

Also the sixth to thirty first applicants (Group B of the applicants) applied to the Committee to be exempted from the liability to contribute to the Pension Fund. They submitted that following a previous gainful employment they continued to be voluntarily affiliated to a general Old Age Pension Scheme (freiwillige Weiterversicherung).

Before the Committee the applicants of Group A and B submitted that neither the Federal Engineers Chamber Act (Ingenieur-Kammergesetz) nor the Statute of the Welfare Institutions of the Federal Engineers Chamber (Statut der Wohlfahrtseinrichtungen der Bundes-Ingenieurkammer) provided for an exemption from the liability to pay contributions to the Pension Fund if members of the Chamber were already insured under other pension schemes. The compulsory affiliation to the Federal Chamber's Pension Fund was not objectively justified (sachlich nicht gerechtfertigt) and thus violated their constitutional right to equal treatment (Recht auf Gleichheit).

The thirty second to thirty sixth applicants (Group C of the applicants) applied to the Committee to render a declaratory decision (Feststellungsbescheid) on their liability to contribute to the Pension Fund. These applicants were not affiliated to any other pension scheme. They submitted that the liability to contribute to the Pension Fund violated their constitutional right to equality and property and that a declaratory decision was necessary for bringing their case to the Constitutional Court.

On 19 January, 15 February and 23 March 1990 the Committee dismissed the applicants' respective applications. In similarly reasoned decisions, it found that all the applicants were civil engineers and at the time they became members of the Engineer Chamber not yet fifty years of age. Thus, the ground for exemption as provided for in Section 6 of the Statute was not applicable, and all applicants were liable to contribute. All applicants appealed against the Committee's decisions.

On 27 April 1990 the Assembly (Kammertag) of the Federal Engineer Chamber dismissed the appeals by identical decisions against all the applicants. It found that, according to the jurisprudence of the Constitutional Court (Verfassungsgerichtshof) and Administrative Court (Verwaltungsgerichtshof), the liability to contribute to the Pension Fund was in accordance with the Federal Constitution.

On 19 July 1990 the applicants lodged a joint complaint with the Constitutional Court. They submitted that the Assembly's decision was based on unconstitutional provisions of law, that the Assembly's

decision violated the principle of equality and their right to property and that the Committee and the Assembly were no tribunals within the meaning of Article 6 para. 1 of the Convention.

On 24 September 1990 the Constitutional Court refused to entertain the applicants' complaint. Referring to its earlier case law, the Constitutional Court found that compulsory affiliation to more than one pension scheme was compatible with the constitutional principle of equality. As regards the applicant's complaint under Article 6 para. 1 of the Convention the Court found that Article 6 of the Convention did not apply as the complaint concerned the applicants' liability to contribute to a pension scheme and not claims for benefits.

B. Relevant domestic law

The Federal Engineer Chamber Act, Federal Law Gazette 1969/71 (Ingenieur-Kammergesetz, BGBl. 1969/71) establishes four Regional Chambers (Länderkammern) and a Federal Chamber (Bundeskammer), which are public law institutions. Membership in a Regional Chamber and the Federal Chamber is compulsory for civil engineers who exercise their profession (S. 5).

The Regional Chambers have to represent the professional, social and economic interests of its members, to ensure the respect of the professional honour (Wahrung des Standesansehens) and to control the fulfilment of the professional duties (S. 2). The Federal Chamber is competent for matters which concern the professional, social and economic interests of members of two or more Regional Chambers, inter alia, to institute and manage the Common Welfare Institutions (gemeinsame Wohlfahrtseinrichtungen) for civil engineers (S. 19 para. 2).

As common welfare institutions for civil engineers and their surviving dependants, a Pension Fund (Versorgungsfonds) and a Burial Fund (Sterbekasse) are instituted and managed (S. 27 para. 1). The means of these Funds are raised by contributions. The amount of the contributions are fixed by the Federal Chamber's Assembly (Kammertag). The Assembly has to take into consideration the amount of benefits granted and to fix the contributions in such an amount that it corresponds to the necessities of the Funds having regard to their permanent existence and continued financial capacity (S. 27 para. 4).

The management of the Pension Fund and the Burial Fund is distinct from the management of other assets of the Federal Chamber, and is the duty of a Committee (Kuratorium), composed of delegates from the Regional Chambers (S. 28).

S. 29 provides for the adoption of a Statute for the Welfare Institutions (Statut der Wohlfahrtseinrichtungen) by the Assembly of the Federal Engineer Chamber (Kammertag). In the Statute, the following matters have to be regulated in more detail: the function of the Pension Fund and Burial Fund; the raising and management of the Funds' means; the administration of the Committee; the liability to contribute to the Funds; the granting of benefits, their amount and how they are paid. The duties of contributors to the Funds have to be regulated in accordance with Sections 27, 28 and 29 para. 2 to 7 of the Act. In doing so the principles of insurance mathematics and management necessities have to be taken into account. The Statute must be published in the gazettes of the Federal Chamber and the Regional Chambers (para. 1).

Civil engineers are, if not provided otherwise, liable to contribute to the Pension Fund and the Burial Fund (S. 29 para. 2).

Civil engineers who do not exercise their profession (Ruhen der Befugnis) are exempt from the liability to contribute to the Pension Fund (S. 29 para. 3). Civil engineers who have passed a certain age,

which in the Statute must not be fixed lower than fifty years, can be exempted as well (S. 29 para. 7).

The Statute has to provide for a reduction of the liability to contribute to the Pension Fund, which must not surpass the following percentages: 75 % if a member is affiliated to another general Old Age Pension Scheme; 85 % if the member's yearly income is lower than the amount which corresponds to 300 units of the basic fee for civil engineers (Zeitgrundgebühr) as provided for in the Fee Regulation (Gebührenordnung) and 75 % in the case of 400 units; 50 % if the levying of the full contribution would constitute a grave hardship (S. 29 para. 4). If the contributions are reduced, the benefits are reduced accordingly (para. 5).

The Statute may also provide that civil engineers exempt from the liability to contribute may continue to pay contributions on a voluntary basis or that civil engineers liable to contributions may pay higher contributions as a voluntary pension insurance (S. 29 para. 6).

The Statute of the Welfare Institutions in force repeats in its Section 6 the contents of S. 29 of the Chamber of Engineers Act. Section 7 of the Statue regulates the amount of the contributions to the Pension Fund by setting out a list of percentages, grouped according to age, which are applied to the liable person's income. The percentage is based on the basic fee for civil engineers as provided for in the Fee Regulation, if the Fee Regulation is amended, the percentage has to be revised accordingly.

COMPLAINTS

1. The applicants complain under Article 1 of Protocol No. 1 that the obligation to pay contributions to the Engineer Chamber's Pension Fund violated their right to property as it constitutes a disproportionate restriction of the use of their property. They submit that the Engineers Chamber Act did not regulate itself with sufficient precision the liability to contributions and their amount but delegated this to the Statute of the Welfare Institutions. They also consider that the compulsory affiliation to the Chamber's Pension Fund was a disproportionate measure for achieving the aim of securing the provision of aged civil engineers. In this respect they submit that the contribution-benefit ratio of the civil engineer's pensions scheme was much less favourable than private pension plans or even other pension schemes for liberal professions or the general Old Age Pension Schemes.

2. The applicants complain under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 that they were discriminated against members of other liberal professions, like veterinary surgeons, who had the right to be exempted from contributions to their Chamber's pension scheme if they were employed as civil servants, while civil engineers in comparable circumstances could only apply for a reduction of their contributions. Moreover only civil engineers who were affiliated to a general Old Age Pension Scheme could apply for a reduction of their contributions while no such possibility existed for civil engineers who had subscribed to a private pension plan.

3. Lastly, the applicants complain that the question of their compulsory affiliation to the Pension Fund was not determined by an impartial and independent tribunal established by law as required by Article 6 para. 1 of the Convention.

THE LAW

1. Under Article 1 of Protocol No. 1 (P1-1) the applicants complain that the obligation to pay contributions to the Engineer Chamber's Pension Fund violated their right to property.

Article 1 of Protocol No. 1 (P1-1) reads as follows:

"(1) 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.

(2) 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 penalties."

The Commission recalls that Article 1 of Protocol No. 1 (P1-1) in substance guarantees the right of property and 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 the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property by such laws as they deem necessary in the general interest or to secure the payment of taxes or other contributions. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rule are concerned with the particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (cf. Eur. Court H.R., James and Others judgment of 21 February 1986, Series A no. 98, p. 30 para. 37; Tre Traktörer AB judgment of 7 July 1989, Series A no. 159, pp. 22-23, para. 54).

The obligation to make compulsory contributions to a social insurance scheme is within the right of a State "to secure the payment of taxes or other contributions" within the meaning of the second paragraph of Art. 1 of Protocol No. 1 (see No. 5763/72, Dec. 18.12.73, Collection 45, p. 76 at 82; No. 11036/84, Dec. 2.12.85, D.R. 45, p. 211 at 222). A financial liability arising out of the raising of taxes or contributions may adversely affect the guarantee of ownership if it places an excessive burden on the person concerned or fundamentally interferes with his financial position. However, it is in the first place for the national authorities to decide what kind of taxes or contributions are to be collected. Furthermore, the decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the Contracting States. The power of appreciation of Contracting States therefore is a wide one (see No. 11036/84, Dec. 2.12.85, D.R. 45, p.211 at 222).

The Commission notes that in the present case, the applicants' liability to contribute to the Pension Fund is based on the Engineer Chamber Act and the Statutes of the Welfare Institutions emanating from the Assembly of the Federal Chamber. The Commission finds that the combined application of the provisions of the Engineer Chamber Act and the Statute provide for a basis in domestic law for the interference with the applicants' rights which were sufficiently clear to enable the applicants to foresee their compulsory affiliation and the consequences thereof (cf. mutatis mutandis Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, p. 21, para. 45).

The Commission further considers that the liability of civil engineers to contribute to the Pension Fund was based on considerations of social policy, namely to secure the provision of aged members of the profession and of their surviving dependants by a pension scheme based

on the principle of solidarity. The Commission finds no indication that the rules on compulsory affiliation to the Pension Fund and their application in the present case went beyond the limits of appreciation left to the Contracting States.

It follows that there is no appearance of a violation of the applicants' rights under Article 1 of Protocol No. 1 (P1-1).

This part of the application, therefore, is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants complain further that they were subject to discrimination in violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (Art. 14+P1-1).

Article 14 (Art. 14) of the Convention reads as follows:

> "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 applicants submit that members of other liberal professions, like veterinary surgeons, had different rules governing their Pension Fund which they consider to be more advantageous.

The Commission recalls that Article 14 (Art. 14) safeguards individuals, placed under analogous situations, from discrimination (see Eur. Court H.R., van der Mussele judgment of 23 November 1983, Series A no. 70, p. 22, para. 46). The Commission recalls further that in the quoted judgment the Court has found that no such analogous situation existed as regards the bar and other professions, like veterinary surgeons, pharmacists, dentists and the judicial and parajudicial professions as each of them was characterized by a corpus of rights and obligations

of which it would be artificial to isolate one specific aspect (loc. cit.).

In the present case, the Commission likewise considers that the applicants failed to show that, as regards the Pension Fund set up by the Federal Engineer Chamber, they were in an analogous situation as other liberal professions, and in particular veterinary surgeons and their respective old age pension schemes. The Commission finds that in these circumstances the differences regarding the liberal professions do not constitute discrimination prohibited by Article 14 (Art. 14) of the Convention.

The applicants also complain that only civil engineers who were affiliated to a general Old Age Pension Scheme could apply for a reduction of their contributions while no such possibility existed for civil engineers who subscribed to a private pensions plan.

The Commission finds that considerable differences between a general Old Age Pension Scheme forming part of the general social policy of a State and based on the principle of solidarity and pension plans offered by private insurance firms exist. Therefore the Commission finds that the difference drawn by Section 29 para. 4 of the Engineer Chamber Act is based on an objective and reasonable criterium and does not constitute discrimination prohibited by Article 14 (Art. 14) of the Convention.

It follows that this part of the application is also manifestly ill-founded in accordance with Article 27 para. 2 (Art. 27-2) of the

Convention.

3. Lastly, the applicants complain that the question of their compulsory affiliation to the Pension Fund was not determined by an impartial and independent tribunal established by law as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as relevant, reads as follows:

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

The Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention only applies to disputes over "rights and obligations" which can be said, at least on arguable grounds, to be recognized under domestic law. The provision does not in itself guarantee any particular content of the substantive rights recognized in the laws of the Contracting States (see Eur. Court H.R., James and Others judgment of 21 February 1986, Series A no. 98, p. 46, para. 81 and Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192). The dispute which gives a right to a determination by a court must be "genuine and of a serious nature" (see Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, p. 14, para. 32). The dispute may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised, and it may concern both questions of fact and questions of law (see Eur. Court H.R., van Marle and Others judgment of 26 June 1986, Series A no. 101, p. 11, para. 32; Karni v. Sweden, Comm. Report 15.12.88, D.R. 62 pp. 90, para. 86).

The Commission notes that the applicants applied to the Committee of the Federal Engineer Chamber's Welfare Institutions for an exemption from their liability to contribute to its Pension Fund. They acknowledged in their applications that they did not meet the conditions for such an exemption according to Section 29 of the Engineer Chamber Act. They considered that the lack of a more general provision allowing for exemption was unconstitutional.

The Commission finds that in the present case there was no dispute on facts, as the applicants admittedly did not fulfil the conditions for exemption from the liability to contribute to the Pension Fund. Furthermore, there was no dispute regarding the scope or manner of a "right" or "obligation". The applicants merely challenged the law in force. The Commission finds that the applicants could not on arguable grounds claim a right of exemption from the liability to contribute to the Chamber's Pension Fund. The dispute thus did not concern a right within the meaning of Article 6 para. 1 (Art. 6-1) and the applicants therefore cannot rely on that provision in this instance.

This part of the application must accordingly be dismissed as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)

APPENDIX I

List of applicants

Group A

1. Dieter Allesch
born 1943, residing in Vienna

2. Jakob Khayat
born 1955, residing in Vienna

3. Günther Marschall
born 1949, residing in Salzburg

4. Gerhard Schweighofer
born in 1948, residing in Salzburg

5. Martin Treberspurg
born in 1953, residing in Vienna

Group B

6. Gunther Breckner
born in 1951, residing in Vienna

7. Walter Buck
born in 1943, residing in Vienna

8. Georg Michael Feferle
born in 1950, residing in Vienna

9. Thomas Freund
born in 1946, residing in Weitra

10. Thomas Gellert
born in 1951, residing in Vienna

11. Lothar Jell-Paradeiser
Born in 1947, residing in Vienna

12. Günther Lautner
born in 1946, residing in Vienna

13. Heinz Lutter
born in 1945, residing in Vienna

14. Michael Mann
born in 1949, residing in Vienna

15. Peter Mikolasch
born in 1950, residing in Vienna

16. Peter Mlczoch
born in 1949, residing in Vienna

17. Joerg Nairz
born in 1951, residing in Vienna

18. Horst Klaus Neu
born in 1944, residing Vienna

19. Alfons Oberhofer
born in 1948, residing in Vienna

20. Wolfgang Oberlik
born in 1947, residing in Vienna

21. Werner Peters
born in 1949, residing in Vienna

22. Herbert Pohl
born in 1946, residing in Vienna

23. Peter Preiss
born in 1952, residing in Kilb

24. Monika Putz
born in 1953, residing in Stixneusiedl

25. Peter Raab
born in 1952, resaiding in Vienna

26. Peter Scheifinger
born in 1948, residing in Viennna

27. Günther Schmidt
born in 1947, residing in Vienna

28. Eric Steiner
born 1945, residing in Vienna

29. Rudolf Szedenik
born 1950, residing in Großwarasdorf

30. Emmanuel Venetos
born 1953, residing in Vienna

31. Johann Winter
born 1949, residing in Vienna

Group C

32. Thomas Gruber
born in 1953, residing in Salzburg

33. Bernd Hala
born in 1944, residing in Vienna

34. Dieter Hofbauer
born in 1949, residing in Vienna

35. Christian Hundt
born 1948, residing in Salzburg

36. Georg Schönfeld
born 1950, residing in Vienna