CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 74159/01
by Walter EGGER and Adelheid EGGER
against Austria

The European Court of Human Rights (Third Section), sitting on 9 October as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mrs E. STEINER, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 2 July 2001,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Walter Egger and Mrs Adelheid Egger, are Austrian nationals living in Salzburg (Austria). They are represented before the Court by Mr F. Unterasinger, a lawyer practising in Graz (Austria).

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

On 4 March 1985 the applicants filed an application for a building permit for a weekend cottage.

On 2 May 1988 the Mayor of Predlitz-Turrach dismissed the applicants' application for a building permit. The applicants appealed against this decision.

On 3 June 1989 the Mayor granted the building permit. On 30 August 1989 the Steiermark Regional Government declared the decision null and void as the building permit was contrary to the area zoning plan (*Flächenwidmungsplan*).

On 28 February 1993 the Mayor issued a demolition order. He found that the applicants had to stop the construction works and to demolish these parts of their cottage already built and to recultivate their plot of land within seven months.

On 27 July 1993 the applicants appealed against this decision and stressed that the construction works had already been terminated in August 1989 and that the revocation of the building permit granted on 4 June 1989 had occurred only after the construction of their cottage.

On 18 March 1999 the Municipal Council (*Gemeinderat*) modified the demolition order and found that the applicants had to demolish their cottage within five months.

On 23 April 1999 the Steiermark Regional Government dismissed the applicants further appeal (*Vorstellung*) and found that the applicants' cottage had been constructed contrary to the applicable law, and that the order to declare the building permit null and void had been issued only three months after the building permit was wrongly granted.

On 10 June 1999 the applicants lodged a complaint with the Constitutional Court.

On 11 October 1999 the Constitutional Court declined to deal with the complaint for lack of prospects of success and transferred the case to the Administrative Court.

On 30 November 1999 the Administrative Court ordered the applicants to amend their complaint. On 4 January 2000 they complied with this order. On 15 March 2000 the Predlitz-Turrach Municipality submitted its observations.

On 5 December 2000 the Administrative Court dismissed the applicants' complaint and found that no building permit existed for their cottage and that, therefore, the demolition order was lawful. This decision was served on the applicants' counsel on 2 January 2001.

B. Relevant domestic law

Section 73 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. Its relevant part reads as follows:

> "(1) Subject to any contrary provision in the administrative regulations, the authorities must give a decision on applications by parties ... and appeals without unnecessary delay, and at the latest six months after the application or appeal has been lodged.
>
> (2) If the decision is not served on the party within this time-limit, jurisdiction will be transferred to the competent superior authority upon the party's written request (*Devolutionsantrag*). ...This request has to be refused by the competent superior authority if the delay was not caused by preponderant fault of the authority.
>
> (3) The period for giving a decision by the superior authority runs from the date the request for transfer of jurisdiction was lodged with it."

COMPLAINTS

The applicants complained about the length of the demolition order proceedings. Further, they complain that the authorities, in particular the Administrative Court, had wrongly applied the applicable law. While the latter quashed the demolition order against their neighbours, which was based on similar facts it did not quash the order against the applicants. They do not rely on a specific provision of the Convention.

Commented [Note1]: Use the present tense for communication of a case (the applicant complains) and the past for a decision (the applicant complained).

THE LAW

1. The applicants complained that the demolition order proceedings were not concluded within a reasonable time and that these proceedings were unfair. Article 6 of the Convention, insofar as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...."

As to the applicability of Article 6 of the Convention, the Court reiterates that Article 6 applies to proceedings concerning orders to demolish unlawfully erected buildings (see *Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A, p. 14, § 31).

2. The applicants complained, first, about the length of the proceedings. The Court considers that the period to be taken into account started on

28 February 1993, when the District Authority issued the demolition order, and ended on 2 January 2001 when the Administrative Court's decision was served.

The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This rule is designed to ensure that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. It is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and others v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, §§ 65-66).

Thus, the Court finds that it is required to examine the question whether the application for a transfer of jurisdiction (*Devolutionsantrag*) under Section 73 of the General Administrative Procedure Act constituted an effective remedy as regards complaints about the unreasonable length of administrative proceedings.

In the case of *Tomé Mota v. Portugal* ((dec.), no. 32082/96, ECHR 1999-IX) the Court found that a request under Articles 108 and 109 of the Portuguese Code of Criminal Procedure to speed up the proceedings was an effective remedy for the purposes of Article 35 § 1 of the Convention. Further, it has found that an application to the Administrative Court under Article 132 of the Austrian Federal Constitution constitutes an effective remedy as regards a complaint about the length of proceedings (*Basic v. Austria* (dec.), no. 29800/96, §§ 39-40, ECHR 2001-I).

As in the *Tomé Mota v. Portugal* case, Austrian law provides time-limits within which each stage of the proceedings has to be completed. If this six months' time-limit is not complied with, each party may lodge an application under Section 73 of the General Administrative Procedure Act with the higher authority. If deemed admissible, the higher authority has to take a decision on the merits within the statutory six months' time-limit. Given the strict time-limits within which the authorities have to decide upon a request to speed up the proceedings, the use of this remedy does not itself contribute to the length of the proceedings.

The Court finds that there are no fundamental differences which would allow to distinguish the application under Section 73 of the General Administrative Procedure Act under review in the present case from the remedies in the cases *Tomé Mota* and *Basic* (cited above). Having regard to the fact that under Austrian law administrative authorities are, as a general rule, under a duty to decide on a party's request within six months, and noting that the use of a Section 73-application does not normally lead to a further delay in the proceedings, the Court concludes that this application

constitutes in principle an effective remedy as regards a complaint about the length of proceedings.

In the present case there was a substantial delay after the applicants appealed against the demolition order on 27 July 1993 on which the Municipal Council only decided on 18 March 1999. Thus, the remedy at issue was at the applicants' disposal for more than five years. However, they made no use of it and there is no indication of any circumstances which might have absolved the applicants from exhausting this remedy.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

3. The applicants complained, next, that the Administrative Court wrongly applied the applicable law.

However, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (*Garcia Ruiz v. Spain* judgment of 21 January 1999, *Reports of Judgments and Decisions* 1999-I, § 28; *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I).

Thus, it is not the Court's task to determine whether the decisions taken by the Austrian courts were based on the correct interpretation of Austrian law. If examined under Article 6 of the Convention, there is no appearance of a violation of the applicants' right to a fair hearing in respect of this complaint.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Mark VILLIGER
Deputy Registrar

Georg RESS
President