FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application No. 16922/90
by Josef FISCHER
against Austria

The European Commission of Human Rights sitting in private on 8 September 1992, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

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 11 May 1990 by Josef FISCHER against Austria and registered on 24 July 1990 under file No. 16922/90;

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

Having regard to the Commission's Partial Decision of 7 January 1991;

Having regard to the observations submitted by the respondent Government on 15 April and 4 September 1991 and the observations in reply submitted by the applicant on 13 June, 21 August and 10 October 1991;

Having regard to the hearing held on 9 September 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1932. He lives in Vienna and is represented before the Commission by Mr. M. Gnesda, a lawyer practising in Vienna.

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

The applicant holds both the western and eastern part of a tip

at Theresienfeld in Lower Austria. He owns the western part outright, having bought it in 1977. He holds the eastern part on a 25 year, assignable tipping lease dated 13 October 1975.

The application concerns the revocation of a licence to tip, as required under the Water Rights Act 1959 (Wasserrechtsgesetz).

The licence was originally granted to a company, Waxina, on 21 September 1972, and related to the tipping of distillation residue on the site. The parties disagree as to whether the licence relates to the whole of the site or only to the eastern part. On 30 July 1973 the licence was extended to cover domestic, commercial and industrial waste. Further conditions were added; the licence was expressed to be revocable pursuant to Section 21 of the 1959 Act. The new licence was granted both to Waxina and the then owners of the site.

On 13 October 1975 the applicant took a 25 year tipping lease from the owners of the site.

In 1977 the applicant purchased from the owners the western part of the site. Title was registered on 10 January 1979 and the relevant authorities were informed of the change of ownership, the rights under the licence of 30 July 1973 thereby passing to the applicant by operation of law.

The licence of 30 July 1973 was revoked on 5 December 1986 by the Provincial Governor (Landeshauptmann) of Lower Austria. The Government submit that the revocation affected only the eastern part of the site, pointing out that separate proceedings were subsequently instituted relating to the western part. Further, the Government point out that the Administrative Court (Verwaltungsgerichtshof) and the Vienna Regional Court (Landesgericht), in subsequent proceedings, agreed that the licence related to the eastern part of the site only. The applicant underlines that until 1980, the administrative authorities themselves accepted that the licence covered the whole of the tip, and adds that in criminal proceedings the courts accepted that the licence related to the entire site.

The reasons given for the revocation included that dangerously high levels of toxic substances had been found in the groundwater at the site (which forms part of an area constituting the groundwater reservoir for drinking water for over half a million people); barrels had been found both in the western and eastern (practically full) part of the site; certain of the barrels found contained non-authorised substances which could escape and mix with other substances; and the site was in any event unsuitable for tipping - even ordinary domestic waste should not be dumped.

The applicant's appeal to the Federal Minister of Agriculture and Forestry (Bundesminister für Land- und Forstwirtschaft) was rejected on 20 July 1987. The facts were accepted as established by the Provincial Governor. The Minister found, after a further expert's report, that it was absolutely necessary to close the tip to safeguard water supplies and the site could not technically be rendered safe.

On 6 August 1987 the applicant made a complaint to the Administrative Court in which he alleged that the decision of 20 July 1987 was unlawful. He requested that the decision be quashed, that the proceedings should have suspensive effect, and that the Administrative Court should hold an oral hearing. On 2 September 1987 the applicant made a constitutional complaint to the Constitutional Court (Verfassungsgerichtshof), alleging violation of, inter alia, Article 1 of Protocol No. 1 to the Convention and Article 6 para. 1 of the Convention. He complained that the administrative authorities did not grant his request for a hearing before them, and requested a hearing before the Constitutional Court.

The Constitutional Court refused the applicant's complaint on 14 March 1989 as it had no reasonable prospects of success and as no problems of constitutional law arose. No hearing was held.

The Administrative Court rejected the applicant's complaint on 21 September 1989 on the ground that it was ill-founded. The Court found that, regardless of the scope of the original licence, the revocation related to the whole of the original licence. It further found that there had been no procedural errors, that the revocation had taken place after due consideration of relevant factors and was in accordance with the law. The Court found that an oral hearing had not been necessary.

COMPLAINTS

The applicant complains that he was not able to have a hearing of the issue of revocation of his tipping licence before a court which complied with Article 6 para. 1 of the Convention. He states that the Provincial Governor and the Minister of Agriculture "have nothing in common with the independent and impartial court as stipulated in Article 6 para. 1 of the Convention". He considers that these bodies decide on the basis of political considerations.

As to the Administrative Court and Constitutional Court, the applicant states that both "only affirm or vacate the decisions appealed against"; the Administrative Court is in principle bound by the facts established by the administrative authorities. Neither court can review existing findings of fact at all. The applicant alleges a violation of Article 6 para. 1 of the Convention.

He initially also alleged a violation of Article 1 of Protocol No. 1 to the Convention in that the licence should only have been revoked for the eastern part of the tip in line with "the principle of minimum interference". He stated that he had spent a large amount of money in preparing the western part of the tip and that there were now no toxic substances there. He also saw a violation of Article 1 of Protocol No. 1 in that he could no longer perform the contracts he entered into with local authorities for the tipping of domestic waste, and in that he could not use the land as he wished. He had a certified opinion which put his loss at AS 18,000,000.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 May 1990 and registered on 24 July 1990.

On 7 January 1991 the Commission declared inadmissible the applicant's complaint under Article 1 of Protocol No. 1 to the Convention, and decided to request the parties to submit written observations on the admissibility and merits of the complaint under Article 6 para. 1 of the Convention.

The respondent Government submitted their observations on 15 April 1991 and the applicant submitted his on 13 June 1991 and 21 August 1991. On 4 September 1991 the Government submitted further observations, to which the applicant replied on 10 October 1991.

On 15 May 1992 the Commission decided to invite the parties to a hearing on the admissibility and the merits of certain aspects of the case. At the hearing, which was held on 8 September 1992, the parties were represented as follows:

For the Government:

Mr. Wolf OKRESEK, Federal Chancellery, Agent

Mr. Franz OBERLEITNER, Federal Ministry for Agriculture and Forestry, Adviser

Ms. Susanne BOIGNER, Federal Ministry for Foreign Affairs, Adviser

For the applicant:

Mr. Michael GNESDA, Lawyer.

THE LAW

The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that he was not able to have a hearing of the issue of the revocation of his tipping licence before a court which complied with Article 6 para. 1 (Art. 6-1) of the Convention.

In connection with the question of a public, oral hearing before the Administrative Court and/or Constitutional Court, the Government consider that the applicant failed to raise this issue in his original application to the Commission and that he has therefore failed to comply with the six months rule set out in Article 26 (Art. 26) of the Convention.

The Commission notes in this respect that the applicant, at page 12 of his original application, referred to his "right to be heard", and again, at pages 28 and 29 of the application, considered that the Constitutional Court cannot be considered as a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention whilst it "makes use of its power to reject a hearing on the merits of a petition". Even assuming that this did not amount to "properly" raising the question of an oral hearing in the initial submissions to it, the Commission recalls that the Convention organs are in any event free to attribute to the facts of a case a qualification in law different from that given by an applicant, or, if need be, may view the facts in a different manner (cf. Eur. Court H.R., Foti and Others judgment of 10 December 1982, Series A no. 56, p. 15 et seq., para. 44). The original complaint to the Commission set out the facts of the case, that is, the proceedings before the domestic authorities, including the absence of a hearing. It is clear from the applicant's replies to the Commission's questions that he thereby manifested his agreement with the approach of the Commission. It follows that this part of the application cannot be declared inadmissible for failure to comply with the six months rule.

The Government further consider that the applicant may not claim to be a victim of a violation of Article 6 para. 1 (Art. 6-1) of the Convention because the eastern part of the land, to which the tipping licence at issue related, had already been completely filled, with the result that the licence no longer had any effect, and that the revocation only related to the eastern part. The applicant contests this, submitting that until 1980 the Austrian administrative authorities accepted that the licence related to the whole of the site, and further submitting that in parallel criminal proceedings the courts assumed that the licence related to the whole of the site.

The Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention applies when there is a genuine and serious dispute concerning a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute may relate not only to the actual existence of a right, but also to its scope and the

manner of its exercise (cf. Eur. Court H.R., Skärby judgment of 28 June 1990, Series A no. 180-B, p. 36, para. 27). The Commission further recalls that the question whether the licence at issue in the present case extends to the whole of the site, or merely to the eastern part, was one of the questions before the Administrative Court. The Commission is not required to decide whether the licence attached to the whole or only part of the site: it is sufficient for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention that the question formed part of the factual elements of the case.

Further in connection with the applicability of Article 6 para. 1 (Art. 6-1) of the Convention in the present case, the Government submit that the revocation the applicant's licence under the Water Rights Act 1959 was a dispute relating only to the effects of civil rights and obligations, such that "the requirements resulting from the fact that a decision has to be taken by an impartial tribunal must be less severe in the non-traditional field of civil rights, including the present case". In any event, the Government consider that the control exercised by the Administrative Court in conjunction with that exercised by the Constitutional Court meets the requirements of Article 6 para. 1 (Art. 6-1) of the Convention. In connection with the absence of a public hearing, the Government refer to the Austrian reservation to Article 6 (Art. 6) of the Convention which provides as follows:

> "The provisions of Article 6 (Art. 6) of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law."

The Government submit that this reservation is valid and applies in such a way as to prevent the Commission from considering this question.

The applicant, referring to the case-law of the Convention organs, contends that the decision in the present case had a decisive influence on his public law tipping licence which, in turn, was a pre-condition for his business activities. He considers that the Constitutional and Administrative Courts do not, even taken together, fulfil the requirements of Article 6 (Art. 6), and submits that the failure to hold a public hearing is not covered by Austria's reservation to Article 6 (Art. 6) of the Convention.

The Commission finds that the application raises complex issues of law under the Convention, including questions concerning the Austrian reservation to Article 6 (Art. 6) of the Convention, the examination of which must be reserved to an examination of the merits.

The application cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE the remainder of the application without prejudging the merits of the case.

Secretary to the Commission	President of the Commission
(H. C. KRÜGER)	(C. A. NORGAARD)