AS TO THE ADMISSIBILITY OF

Application No. 29477/95
by Herbert EISENSTECKEN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 10 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 19 September 1995 by Herbert EISENSTECKEN against Austria and registered on 6 December 1995 under file No. 29477/95;

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

Having deliberated;

Decides as follows:

FACTS

The applicant, born in 1961, is an Italian national, residing in Vahrn, Italy. Before the Commission he is represented by Mr. J. Posch and Mrs. E. Posch, both lawyers practising in Innsbruck.

The facts as submitted by the applicant may be summarised as follows.

A. Particular circumstances of the case

On 7 March 1985 the applicant concluded with E. a contract for property to vest in a third person on the owner's death (Übergabevertrag auf den Todesfall) under which the applicant should receive the farming estate of E. situated in Mils after the latter's death.

On 15 December 1992, after the death of E., the applicant filed a request with the local Real Property Transactions Authority for Mils (Grundverkehrsbehörde Mils) at the office of the Innsbruck District Administration (Bezirkshauptmannschaft) for the approval of the above contract and submitted that he intended to exploit the land himself.

On 28 April 1993 the applicant informed the Real Property Transactions Authority that meanwhile, on 26 April 1993, he had concluded a sales contract concerning E.'s farming estate with the municipality of Mils. He requested the Real Property Transactions Authority to approve the contract with E., taking into account that he had meanwhile concluded a sales contract with the municipality of Mils.

On 23 July 1993 the Real Property Transactions Authority approved the contract concluded with E. under the conditions that the land be immediately transferred to the municipality of Mils and that the municipality of Mils be registered as its owner in the land register (Grundbuch) while a registration of the applicant as the owner in the land register should not take place.

Meanwhile, on 25 May 1993, the Real Property Transactions Authority had also approved the sales contract of 26 April 1993.

On 2 August 1993 the Real Estate Transactions Officer (Landesgrundverkehrsreferent) at the Office of the Regional Government for the Tyrol (Amt der Landesregierung) exercised his right of appeal to the Regional Real Property Transactions Authority (Landesgrund-verkehrsbehörde). He submitted that the contract with E. was in breach of the Tyrolean Real Property Transactions Act (Grundverkehrsgesetz) as neither the provisions on the transfer of agricultural and forestry land nor the provisions on the transfer of real property to foreigners were met. Section 4 of the Real Property Transactions Act required the safeguard of the public interest in maintaining and strengthening an economically viable agriculture and forestry. Under Section 6 of the Act the approval of an acquisition of land must be refused if a person acquired agricultural or forestry land without guaranteeing that he would exploit the land himself. For this reason the approval had to be denied. In any event, approval had to be refused on the ground that the matter was res iudicata, since the applicant had already on two previous occasions in 1982 and 1984 submitted contracts for transfer of property concerning the same farming estate and each time approval of the transfer had been refused by the Real Property Transactions Authorities.

On 10 August 1993 also the administrator of the deceased's estate appealed.

On 1 September 1993 the applicant commented on the appeals. He contested that the matter was res iudicata. In his opinion also the fact that he would not exploit the land himself was irrelevant as he had already concluded a sales contract with the municipality of Mils.

On 28 September 1993 the Regional Real Property Transactions Authority established a report on an inspection of the land in question.

On 14 October 1993 the applicant approved this report and requested an oral hearing. On 2 December 1993 the Regional Real Property Transactions Authority held an oral hearing.

On 7 July 1993 a new Tyrolean Real Property Transactions Act was adopted, which entered into force on 1 January 1994. By this Act the name and composition of the Regional Real Property Transactions Authority was changed.

On 28 February 1994 the new Real Property Transactions Commission (Landes-Grundverkehrskommission) granted the appeal of the Real Estate Transactions Officer and refused to approve the contract with E. Refuting the argument that the matter was res iudicata, the Real Property Transactions Commission found that the approval had to be refused on the ground that the applicant did not intend to exploit the land himself. The sales contract concluded with the municipality of Mils was irrelevant, because the applicant's failure to fulfil the

requirements for an approval of the transfer of the land could not be remedied by a subsequent transfer of the land. As regards the appeal of the administrator of the deceased's estate the Real Property Transactions Commission found that he lacked legal standing.

On 13 April 1994 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof).

He complained that the Regional Real Property Transactions Commission had infringed his right to inviolability of property and his right to acquire real property because it had applied the law in a misconceived (denkunmöglich) manner by requiring that he exploited the land himself, although this question had been irrelevant since he had already concluded a sales contract with the municipality of Mils.

The applicant further raised the following complaints about the Regional Real Property Transactions Commission and the appeal proceedings:

- the Real Property Transactions Commission had not been competent to decide his case as, according to the transitional provisions in Section 40 of the Real Property Transactions Act 1993, the Real Property Transactions Act 1983 was still applicable and the Regional Real Property Authority should therefore have decided his case;

- the Real Property Transactions Commission had not been properly composed since at its session of 24 February 1994 three of its members had been replaced by substitute members, although they had not officially informed the chairman of any reason for their absence;

- although the law required that the chairman of the Real Property Transactions Commission should be someone with experience in real property transaction matters the applicant was not aware that the person appointed as chairman had any such experience;

- several members of the Real Property Transactions Commission and the Real Property Transactions Authority, namely the senior civil servant from the Agricultural Services Department (technischer Agrardienst), the senior civil servant from the Forestry Services Department (forsttechnischer Dienst), the legal expert and in the case of the Real Property Transactions Commission also the chairman, were members of the same division (B III) of the Office of the Regional Government. Also the Real Property Transactions Officer was part of this division. Although the Real Property Transactions Officer was not a superior of the above civil servants indirect influence via their common superior could not be ruled out;

- the setting up of the Regional Real Property Transactions Commission had never been made public and therefore had not been valid;

- the Real Property Transactions Commission had held its session and had decided on 28 February 1994, although its rules of procedure (Geschäftsordnung) adopted by the Regional Government on 8 February 1994 had only been published in the Regional Official Gazette on 8 March 1994;

- the Regional Real Property Transactions Authority had held a hearing on 2 December 1993 at which the parties were present. However, on 24 February 1994 the Regional Real Property Commission had held a further hearing without informing the applicant thereof. Thus, two different bodies had held a hearing and taken a decision in his case and he had not been offered the possibility to present his arguments in the course of the second hearing.

On 27 February 1995 the Constitutional Court dismissed the applicant's complaint.

As regards the competence of the Real Property Transactions Commission and the applicant's complaint about a decision-taking by two authorities, the Constitutional Court found that the Real Property Transactions Authority had not taken any decision. The Real Property Transactions Commission which had taken the contested decision, had, according to the transitional provision of Section 40 of the Real Property Transactions Act 1993, been competent to do so. This Commission had not decided on the basis of the oral hearing of 2 December 1993, but on the basis of the contents of the file. Referring to its own case-law the Court found that an oral hearing was in the present case not obligatory.

As regards the composition of the Real Property Transactions Commission the Constitutional Court found that all the members had been properly summoned to its session of 24 February 1994. The fact that the chairman had in his previous positions never dealt with real property transaction matters did not show that he was not "a person experienced with real property transaction matters" as provided for by the law. Neither the Federal Constitution nor any ordinary law required the publication of the appointment of the members of a collective authority (Kollegialbehörde). There were no members in the Real Property Transactions Commission who were in their ordinary administrative functions hierarchically subordinated to one of the parties to the proceedings. Moreover, the Real Property Transactions Act and the General Administrative Procedure Act (Allgemeines Verwaltungsverfahrensgesetz) regulated the proceedings before the Real Property Transactions Commission in a sufficiently precise manner. It followed that the composition of the Real Property Transactions Commission did not give rise to any constitutional concerns.

As regards the complaint that the Real Property Transactions Commission applied the law in a misconceived manner the Constitutional Court found that the subject-matter of the proceedings at issue had been the approval of the transfer of rights to the applicant, and not any subsequent contracts. Even the applicant himself had not alleged that the authorities had assessed in a misconceived manner that he did not exploit the land himself. Insofar the applicant had relied on a right to freedom of acquisition of real property the Constitutional Court found that this right was only granted to Austrian citizens.

B. Relevant domestic law

1. Under the Tyrolean Real Property Transactions Act of 1983 (Grundverkehrsgesetz), a contract concerning the transfer of ownership over real property was subject to approval by the real property transaction authorities if agricultural and forestry land was concerned or if the purchaser did not possess Austrian nationality (Sections 1 and 3). Such a contract could only take effect if it was approved by the real property transaction authorities (Sections 3 and 16). The purchaser of land was obliged to seek approval within two months of the approval of the contract (Section 15 para. 1). No entry could be made in the land register (and thus property definitely acquired) until the transaction had been approved by the competent authority (Section 2 para. 3). If approval was withheld, the acquisition was null and void (Section 16 para. 1).

On 1 January 1994 a new Real Property Transactions Act (of 1993) entered into force. It regulates the matter in more detail but essentially maintains the above principles.

The transitional provision of Section 40 of the 1993 Act provides that pending proceedings have to be terminated in accordance with the provisions of the 1983 Act (para. 3) and that the 1983 Act remains applicable to contracts concluded before the entry into force of the 1993 Act (para. 4). The Regional Government shall appoint the members

of the Real Property Transactions Commission in time so that they can take up their duties when the 1993 Act enters into force (para. 2).

According to the 1983 Act the second and final instance was the Regional Real Property Authority (Landesgrundverkehrsbehörde). In the 1993 Act the Regional Real Property Authority is replaced by the Regional Real Property Commission (Landes-Grundverkehrskommission). The membership in both bodies varies according to the subject-matter of the contract to be examined. In the case of agricultural or forestry land - whether the buyer be Austrian or foreign - the nine members of the Regional Real Property Commission are (Section 28):

a) a person experienced in real property transaction matters as chairman
b) a member of the judiciary (Richterstand)
c) a legally qualified civil servant from the Office of the Regional Government as rapporteur
d) a lawyer or public notary (Rechtsanwalt oder Notar)
e) a member of the Chamber of Workers and Employees (Kammer für Arbeiter und Angestellte), a member of the Chamber of Commerce (Kammer der Gewerblichen Wirtschaft), a member of the Chamber of Agriculture (Landwirtschaftskammer)
f) a senior civil servant from the Agricultural Services Department (technischer Agrardienst)
g) a senior civil servant from the Forestry Services Department (forsttechnischer Dienst)

The Regional Real Property Transactions Authority, when dealing with matters of agricultural and forestry land, was composed in the same manner (Section 13 para. 4 of the 1983 Act as amended in 1991).

2. The procedure before the real property transaction authorities is governed by the General Administrative Procedure Act 1950 (Allgemeines Verwaltungsverfahrensgesetz).

Section 40 para. 1 of the General Administrative Procedure Act deals with oral hearings and provides as follows:

[Translation]

"(1) Oral hearings shall be held in the presence of all known parties and the necessary witnesses and experts. If oral hearings have to be combined with an inspection of the location, they should, if possible, be held there or otherwise at the seat of the authority or another location which in the circumstances appears most suitable.

[German]

"(1) Mündliche Verhandlungen sind unter Zuziehung aller bekannten Beteiligten sowie der erforderlichen Zeugen und Sachverständigen vorzunehmen und, sofern sie mit einem Augenschein verbunden sind, womöglich an Ort und Stelle, sonst am Sitz der Behörde oder an dem Ort abzuhalten, der nach der Sachlage am zweckmäßigsten erscheint.

COMPLAINTS

1. The applicant complains under Article 1 of Protocol No. 1 that the Regional Real Property Transactions Commission's refusal to approve the contract for a transfer of property violates his property rights because the Authority had applied the law in a misconceived manner.

2. He further complains that the Real Property Transactions Commission could not be considered a "tribunal established by law" within the meaning of Article 6 para. 1 of the Convention and had not

been competent to decide his case. He submits in particular that:

- according to the transitional provisions of the 1993 Real Property Transactions Act it should have been the former Real Estate Transactions Authority and not the newly created Real Property Transactions Commission which should have decided his case;

- at its session of 24 February 1994 the Real Property Transactions Commission had not been properly composed because three of its members had been represented by substitute members and the absent members had not properly informed the chairman of any reasons for their absence;

- the rules of procedure of the Real Property Transactions Commission, adopted by the Regional Government of the Tyrol on 8 February 1994, had only been published after the decision had been taken in his case;

- the appointment of the members of the Real Property Transactions Commission had not been published;

- the chairman of the Real Property Transactions Commission is not a person experienced in real property transactions matters.

3. The applicant also complains that the Regional Real Property Transactions Commission did not satisfy the requirement of impartiality under Article 6 para. 1 of the Convention because four of its members were civil servants belonging to the same division as the Real Property Transactions Officer. Although the Real Property Transactions Officer was not a superior of the above civil servants, indirect influence via their common superior could not be ruled out.

4. The applicant complains under Article 6 para. 1 of the Convention about the lack of an oral and public hearing before the Regional Real Property Transactions Commission.

THE LAW

1. The applicant complains about the fact that he could not acquire the farming estate at issue and relies on Article 1 of Protocol No. 1, (P1-1) which provides as follows:

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

The Commission observes that under the relevant domestic law a contract for transfer of ownership of real property can only take effect and entered into the land register if it has been approved by the competent real property transactions authority. The transfer of title does not occur before the entry into the land register. The applicant thus complains that he could not acquire property over the land at issue. However, Article 1 of Protocol No. 1 (P1-1) does not guarantee a right to acquire possessions (No. 11628/85, Dec. 9.5.86, D.R. 47, p. 270; Union of Atheists v. France, Comm. Report 6.7.94, para. 55; No. 21956/93, Dec. 22.2.95, unpublished; No. 23962/94, Dec. 12.4.96, unpublished).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the

meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains that the Real Property Transactions Commission could not be considered a "tribunal established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention and had not been competent to decide his case.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads 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 Commission finds that the proceedings at issue involved a determination of the applicant's civil rights or obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (see Eur. Court HR, Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 17, para. 34). Article 6 para. 1 (Art. 6-1) therefore applies.

The Commission recalls that it is the purpose of Article 6 para. 1 (Art. 6-1) requiring that tribunals shall be "established by law" that the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, Article 6 para. 1 (Art. 6-1) does not require the legislature to regulate every detail in this area by formal Act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation (cf. Zand v. Austria, Comm. Report 12.10.78, para. 69, D.R. 15, p. 80).

Having regard to the findings of the Constitutional Court in its decision of 27 February 1995, the Commission finds that the Real Property Transactions Commission, and not another body which had already ceased to exist, had been competent to examine the applicant's case.

The Commission observes that the applicant further raises various complaints concerning formalities of the appointment and composition of the Commission which decided his case on 24 February 1994, which the Constitutional Court, in its detailed decision, considered unfounded. In the Constitutional Court's view this Commission had been correctly composed, correctly summoned and had sufficiently precise procedural rules for dealing with the applicant's case.

The Commission therefore finds that there is no appearance of a violation of the applicant's rights under Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains that the Regional Real Property Transactions Commission did not satisfy the requirement of impartiality under Article 6 para. 1 (Art. 6-1) of the Convention because four of its members were civil servants belonging to the same division as the Real Property Transactions Officer. Although the Real Property Transactions Officer was not a superior of the above civil servants, indirect influence via their common superior could not be ruled out.

The Commission recalls that in the Sramek case the Court has found that where a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-a-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence (Eur. Court HR, Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 20,

para. 42).

The Commission observes, however, that in the present case the civil servants employed by the Office of the Regional Government were not in a subordinate position vis-a-vis the Real Property Transactions Officer. This is also accepted by the applicant. He argues, however, that because all these persons belong to the staff of the same body, the Office of the Regional Government, indirect influence on the civil servants sitting in the Regional Real Transactions Commission could not be ruled out. The Commission finds that this allegation, not substantiated by any other element, is not in itself sufficient for casting doubts on the independence of these civil servants (see Eur. Court HR, Ettl v. Austria judgment of 23 April 1987, Series A no. 117-A, p. 18, paras. 38-39).

The Commission therefore finds that there is no appearance of a violation of the applicant's rights under Article 6 para. 1 (Art. 6-1) of the Convention in this respect either.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the lack of an oral and public hearing before the Regional Real Property Transactions Commission.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of this complaint to the respondent Government.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaint about the lack of an oral and public hearing before the Regional Real Property Transactions Commission;

and, unanimously,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber