AS TO THE ADMISSIBILITY OF

Application No. 15780/89
by Johann EGGER
against Austria

The European Commission of Human Rights sitting in private on 11 October 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

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 5 July 1989 by Johann EGGER against Austria and registered on 20 November 1989 under file No. 15780/89;

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 parties, may be summarised as follows.

The applicant, an Austrian citizen born in 1945, is residing in Utterdorf in Austria. Before the Commission he is represented by Mr. Gerhard Mory, a lawyer practising in Salzburg.

A. Particular circumstances of the case

On 5 April 1973 the Mittersill District Court (Bezirksgericht) placed the applicant, who has been mentally disabled since his birth, under full guardianship (volle Entmündigung), in accordance with Section 273 para. 3 sub-para. 3 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch).

On 1 January 1973 the applicant's father died. The applicant's

brother then inherited the estate, which included a farm. On 17 August 1973 the applicant, represented by his guardian, and his brother concluded a family agreement according to which the brother would provide the applicant with full subsistence ("volles bäuerliches Ausgedinge"), as was common in rural life in the area.

Subsequently, difficulties arose between the applicant and his brother. On 5 December 1975 the applicant's guardian informed the Guardianship Court - which is a division of the Mittersill District Court (Bezirksgericht) dealing, inter alia, with guardianship matters - that on 15 November 1975 the brother had evicted the applicant and his mother from the parental farm and that both were now staying with the applicant's brother-in-law.

On 29 January 1976 the Guardianship Court authorised the applicant's guardian to file a court action against the applicant's brother. On 2 February 1976 the guardian filed such an action claiming a monthly payment of AS 1,500 on the basis of the above agreement.

On 1 June 1976 the District Court decided to refer the case back to the Court's guardianship division for a review of the guardian's authorisation to conduct legal proceedings.

On 17 November 1976 the guardianship division of the District Court withdrew the authorisation from the guardian and withdrew the action itself. The Court found that, in the civil proceedings concerned, an "entangled family dispute" (verwickelte Familienstreitigkeiten) came to light so that the mere assessment of the evidence would be decisive for the outcome of the proceedings. Therefore, the applicant's risk of losing his case and having to pay the costs was too high. The guardian did not appeal against this decision.

On 25 February 1977 the guardian reached an agreement with the applicant's brother before the District Court, according to which the rights resulting from the 1973 agreement were to be suspended as long as the applicant did not live in his parental house. The guardian waived the applicant's claim for payment. On the same day the Guardianship Court decided to authorise the friendly settlement.

In spring 1977 the applicant and his mother returned to the farm. However, following further difficulties between the applicant and his brother and sister-in-law, they again left the farm in November 1977.

On 20 May 1988 the applicant, who was represented by his mother and Mr. Mory, requested the Guardianship Court to dismiss his guardian and to appoint another guardian as the former had waived the applicant's claim in the agreement of 1977. The applicant further requested the Court to authorise the new guardian to conduct court proceedings in order to enforce his rights resulting from the 1973 agreement. Alternatively, the applicant requested the Court to authorise the new guardian to claim damages from his present guardian for failure to comply with his duties.

On 28 July 1988 the applicant requested his mother to be appointed as his guardian.

On 28 July 1988 the Guardianship Court rejected the requests of 20 May 1988. The Court found that the applicant's mother had no position to file applications on her son's behalf. The applicant himself was unable to authorise the lawyer. The Court noted that the Judge and the Court Registrar (Rechtspfleger) had verified, in the course of a visit to the applicant on 25 July 1988, that the latter was not able to express himself in an understandable manner. Furthermore, the Court pointed out that, according to the report of the Court Registrar, the present guardian complied with his duties "in an extremely correct way" ("überaus korrekt"). Moreover, the Court,

having heard the guardian on 5 July 1988, found no indications justifying his dismissal.

On 4 August 1988 the Guardianship Court rejected the request of 28 July 1988 referring to its decision of 28 July 1988.

The applicant and his mother appealed against both decisions.

On 22 September 1988 the Salzburg Regional Court (Landesgericht) rejected the appeals. With regard to the applicant's case, the Court found that he was not able to authorise a lawyer to file the appeal. In respect of his mother's appeal, the Court pointed out that she could not file a request as there was already a guardian who was entrusted with managing all the applicant's affairs. The Court also pointed out that the Guardianship Court had been able to consider the complaints submitted by the applicant's mother in the ex officio proceedings controlling the performance of the guardian.

The further appeal (Revisionsrekurs) of the applicant and his mother was rejected by the Supreme Court (Oberster Gerichtshof) on 11 May 1989. The Court held that the proceedings in the lower courts had only concerned the procedural question of the standing of the applicant and his mother. It confirmed the decisions of the courts of first and second instance. Furthermore it found that in guardianship proceedings only the person concerned had a right to file a request or appeal, but not his close relatives. Therefore, the applicant's mother could only make suggestions (Anregungen) to the courts.

On 3 July 1989 the Guardianship Court drew up a report in which it laid down its reasons for not pursuing the complaints raised by the applicant's mother. According to this report she was herself involved as a party in the conflict between the applicant and his brother and was generally on bad terms with the latter; she thus partly acted in her own interest.

On 11 July 1989 the applicant's mother suggested that the Guardianship Court appoint a new guardian for the applicant and authorise a civil action against the applicant's guardian for compensation for damage caused to him. She attached a draft writ. On 25 January 1990 she repeated her suggestion of 11 July 1989 as a request.

On 14 February 1990 the District Court rejected the request. The Court pointed out that the arguments submitted by the applicant's mother had to be considered in the official proceedings which led to the Court's report of 3 July 1989. The applicant's mother appealed.

On 28 March 1990 the Salzburg Regional Court dismissed the appeal, but allowed a further ordinary appeal (ordentlicher Revisionsrekurs) to the Supreme Court. The Regional Court found that the applicant's mother had no right to file requests concerning the applicant's guardianship. Only in exceptional circumstances a close relative of a ward, who acts exclusively in the ward's interests without pursuing his own, has a right of appeal in order to prevent danger caused by the guardian himself. In this respect the Court referred to the Guardianship Court's report of 3 July 1989.

On 17 May 1990 the Supreme Court, referring to its judgment of 11 May 1989, rejected a further appeal.

B. Relevant domestic law

Section 273 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch), in the version in force since 1984, reads as follows:

(1) Where a person who suffers from a mental illness or is

mentally handicapped is incapable of managing his affairs without danger of a disadvantage to himself, a guardian shall be appointed for him at his own request or ex officio.

(2) Appointment of a guardian is inadmissible if the person concerned is in a position to take sufficient care of his matters with the help of others, in particular his family or public or private institutions for handicapped persons. A curator may not be appointed for the sole reason of protecting a third person against the assertion of a hypothetical claim.

(3) Depending on the extent of the person's handicap and on the nature and scale of the affairs to be managed, the guardian shall be entrusted

1. with managing specific affairs, such as enforcement of or defence against a claim, or entry upon and execution of a legal transaction,

2. with managing a certain class of affairs, such as administering a part of his property or his entire property, or

3. with managing all the affairs of the handicapped person."

Section 273 a para. 1 of the Civil Code read as follows:

"The handicapped person can neither dispose of his property nor bind himself by a legal transaction within the guardian's sphere of action without the latter's express or implicit approval ..."

Section 283 paras. 2 and 3 of the Civil Code read as follows:

"(2) The guardian is to be dismissed upon request or ex officio when the person under care no longer requires assistance.

(3) In the context of its duty to protect the interests of the person in care, the court has to examine at adequate intervals whether his welfare requires termination or change of guardianship."

Section 254 of the Civil Code reads as follows:

"A guardian has to be dismissed ex officio if he manages the guardianship in breach of duty, if he is found to be incompetent, or if objections arise which would have legally excluded him from taking charge of the guardianship."

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that he has no access to court for the purpose of taking measures against his guardian who allegedly failed to comply with his duty when he gave up the applicant's claim in the 1977 agreement. He especially complains about the fact that he cannot file either an application for dismissal/replacement of his present guardian or an action for damages against this person.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 July 1989 and registered on 20 November 1989.

On 6 September 1991 the Commission decided to communicate the application to the respondent Government and to request them to submit their written observations on admissibility and merits.

The Government's observations were submitted on 10 January 1992. On 16 March 1992 the applicant submitted his observations in reply.

On 23 October 1992 the Commission decided to grant the applicant legal aid.

THE LAW

The applicant complains that his incapacity to take measures against his guardian before a court constitutes a violation of his rights under Article 6 para. 1 (Art. 6-1) of the Convention which, insofar as relevant, provides as follows:

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

The Government submit that the applicant was not unduly restricted in his access to court as he had the right to file a complaint with the court regarding any abuse by the guardian of his powers and to introduce a request for his dismissal. Under exceptional circumstances, such a right would also be granted to the ward's close relatives, but only to such close relatives as did not at the same time pursue their own interests. In the present case, the courts found that the applicant's mother did not exclusively pursue the applicant's interests but also her own. Consequently, she had no right to act on the applicant's behalf in these proceedings.

The Government further submit that Austrian law provides for sufficient control of the guardian and for safeguards preventing abuse of his powers. In the present case, it was not established that the applicant had actually been evicted from the parental farm by his brother, since the lawsuit brought before the Mittersill District Court on this matter was not terminated by a court decision, but by a settlement between the parties. If an official examination by the Guardianship Court would have shown that in fact disadvantageous dispositions had been made by the guardian, the Guardianship Court would have appointed a guardian ad litem in order to verify the justification of the claim and possibly obtain approval by the Court to take legal action. The Guardianship Court in the present case, however, did not consider the court action to be justified.

The applicant, referring to Sections 254 and 283 of the Civil Code, contests that he himself could have introduced a request for dismissal of the guardian. Moreover, in view of his severe handicaps, such a possibility was not realistic. The applicant further submits that under Article 6 para. 1 (Art. 6-1) of the Convention it did not suffice that the Guardianship Court decided in ex officio proceedings, without his participation, whether he had a valid compensation claim against his guardian.

The Commission recalls that the right of access to court is not absolute but may be subject to limitations (Eur. Court H.R., Golder judgment of 21 February 1975, Series A no. 18, p. 18, para. 38; Ashingdane judgment of 28 May 1985, Series A no. 93, p. 24, para. 57). In laying down such limitations the Contracting States enjoy a certain margin of appreciation. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent as to impair the very essence of the right.

The Commission further recalls that it is a common feature in the

laws of the States Parties to the Convention that limitations on the right of access to court exist for minors and persons of unsound mind. Such limitations must in principle be regarded as admissible under Article 6 para. 1 (Art. 6-1) of the Convention. In this respect the Commission has held "that where court actions are brought by individuals who do not have the capacity of bringing such actions because of their mental state, the right of access to court under Article 6 para. 1 (Art. 6-1) cannot be interpreted as including an unlimited right to have an ad hoc guardian or other ad hoc representative appointed for the purpose of pursuing the intended court action" (No. 10877/84, Dec. 16.5.85, D.R. 43 p. 184 at p. 186).

The Commission notes that the applicant has been placed under guardianship because he has been mentally disabled since birth. According to the Guardianship Court's decision of 28 July 1988 the applicant could not express himself in an intelligible manner.

The Commission notes further that, according to the relevant provisions of the Civil Code, the imposition of guardianship did not hinder the applicant's access to court completely; rather it provided for his representation by a guardian. The Code also provides for a review of the necessity of the guardianship and the performance of the guardian at regular intervals by the Guardianship Court. In these proceedings complaints by the ward and his close relatives have to be taken into consideration by the courts.

The Commission also observes that in the present case the applicant's request for dismissal of his guardian of 20 May 1988 related to complaints about the guardian concerning court proceedings between the applicant and his brother which were terminated by a settlement concluded in 1977. In its decision of 28 July 1988 the Guardianship Court pointed out that, according to a report by the Court Registrar, the guardian complied with his duties "in an extremely correct way". On 5 July 1988 the Court had heard the guardian and found no indications justifying his dismissal. On 25 July 1988 the Judge and the Court Registrar of the Guardianship Court visited the applicant for the purpose of verifying his situation. Furthermore, the arguments submitted by the applicant's mother in her requests to the Court were considered in ex officio proceedings which led to the Court's report of 3 July 1989.

Accordingly, the Commission is satisfied that Austrian law provides for effective supervision of guardianship and that, in the present case, the Guardianship Court did effectively exercise control over the applicant's guardian. In these circumstances, the Commission finds that the restrictions imposed on the applicant's legal capacity in the present case by the appointment of a guardian did not impair the very essence of the applicant's right to access to a court. The Commission concludes, therefore, that the present case does not disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)