AS TO THE ADMISSIBILITY OF

Application No. 20619/92
by Elisabeth BIRNLEITNER
against Austria

The European Commission of Human Rights (Second Chamber) sitting in private on 28 June 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 2 September 1992 by Elisabeth BIRNLEITNER against Austria and registered on 14 September 1992 under file No. 20619/92;

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 applicant is an Austrian citizen born in 1936 and living in Aistersheim. She is represented by Mr. W. L. Weh, a lawyer practising in Bregenz.

The facts of the present case as submitted by the applicant, and which may be deduced from documents lodged with the application, may be summarised as follows:

On 3 May 1985 the mayor of the community of Aistersheim issued a construction order (Baubescheid) in accordance with Section 57 (4) and Section 59 (3) of the Upper Austrian Regional Road Administration Act (Landes-Strassenverwaltungsgesetz - LStVG) providing for the reconstruction (Umbau) of a public road.

The order referred to the jurisprudence of the Administrative Court (Verwaltungsgerichtshof) and stated that, in deciding on the project in question, a balance had to be struck between public and private interests. Private interests should only be interfered with if and to the extent that such interference was necessary in the public interest.

The order further stated that, according to expert opinion, the road in question was too narrow between the properties Nos. 18 and 17; therefore the Community Council had decided to widen the road and

requested the mayor to carry out the authorisation proceedings. The applicant, as one of the property owners concerned by the widening of the road, had been heard but her objections, in the light of two expert opinions, had to be rejected.

Prior to the order, the Community Council had issued a decree (Verordnung) on 27 December 1984 on the basis of Sections 8 and 9 of the above-mentioned Road Administration Act. This order related to the line of construction (Trasse) of the road project in question.

The applicant's appeal against the mayor's order of 3 May 1985 was dismissed by the Aistersheim Community Council on 8 September 1988, subsequent to supplementary investigation proceedings (ergänzende Ermittlungsverfahren).

The Council stated that the road construction works in question had been provided for by the Community Council decree of 27 December 1984 and the mayor was bound by that decree. Nevertheless the applicant was free to formulate an objection. The reasons for her objection were not, however, considered to be decisive. The applicant had relied on a private expert opinion to contradict the official expert opinion (Amtssachverständigengutachten) and both opinions were of equal evidential value, but in the circumstances the private expert opinion was less conclusive. The private expert had effected a traffic census during a calm period on 19 and 20 June 1985, but traffic was, for example, more dense at harvesting time. Moreover, a project for the construction of a road station had meanwhile been adopted. This was a further indication that, contrary to the opinion of the private expert and in agreement with the official expert, traffic would increase in the future. Therefore the widening of the road in question was necessary to secure fluid and safe road traffic.

On further appeal this decision was confirmed by the Upper Austrian Regional Government on 22 December 1988. The Regional Government stressed that the construction route of the new road had been determined by the Community Council decree of 27 December 1984 which could not be challenged. The applicant could complain about tangible construction measures, but her complaints were unfounded; it had been shown by official expert evidence that the widening of the road from 3 to 5.50 metres was necessary in the interests of secure and fluid road traffic, taking into account that traffic was likely to increase. The official expert opinion was conclusive and confirmed that the road construction project envisaged was the best of all possible solutions. The applicant's argument that the Community Council, being the interested party, should not have competence to issue a construction decree was unfounded.

The applicant then lodged a constitutional complaint alleging violations of her property right, the right to equal treatment and the rights guaranteed by Article 6 of the Convention. On 12 June 1989 the Constitutional Court (Verfassungsgerichtshof) rejected the applicant's complaint. The Court stated that while the applicant invoked the right of property, of equality before the law and the right to a fair trial (Article 6 of the Convention) her arguments were limited to alleging that the violations of these rights were the consequence of an incorrect application of non-constitutional law. However, insofar as constitutional law itself was concerned, the Constitutional Court considered in the light of its constant jurisprudence that the applicant's complaints had no prospects of success. The Constitutional Court also pointed out that the matter could be considered by the Administrative Court.

Before this court the applicant argued that the new road project was unnecessary as the existing road was fully sufficient given that there was hardly any traffic. Also, an increase of traffic in the future was not to be expected. She concluded that the community had no reason to realise the project which it had itself provided for in

the decree of 27 December 1984. Lastly she argued that the construction and expropriation measures should not have been brought by the community but by the regional authorities.

On 21 January 1992, the Administrative Court dismissed the applicant's appeal (Beschwerde) stating that the decree of 27 December 1984 implied a public interest of the road construction project. The property owners affected by the decree were not parties to the decree proceedings. They could not contest the utility of the new road as the decree had entered into legal force (dem Rechtbestand angehörende). The Court pointed out that the applicant nevertheless had the possibility to raise her objection that the road project did not serve a public interest by way of a constitutional complaint. The Administrative Court noted in this respect that the applicant had in fact seized the Constitutional Court which had, however, rejected her complaint.

In the proceedings before the Administrative Court the applicant therefore could no longer contest the necessity and utility of the new road construction. It was of no relevance whether or not the authorities were right in relying on the official expert opinion rather than following the private expert opinion submitted by the applicant. The applicant's submissions furthermore did not disclose any appearance of a violation of constitutional rights necessitating the reference of the matter back to the Constitutional Court.

The Administrative Court also rejected as being unfounded the applicant's argument that the local authorities lacked competence to carry out the proceedings relating to the authorisation of the road construction project.

Meanwhile the District Authority (Bezirkshauptmannschaft) in Grieskirchen had on 1 February 1989 issued an expropriation order, according to which, inter alia, certain parts of the applicant's property situated in Aistersheim were expropriated for the purposes of the road construction. The applicant was awarded AS 130,702 in compensation for about 1,000 m2 of expropriated land.

The applicant's appeal against the expropriation order was rejected by the Regional Government on 19 August 1991. Her request for a stay of execution of the expropriation order was rejected at the same time. The Regional Government stated that the proceedings relating to the authorisation of the road construction project had been terminated by a final decision. The only object of the expropriation proceedings was the question of whether or not the expropriated properties were needed for the authorised road construction project. This was not seriously disputed by the applicant, nor had she shown that procedural guarantees had been violated in the matter.

The applicant then lodged a second constitutional complaint requesting at the same time an interim order, staying the expropriation proceedings. The request for an interim order was rejected by the Constitutional Court on 6 November 1991.

On 9 June 1992 the Constitutional Court rejected the constitutional complaint as offering no prospects of success.

The applicant brought proceedings against the expropriation order before the Administrative Court, which rejected the applicant's complaint on 30 April 1992 as being unfounded. The Court inter alia stressed that the applicant could not challenge the expropriation order by raising again the objection that the road construction was not necessary. The Court referred to its previous judgment of 21 January 1992 which explained that the road construction decree implied a decision that the construction of the road was in the public interest and thereby in a certain way was also binding in the expropriation proceedings, as the property owners, affected by the

construction of the road, were barred from contesting the necessity of the road construction which the expropriation served. The fact that the expropriation was effected several years later in no way affected the legality of the proceedings as no substantial factual changes had occurred in the meantime.

Insofar as the applicant had invoked Article 6 of the Convention, the Administrative Court referred to a decision of the Constitutional Court of 14 October 1987 according to which the competence of administrative authorities to decide on the question of expropriation was compatible with Article 6. Finally, the Administrative Court referred to its previous decision of 21 January 1992 in which it had pointed out that the applicant had the possibility of lodging a constitutional complaint against the decisions relating to the authorisation of the road construction.

COMPLAINTS

The applicant considers that the expropriation proceedings violated Article 6 of the Convention. She also invokes Article 1 of Protocol N° 1.

In this context the applicant first complains that the road construction decree of 27 December 1984 was issued by the Community Council without prior proceedings in due form. A constitutional complaint against the construction decree would not have been an adequate remedy as the Constitutional Court can neither control the establishment of the facts nor the application of non-constitutional law. Consequently, it had never been possible to have examined by a court the question of whether or not a fair balance was struck between the public interests and the interests of the property owner concerned by the construction decree, which was binding for the authorities which later issued the construction and expropriation orders.

The applicant also complains that, in the proceedings relating to the authorisation of the road construction project in the present case, the official expert opinion was given preference over the private expert opinion, although the official expert is a civil servant employed by the authorities which issued the expropriation order.

The applicant points out that the public authority concerned, i.e. the Community Council, acts both as a party to the administrative proceedings relating to the authorisation of the road construction and the expropriation proceedings, and as the decision-making authority.

Moreover, the applicant did not have a right to a full judicial review of the authorities' decisions. The appeal to the Administrative Court against the expropriation order could not be considered an effective remedy because this court was bound by the construction decree issued by the Aistersheim Community Council on 27 December 1984. The situation complained of is alleged to be similar to that in the Bodén and Obermaier cases (see Eur. Court H.R., Bodén judgment of 27 October 1987, Series A no. 125-B and Obermaier judgment of 28 June 1990, Series A no. 179).

The applicant also alleges that the community of Aistersheim designated a construction firm to carry out the road construction works beginning on 30 July 1991, i.e. three weeks before the Regional Government confirmed the expropriation order. She considers that this is proof of unlawful collusion between the local and regional authorities.

Finally, the applicant suggests joining the present application with application no. 26507/95 which allegedly raises similar issues.

THE LAW

1. The Commission has considered the applicant's request to join the present matter with application no. 26507/95, but sees no cogent reason to do so, since the applicant has failed to submit sufficient arguments in support of his request.

2. The applicant argues above all that her right to a court as guaranteed by Article 6 (Art. 6) of the Convention (see Eur. Court H.R., Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 36) was violated in that the scope of the judicial review of the domestic courts which dealt with her case was too limited.

a. The Commission notes that contrary to the situation in the Bodén case, to which the applicant refers (see judgment of 27 October 1987, as cited above), she did have the possibility to complain to the Constitutional Court about the community decree of 27 December 1984 affecting her property. As was pointed out by the Administrative Court's decision of 21 January 1992 she did thus have the possibility to contest before the Constitutional Court that the community's road construction project was in the "public interest".

The Commission recalls, however, that the notion of "public interest", is necessarily extensive and confers on the national authorities wide discretionary powers. The domestic courts therefore will normally respect the legislator's assessment as to what is "in the public interest" unless this assessment is without reasonable foundation (cf. Eur. Court H.R., James and others, judgment of 21 February 1986, Series A no. 98, p. 32, para. 46). The scope of the control exercised by the Austrian Constitutional Court was therefore limited in view of the nature of the right in question. The Commission cannot find that this limitation amounted to a violation of Article 6 (Art. 6) of the Convention.

b. The applicant further complains about alleged unfairness of the proceedings before the administrative bodies, in particular as regards the expert opinions. However, she has not shown that she could not raise these complaints before the Administrative Court, in particular that she could not put forward any evidence which she regarded as pertinent (see Comm. Report 30.6.92, Zumtobel v. Austria, Eur. Court H.R., Series A no. 268-A, p. 22, para. 87).

The applicant next complains of the limited scope of judicial review of the Administrative Court.

The Commission recalls that the Convention calls at least for one of the following systems: either the first instance organs themselves comply with the requirements of Article 6 para. 1 (Art. 6-1), or they do not so comply, but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (Art. 6-1) (see Eur. Court H.R., Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29).

In the present case, the applicant filed appeals with the Administrative Court against the decisions of the Upper Austrian Regional Government of 22 December 1988 and 19 August 1991. The Administrative Court gave its decisions on 21 January and 30 April 1992, respectively.

In examining whether the Administrative Court constituted a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, the Commission must confine itself as far as possible to the circumstances of the case before it. An important indication will be whether the court itself in the circumstances of the case considered that it lacked jurisdiction to examine the complaints raised (see Eur. Court H.R., Zumtobel judgment of 21 September 1993, Series A no. 268-A, p. 14, para. 32; Ortenberg judgment of 25 November 1994, Series A no. 295-B, para. 34).

The Commission has first examined the proceedings leading to the Administrative Court's decision of 21 January 1992.

It notes that these proceedings concerned general legal provisions, namely the decree of 27 December 1984 ordering the construction of a road. The applicant contested the necessity of this construction. The Administrative Court, however, did not refuse to examine this complaint on the ground that its powers of review were too narrow. Rather it found that the complaint at issue could not be directed against the decree as the latter had entered into legal force. Insofar as the complaint at issue related to the question of whether the road project was in the "public interest", the Court found that this matter could be dealt with by the Constitutional Court.

On the other hand the Administrative Court had in fact entered into an examination of the lawfulness of the decree though it concluded that no doubts arose in this respect.

In these circumstances it cannot be found that the proceedings in question reveal any appearance of a violation of Article 6 (Art. 6).

c. The Commission has next examined the proceedings concerning the expropriation of the applicant's property and leading to the Administrative Court's decision of 30 April 1992.

The Court then dealt again with the applicant's complaint that the road construction as such was unnecessary; in this respect the Court recalled that this matter had already been decided in its decision of 21 January 1992. There is, therefore, also in its decision of 30 April 1992 no indication that the Court refused to examine the complaint on the ground that its powers of review were too narrow.

The Commission finds no support for the applicant's complaint that she did not have access to a court within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, and this part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also invokes Article 1 of Protocol No. 1 (P1-1) of the Convention, but the Commission finds no separate issue under this provision. The remainder of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECIDES TO REJECT the request for a joinder with Application No. 26507/95;

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)