AS TO THE ADMISSIBILITY OF

Application No. 19745/92
by E. & H. G.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 23 December 1991 by E. & H. G. against Austria and registered on 20 September 1992 under file No. 19745/93;

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

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 22 April 1994 and the observations in reply submitted by the applicants on 30 May 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicants, a married couple, are Austrian citizens living in Schrems. The first applicant was born in 1923 and the second applicant in 1924. They are represented by Mr. E. Proksch, a lawyer practising in Vienna.

It follows from their statements and the documents submitted that on 28 July 1975, the applicants requested a building permit authorising the construction of a four-storey office and apartment building.

On 5 August 1975, a neighbour, Mr. B., raised objections claiming that the intended construction would take too much light away from his house on the opposite side of the street.

On 18 March 1976, an agreement was reached between the mayor

representing the construction authority and the two neighbours. It was inter alia agreed that the upper storey of the intended building would be constructed less high in order not to overshadow B's building ("Das oberste Geschoß ist entsprechend dem Lichteinfallswinkel zurückzusetzen").

On 13 April 1976, a building permit was granted taking account of their agreement. An architectural plan representing the newly designed upper storey with an inclined facade was included in the building permit.

On 27 July 1977, the mayor ordered in accordance with Section 109 para. 4 of the Construction Decree (Bauordnung) that part 3 of the upper storey be narrowed in order to be conform with the building permit.

The applicants' appeal (Berufung) against the order (Bescheid) of 27 July 1977 was dismissed by the Community Council on 13 September 1977.

The applicants then brought the matter before the Regional Government.

On 31 January 1978, neighbour B. made a request for the demolition of that part of the upper storey which was not in conformity with the Construction Decree.

On 14 August 1978, the Regional Government set aside the decision of the Community Council of 13 September 1977 and sent the matter back to be reconsidered. This decision was based on an official expert opinion submitted on 12 April 1978. The technical expert expressed the view that he could not establish a violation of Section 47 of the Construction Decree with regard to the inclination of the upper storey.

Neighbour B. appealed to the Administrative Court (Verwaltungsgerichtshof).

On 23 June 1981, the Administrative Court quashed the Regional Government's decision for unlawfulness (inhaltliche Rechtswidrigikeit) and sent the matter back for a new decision.

On 9 March 1982, the Regional Government referred the matter to the Community Council.

On 17 July 1982, the Community Council set aside the mayor's order of 27 July 1977 and sent the matter back for further investigations.

The mayor having taken no action, the Community Council conducted an investigation, heard witnesses and the parties, obtained documentary evidence etc. and ordered on 4 October 1983, in accordance with Section 109 para. 4 of the Construction Decree, that the third part of the upper storey had to be narrowed by way of inclination of the facade.

The applicants again brought the matter before the Regional Government.

On 1 August 1984, the Regional Government set aside the order of 4 October 1983 considering that the applicants' building had been constructed conform to the agreement reached in March 1976. Neighbour B. appealed to the Administrative Court.

On 10 December 1985, the Administrative Court set aside the Regional Government's decision of 1 August 1984. Referring to Section 63 para. 1 of the Administrative Court Act (VwGG) the Court pointed out that so far no decision had been taken on the neighbour's request of 31 January 1978 to remove the alleged unauthorised part of

the applicants' building (Demolierungsantrag). It added that in the course of the proceedings which the construction authority had to carry out in accordance with Section 112 of the Construction Decree it would be necessary to establish the extent of the prior building permit (Im Rahmen des nach Paragraph 112 BO durchzuführenden Verfahrens hätten die Baubehörden den Inhalt der seinerzeit erteilten Baubewilligung zu erforschen).

Recognising that the construction authorities were not formally bound in these proceedings by its decision, the Court further stated that it nevertheless wished to reiterate its opinion that Section 47 of the Construction Decree did not directly apply because this provision only contained regulations which aimed at ensuring appropriate light and aeration conditions in respect of planned constructions while it did not provide for subjective rights for property owners complaining about a neighbouring construction. Nevertheless the construction authorities would in the context of examining the extent of the prior building permit also have to find out, having regard to available witness evidence and planning documents, whether in the agreement of 18 March 1976 the term "Lichteinfallswinkel" (light's angle of incidence) had been used in the same sense as in Section 47 of the Construction Decree.

On 6 March 1986, the Regional Government sent the matter back to the Community Council.

On 9 April 1986, B. complained to the Community Council that his request of 31 January 1978 for the demolition of the upper storey of the applicants' building had not yet been decided.

On 11 December 1986, B. complained to the Administrative Court about the inactivity of the Community Council.

On 16 December 1986 the Administrative Court opened preliminary proceedings (Vorverfahren) in accordance with Section 35 para. 3 of the Administrative Court Act and requested the Community Council to decide the matter within three months or to justify its inactivity.

On 17 March 1987 the mayor informed the court that in view of the complex character and the often contradictory decisions so far given in the matter, the Community Council had not seen fit to give a decision.

By order of 20 July 1988 the Administrative Court requested the Community Council to answer certain questions and to submit certain documents and plans showing the situation of the two neighbouring constructions in question.

On 21 November 1988 the applicants submitted an expert opinion and argued that their construction conformed to existing building regulations.

On 12 February 1991 the Administrative Court communicated to the neighbour B. and the applicants the observations of the Community Council dated 5 September 1988 and the plans submitted by them.

On 4 March 1991 neighbour B. filed his observations. The applicants submitted further observations on 30 April 1991 and again offered evidence.

On 14 May 1991, the Administrative Court decided without a hearing that part 3 of the upper storey likewise had to be put back (zurücksetzen) within six months in order to conform to the agreement of 18 March 1976. The Court found that on the basis of the documentary evidence obtained and contrary to the opinion expressed previously by an expert of the building authority, the applicants' construction exceeded the maximum admissible height. It was true that according to

the agreement of 18 March 1978 the neighbour B. had not raised objections against the excessive height, but to this extent the agreement was unlawful. On the other hand the agreement had been taken into account in the building plans and according to these plans the whole of the upper storey was to be smaller than the lower storeys. This corresponded, in the opinion of the court, to the meaning of the agreement and was not contradicted by the fact that in a note (Vermerk) of 13 July 1977 an official expert attested that the construction as represented in a plan of December 1976 was unobjectionable (kein Einwand). This note was, so the court stated, not binding as it could not replace the necessary authorisation of the construction authorities (baubehördliche Bewilligung). The court concluded that the upper storey had been constructed without there being an agreement (... im obersten Geschoß [ist] die Bauführung konsenslos erfolgt ...). It added that in the proceedings made under Section 112 of the Construction Decree, it did not have to examine the question of whether or not obtaining a subsequent building permit was possible (Wie weit für diese Bauausführung die nachträgliche Erteilung einer Baubewilligung möglich wäre, war im Rahmen des Auftragsverfahrens nach § 112 Bauordnung, ... nicht zu prüfen).

The judgment of 14 May 1991 was communicated on 10 July 1991.

The applicants then made a request for a retrial alleging that when examining the court files on 2 August 1991 their counsel discovered that a building plan which had been decisive for the Administrative Court's decision of 14 May 1991 had apparently been forged. They also based their request on the fact that this decision was given without a prior oral hearing.

On 10 December 1991 the Administrative Court rejected the request as being inadmissible. In so far as the applicants alleged that their counsel had not discovered the existence of a forged building plan before 2 August 1991, the Court found that it followed from the file that the applicants had taken cognisance of the plan in question in 1977 and also on later occasions and consequently their request for a retrial was in this respect lodged out of time.

In so far as the applicants complained that there had been no oral hearing, the Administrative Court stated that the parties had been given the opportunity to submit their case (... daß im vollen Umfang Parteiengehör gewahrt worden ist) and that the applicants had not, in their submissions of 30 April 1991, requested an oral hearing.

In August 1992 the applicants made a request for a supplementary building permit. It was rejected by the local mayor on 11 May 1993. On the same day the construction authorities requested the applicants to put back also part 4 of the upper storey.

The applicants appealed against both decisions.

The decision to put back part 4 was set aside by the Community Council on 30 September 1993 which at the same time confirmed the mayor's decision on the ground of res judicata.

An appeal by the applicants to the Regional Government was still pending in 1994 and no information about its result has been submitted by the parties.

COMPLAINTS

The applicants complain that Article 6 para. 1 of the Convention was violated in their case and that their case was not heard in a fair manner and in a public oral hearing before the Administrative Court which examined in first and last instance the objections which their neighbour B. had formulated in respect of their construction. The applicants point out that Section 112 para. 2 of the Construction

Decree of Lower Austria (NÖ Bauordnung) provides cogently that decisions relating to construction or demolition permits and related orders have to be taken on the basis of an oral hearing (Bauverhandlung) on the spot (Lokalaugenschein) and, if necessary, with the assistance of experts. The Administrative Court however did not even inform the parties of its intention to decide on the basis of the given state of the files without an oral hearing although in its earlier decision of 10 December 1985 it had expressed the opinion that the authorities should consider available evidence in order to determine the meaning of the agreement they had concluded in March 1976 with neighbour B. and the mayor of the community. They further point out that the proceedings before the Administrative Court were not brought by them but their neighbour B. They, the applicants, merely played a participating role (Beteiligte) in the proceedings and were only once requested to submit observations. They did so on 21 November 1988 when they requested that the parties should be questioned (Einvernahme der mitbeteiligten Parteien), that an expert opinion be obtained, that an architect be heard as an expert witness and that an on-the-spot investigation be carried out. They further submit that the complaint of the neighbour B. was not communicated to them by the Administrative Court before 1991 after their counsel had succeeded, for the first time, in inspecting the files on 17 April 1991. Subsequently they submitted a reply on 30 April 1991 and again requested to hear an expert, an expert witness and the parties (Parteieneinvernahme). They consider that these requests implied a request to hold an oral hearing. They also point out that the Regional Government decided twice in their favour while eventually the mayor refused to take any decision in view of the contradictory opinions expressed in the matter by the various instances dealing with it. In all these circumstances, so the applicants conclude, they were denied a fair and public oral hearing. In their submissions dated 15 June 1993 and in their reply to the respondent Government's observations, they also complain of the length of the proceedings.

The applicants allege violations of Article 6 of the Convention and Article 1 para. 1 of the First Protocol.

RELEVANT DOMESTIC LAW

As regards the proceedings before the Administrative Court, Section 35 paras. 1 and 3 of the Administrative Court Act (VwGG) provide for a preliminary investigation under the following conditions;

[Translation]

> "Section 35 (1) Where it is clear from the contents of the complaint that the breach of law alleged by the applicant is unsubstantiated, the complaint shall be dismissed without further proceedings in a private hearing.
> ...
>
> Section 35 (3) In all other cases in which the complaint is substantiated, preliminary investigations have to be carried out."

[German]

> "§ 35. (1) Beschwerden, deren Inhalt erkennen läßt, daß die vom Beschwerdeführer behauptete Rechtsverletzung nicht vorliegt, sind ohne weiteres Verfahren in nichtöffentlicher Sitzung als unbegründet abzuweisen.
>
> ...
>
> (3) In allen übrigen Fällen, in denen sich die Beschwerde zur weiteren Behandlung als geeignet erweist, ist das Vorverfahren einzuleiten."

Section 39 para. 1 of the Administrative Court Act provides that the Administrative Court is to hold a hearing after the preliminary investigation of the case where a complainant has requested a hearing within the time-limit. Section 39 para. 2 Nos. 4 and 6, which was added to the Act in 1982, provide however;

[Translation]

"Notwithstanding a party's application, the Administrative Court may decide not to hold a hearing when

> ...
>
> 4. The administrative act appealed from is in the light of the Administrative Court's constant case law to be set aside as being unlawful.
>
> ...
>
> 6. It is apparent to the Court from the written pleadings of the parties to the proceedings before the Administrative Court and from the files relating to the prior proceedings that an oral hearing is not likely to contribute to clarifying the case."

[German]

"Der Verwaltungsgerichtshof kann ungeachtet eines Parteiantrages nach Abs. 1 Z. 1 von einer Verhandlung absehen, wenn

> ...
>
> 4. der angefochtene Bescheid nach der ständigen Rechtsprechung der Verwaltungsgerichtshofes wegen Rechtswidrigkeit seines Inhalts aufzuheben ist.
>
> ...
>
> 6. die Schriftsätze der Parteien des verwaltungsgerichtlichen Verfahrens und die dem Verwaltungsgerichtshof vorgelegten Akten des Verwaltungsverfahrens erkennen lassen, daß die mündliche Erörterung eine weitere Klärung der Rechtssache nicht erwarten läßt."

As regards the avoidance and the repair of defects (Vermeidung und Behebung von Baugebrechen), Section 112 of the Construction Decree provides;

[Translation]

"§ 11

> (1) The owner of a construction has to see to it that it is in conformity with the construction permit. He has to remedy defects that can affect ... the exterior shaping ...
>
> (2) If the owner does not comply with his obligation under para. 1, the construction authority has, after having carried out an oral hearing connected with a visit on the spot, to set a time-limit for the repair. The taking of expert evidence cannot be renounced ..."

[German]

"§ 11

> "(1) Der Eigentümer eines Bauwerks hat dafür zu sorgen, daß

dieses in einem der Baubewilligung entsprechenden Zustand erhalten wird. Er hat Baugebrechen, durch welche ... die äußere Gestaltung ... beeinträchtigt werden können, zu beheben.

(2) Kommt der Eigentümer eines Bauwerks seiner Verpflichtung nach Abs. 1 nicht nach, hat die Baubehörde nach Durchführung einer mündlichen Verhandlung, die mit einem Augenschein an Ort und Stelle zu verbinden ist, unter Gewährung einer angemessenen Frist die Behebung des Baugebrechens zu verfügen. Von der Aufnahme des Beweises durch Sachverständige kann nicht abgesehen werden ..."

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 December 1991 and registered on 20 September 1992.

On 11 January 1994 the Commission decided to request the parties to submit their written observations on the admissibility and merits of the application.

The respondent Government submitted their observations after an extension of the time-limit on 22 April 1994 and the applicants submitted their observations on 30 May 1994.

THE LAW

1. The applicants consider that Article 6 para. 1 (Art. 6-1) of the Convention and Article 1 of Protocol No 1 (P1-1) were violated in their case in that they were denied a fair and public hearing and a decision within a reasonable time. They point out that in its decision of 10 December 1985, the Administrative Court gave to understand that it considered the taking of evidence to be necessary. Contrary to that opinion and despite the fact that no hearing had taken place before the construction authorities which had refused to deal with the matter, the Administrative Court then surprised them with its decision of 14 May 1991 where it found without an oral hearing that their construction was not in conformity with the agreement of 18 March 1976. They refer to Section 112 of the Construction Decree which provides for an oral hearing in such cases.

2. The respondent Government consider that the applicants were given a fair trial by the Administrative Court. They submit that in its decision of 10 December 1985 the Administrative Court only expressed a non-binding opinion as to how the authorities should proceed in the matter. This did not prevent the Court from eventually deciding otherwise without prior warning to the parties, all the more so as the administrative authorities had, by their inactivity, forfeited their right to decide the matter. The Government further considers that the applicants could and should have applied for an oral hearing in accordance with Section 39 para. 1 of the Administrative Court Act (VwGG).

3. Having regard to the nature of the applicants' complaints the Commission considers that they should be dealt with exclusively under Article 6 (Art. 6) of the Convention and do not raise any separate issues under Article 1 of Protocol No 1 (P1-1).

Article 6, para. 1 (Art. 6-1) of the Convention states that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The Commission is of the opinion that the proceedings here in question involve the determination of civil rights within the sense of this provision (see Eur. Court H.R., Mats Jacobsen judgment of 28 June 1990, Series A no. 180-B, p.14, para. 34). However, the Commission recalls, with regard to the finding of the

Administrative Court on 14 May 1991 of which the applicants complain, that in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or facts have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant jurisprudence (see e.g. decisions on the admissibility of applications No 458/59, Yearbook 3, pp. 222, 236 and No. 1140/61, Collection of Decisions 8, pp. 57,62; No 8315/79, Dec. 15.7.81,
D.R. 25, 203 [205]).

a. It is true that the applicants have alleged that their case was not heard in a fair manner and that they were taken by surprise in that the Administrative Court had in its earlier decision of 10 December 1985 expressed the opinion that the authorities should take into consideration available evidence while later, in its final decision of 14 May 1991, it decided against them without considering the evidence offered by them.

However, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which a party seeks to adduce. The Commission can only determine whether the domestic proceedings, considered as a whole, were fair as required by Art. 6 para. 1 of the Convention (see Eur. Court H.R., Barberà, Messequé and Jabardo, judgment of 6 December 1988, Series A no 146, p. 31, para 68). The Commission cannot, in the circumstances of the present case and in particular having regard to the applicants' allegations find that the applicants were prevented from arguing their case in an effective manner that the Administrative Court arbitrarily disregarded vital evidence or relevant arguments proposed or advanced by the applicants.

b. Insofar as the applicants complain that the Administrative Court decided the matter without an oral hearing the Commission notes that the Austrian Administrative Court can, in accordance with Section 35(1) of the Administrative Court Act, reject de plano, without a public hearing, complaints it considers to be manifestly ill-founded.

In fact it follows from cases previously dealt with by the Commission that it is the practice of the Austrian Administrative Court not to hear the parties unless one of them expressly requests it to do so. Therefore the European Court of Human Rights constantly finds that whenever a complainant failed to make such a request he/she must be deemed to have waived unequivocally his/her right to a hearing (see Eur Court H.R., Zumtobel judgment of 21 September 1993, Series A no 268, p. 14, para. 34, cf. also Eur. Court H.R., Fischer judgment of 26 April 1995, Series A no. 312, p. 20, para. 44). This rule also applies in the present case as no request for an oral hearing was made. Furthermore the dispute at issue did not give rise to questions of public interest and thereby making a hearing necessary.

c. The applicant finally complains of the length of the domestic proceedings.

However this particular complaint was not mentioned in the application form dated 3 March 1992 but was raised in substance in their submissions dated 15 June 1993 while the proceedings in question were terminated by the Administrative Court's decision of 14 May 1991. It follows that to this extent the six month's time limit provided for in Article 26 (Art. 26) of the Convention has not been respected.

d. In conclusion, the applicants complaints have to be rejected partly (points a and b) as being manifestly ill-founded (Art. 27 para. 2 (Art. 27-2) and partly (point c) as having been lodged out of time

(Art. 26, 27).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)