AS TO THE ADMISSIBILITY OF

Application No. 19365/92
by Wilhelm FISCHER
against Austria

The European Commission of Human Rights sitting in private on 31 March 1993, the following members being present:

MM. J.A. FROWEIN, President of the First Chamber
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 29 October 1991 by Wilhelm FISCHER against Austria and registered on 17 January 1992 under file No. 19365/92;

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 applicant is an Austrian citizen born in 1940 and living in Vienna. He is represented by Mr. G. Pointner, a lawyer practising in Tulln.

It follows from the applicant's statements and the documents submitted that on 28 November 1988 the applicant was refused permission to erect a tool shed on agricultural property belonging to him, situated in the community of Königstetten. His appeal against this decision of the competent local authorities (Bezirkshauptmannschaft) was rejected by the office of the Regional Government of Lower Austria (Amt der NÖ Landesregierung) on 10 January 1989.

The refusal was based on sections 6 and 5 of the Nature Conservation Act (Naturschutzgesetz) according to which constructions are prohibited if they affect the beauty or particular environment of the site in question and if such negative effects could not be avoided, otherwise than by a prohibition.

According to the findings of the authorities, the applicant's premises are in a zone which falls under environmental protection (Landschaftsschutzgebiet).

The authorities based their decision on a nature conservation expert opinion according to which the applicant and his wife intended

to use the property in question as hobby gardeners and as beekeepers but for these purposes did not necessarily need the tool shed. In accordance with the expert opinion, the authorities considered that in view of its size and shape the shed resembled a weekend house and affected the beauty of the landscape which offered a harmonious view of meadows mingled with woods. As there were no other huts in the immediate vicinity, the shed in question disturbed this harmony and this could not be avoided by less stringent measures than the interdiction of the construction.

The authorities also referred to the opinion of an agrarian expert who denied that the applicant used the premises in question for agricultural purposes.

The applicant's constitutional complaint was not admitted by the Constitutional Court (Verfassungsgerichtshof) which on 2 October 1989 referred the matter to the Administrative Court (Verwaltungsgerichtshof).

On 22 March 1991 the Administrative Court rejected the applicant's appeal (Beschwerde) against the aforementioned decisions of the administrative authorities as being unfounded.

The Administrative Court stated that the agrarian expert's opinion was insufficient but considered however that the denial to approve the construction of the tool shed was justified for nature conservation reasons as demonstrated by the nature conservation expert. This expert had refuted the necessity of a tool shed for the purpose of beekeeping and thus for agricultural purposes and in accordance with his opinion the authorities had correctly decided that the shed in question would affect the beauty of the landscape.

As the applicant had constructed the shed before applying for an authorization, he was repeatedly ordered to remove the construction. On 20 September 1991 the office of the Regional Government of Lower Austria ordered the applicant to pay the sum of AS 43,696 for the purpose of having the construction removed. An appeal against this order is apparently still pending.

COMPLAINTS

The applicant complains that the refusal to grant him authorization for the toolshed violates his right to the peaceful enjoyment of his possessions as guaranteed by Article 1 of Protocol No. 1. He also complains that his civil right of whether or not he was entitled to construct and use a tool shed on his premises was decided by administrative authorities and not by an impartial tribunal in proceedings respecting the guarantees contained in Article 6 of the Convention.

THE LAW

1. The applicant has mainly complained that his right to the peaceful enjoyment of possessions, as guaranteed by Article 1 of Protocol no. 1 (P1-1), was violated, alleging that the shed which he is not allowed to maintain is necessary for agricultural purposes and therefore the authorities order to remove it constituted a disproportionate burden given that huts constructed on other premises were tolerated by the authorities.

Article 1 of Protocol No. 1 (P1-1) provides:

> "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 considers that the measure in question concerns a regulation of the use of the applicant's property. It first notes that the applicant has not contested that the measure in question was taken on the basis of domestic law. The Commission further considers that nature conservation is in the general interest. Finally, as far as the question of a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights is concerned (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 24 September 1982, Series A No. 52, p. 26, para. 69), the Commission notes that in the applicant's case the decisions complained of were reached at on the basis of an expert opinion which both denied the necessity of the shed in question as well as its compatibility with the purpose of the relevant legislation, namely nature conservation.

It can in these circumstances not be found that the competent authorities exceeded their margin of appreciation and imposed an intolerable, excessive burden on the applicant.

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

2. The applicant has further invoked Article 6 (Art. 6) of the Convention arguing that he did not have access to an independent tribunal which could have examined both the factual as well as the legal issues in the dispute relating to the expropriation matter.

The Commission notes that before the Administrative Court the applicant tried to show that contrary to the view expressed by a nature conservation expert and adopted by the authorities in his case he needed the shed for agricultural purposes and that the construction would not negatively affect the beauty of the landscape. However, the Commission notes that the Administrative Court discussed in detail the expert evidence and even considered the agrarian expert's opinion to be insufficient while on the other hand it found that the decision complained of was justified for nature conservation reasons as had been demonstrated by the nature conservation expert. In these particular circumstances there is nothing to show that the Administrative Court was in any way limited in its competence to examine the complaints raised by the applicant. It follows that the dispute on the question of whether or not the use of the applicant's property was lawfully restricted was eventually decided by an impartial tribunal.

Consequently there is no appearance of a violation of Article 6 (Art. 6) and to this extent the application has therefore likewise to be rejected as being manifestly ill-founded.

For these reasons the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (J.A. FROWEIN)