AS TO THE ADMISSIBILITY OF

Application No. 17592/90
by Alois and Herma DANNER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993, the following members being present:

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

Mrs. M.F. BUQUICCHIO, 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 21 July 1988 by Alois and Herma DANNER against Austria and registered on 21 December 1990 under file No. 17592/90;

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 applicants, a married couple, are Austrian citizens living in Ohlsdorf. They are represented by Mr. E. Proksch, a lawyer practising in Vienna.

It follows from the applicants' statements and the documents submitted by them that they are running a farm in Ohlsdorf.

According to a decree of 16 February 1984 issued by the District Agricultural Authority (Agrarbezirksbehörde - "the District Authority") in Gmunden, the applicants' real estate property of some 20 hectares was included in consolidation proceedings.

On 8 October 1986, the District Authority ordered the provisional transfer of the newly allotted plots to the farmers participating in the consolidation proceedings.

The applicants lodged an appeal (Berufung) with the Provincial Land Reform Board (Landesagrarsenat - "the Provincial Board") of Upper Austria. They claimed that the new property provisionally allotted to them was not as valuable as their prior property and that the yield per year and hectare would be some AS 70 000 lower.

On 25 June 1987, the Provincial Board rejected the appeal as being unfounded. It is stated in the decision that the provisional land transfer had been effected in accordance with the law. The question of

whether or not the newly allotted land constituted adequate compensation could only be examined later once the consolidation plan had been adopted. Finally it is stated that the total new area which was provisionally allotted to the applicants covered 61% of their former property and that there was nothing to show that the attribution clearly ran counter to the principles of the Agricultural Land Planning Act (Flurverfassungs-Landesgesetz), according to which the transfer had to be effected in a manner as to guarantee the best possible cultivation of the newly allotted property. Even the private expert opinion submitted by the applicants had not shown or even alleged that this principle was not respected.

The applicants then lodged a constitutional complaint. They complained that in their case, the Provincial Board had not been correctly composed as two of the board members, namely H-P. Th., a judge of the District Court, and K. Pf., a civil servant, had participated in their capacity as substitute members while no explanation was given that and why the ordinary members which they replaced had been prevented.

Furthermore they alleged a violation of their property right. They claimed that Section 22 of the Agricultural Land Planning Act which authorises the agricultural authorities to proceed to provisional land transfers was unconstitutional in that it allows to provisionally allocate to a farmer less valuable land than taken from him without providing for compensation in respect of the financial losses thereby incurred.

The Provincial Board submitted observations in reply arguing inter alia, that there was no proof for the applicant's allegation that the provisional transfer caused them damages. In any event, so it is pointed out, the applicants could make a request for compensation which had to be addressed to the District authorities.

On 11 December 1987, the Austrian Constitutional Court (Verfassungsgerichtshof) refused to admit the constitutional complaint for decision on its merits. Applicant's counsel states that the decision was communicated on 29 January 1988. It is stated in the decision that the alleged violations, if they existed, were only the consequence of an alleged wrong application of non-constitutional, i.e. ordinary law. To this extent the constitutional complaint did not raise any issues of constitutionality. In so far as the constitutional complaint raised issues that could be examined by the Constitutional Court, they were in view of the court's constant jurisprudence not offering any prospect of success.

Finally it is pointed out that the matter could be brought before the Administrative Court (Verwaltungsgerichtshof).

COMPLAINTS

The applicants point out that in the domestic proceedings, they had shown by way of an expert opinion that the land provisionally allotted to them would yield considerably less than the property taken from them. They submit that Austrian law does not provide any remedy in this respect, that means they can neither obtain a rectification of the provisional transfer nor money compensation for the loss of yield. Consequently they consider that the provisional transfer violates their right to the peaceful enjoyment of possessions as guaranteed by Article 1 of the first Protocol.

The applicants furthermore argue that they did not have an effective remedy against the District Authorities' decision relating to the provisional transfer of property. The District Authority is however in their opinion no tribunal in the sense of Article 6 of the Convention. They submit that the District Authorities as well as the

Provincial Board act both as executive, expert and judge and can therefore not be considered to be impartial and independent within the meaning of Article 6 of the Convention.

THE LAW

1. The applicants have first submitted that their property right as guaranteed by Article 1 of the First Protocol (P1-1) is violated because first, the land provisionally allotted to them yields less than their previous land and second, they cannot claim compensation in this respect.

Even assuming that domestic remedies were exhausted although the applicants have not shown that they made a request for compensation as suggested in the Provincial Board's observations submitted to the Austrian Constitutional Court, the Commission considers, for the following reasons, that the present complaint can be rejected as being manifestly ill-founded.

Article 1 of the First Protocol (P1-1) reads:

> "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 to use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission first notes that the provisional transfer can neither be regarded as a "deprivation of possessions" nor as a measure controlling the "use" of the land. It therefore has to be considered under the first sentence of the first paragraph of Article 1 (Art. 1) (Eur. Court H.R., Poiss judgment of 23.4.1987, Series A No. 117, p. 108 para. 64).

For the purposes of this provision, it has to be examined whether a proper balance was struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual (loc. cit., p. 108 para. 65).

In the Poiss judgment cited an inbalance was found to exist in view of the fact that the domestic proceedings had dragged on for nearly twenty-four years without the adoption of a final consolidation plan.

In the present case the applicants have not shown that the alleged loss of yield is of such importance that even if the final consolidation plan were adopted within a reasonable period of time, it constituted an individual and excessive burden (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23.09.1982, Series A No. 52, p. 28, para. 73).

There is consequently no appearance of a violation of the provision in question and this part of the application therefore has to be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants furthermore invoke Article 6 (Art. 6) of the Convention arguing that they did not have access to an independent and impartial tribunal within the meaning of the provision invoked by them.

The Commission notes however that the present complaint was not raised before the Austrian Constitutional Court as the applicants had limited themselves in their constitutional complaint to criticising the participation in the decision making of the Provincial Board of substitute members.

They have not shown also to have raised their present complaint that the Provincial Board allegedly acts both as executive, expert and judicial organ.

In these circumstances, they cannot be considered to have exhausted domestic remedies and to this extent the application has to be rejected in accordance with Articles 26, 27 para. 3 (Art. 26, 27-3) of the Convention.

The Commission notes in addition that the applicants had the possibility to have their case decided by the Austrian Administrative Court.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)