AS TO THE ADMISSIBILITY OF

Application No. 26252/95
by Josef FISCHER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
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 9 December 1994 by Josef FISCHER against Austria and registered on 19 January 1995 under file No. 26252/95;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 16 July 1996 and the observations in reply submitted by the applicant on 22 November 1996;

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.

On 9 December 1985 the applicant submitted proposals for the cleaning up of a refuse tip at Theresienfeld, in Lower Austria. The proposals were made with a view to a new licence being granted in place of a licence which had been withdrawn and in respect of which proceedings were pending (see Eur. Court HR, Fischer v. Austria judgment of 26 April 1995, Series A no. 312, "Fischer judgment"). Oral hearings took place on 7 July and 18 November 1986 before the lower administrative authority. On 6 February 1987 the applicant requested the case to be transferred to the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft), as the

lower authority had not decided within the fixed time-limit.

On 25 April 1988 the applicant's registration in the trade register under the style "Dkfm Josef Fischer KG" was cancelled. The Ministry was of the view that there was no longer an applicant, and stayed the proceedings. The applicant was informed on 15 April 1990. On 15 March 1991 the applicant advised the Ministry that he had in fact been operating the refuse tip in his own name, so that he was entitled to continue the proceedings. The Ministry rejected the application on 29 April 1991 on the ground that the applicant did not have the necessary status to pursue the claim. That rejection was quashed by the Administrative Court on 31 March 1992, and the case was returned to the Ministry.

On 15 January 1993 the Ministry dismissed the applicant's application of 9 December 1985 under the Water Rights Act 1975. The applicant made an administrative complaint to the Administrative Court (Verwaltungsgerichtshof).

The Administrative Court dismissed the administrative complaint on 21 June 1994. It recited the above background and noted that the official expert had considered the applicant's proposals unsatisfactory in 1986, before the matter was remitted to the competence of the Ministry. The Ministry had based its decision of 15 January 1993 largely on the consideration that waste technology had developed considerably since 1986, and that that alone would prevent approval being given to the applicant's proposals. Moreover, the tip was not in an appropriate site, as had been established in the proceedings concerning the withdrawal of the applicant's 1973 licence, and in the judgment in a criminal case of 18 March 1991. The Court noted that the Ministry had considered that the inadequacy of the site of the applicant's tip was generally known.

The Administrative Court recalled that polluting waste may only be stored where a licence has been obtained from the appropriate authority, and that such a licence may only be granted when water protection measures - including groundwater protection measures - comply with the current state of technology. Further, there must be no inadmissible effect on public interests or third party rights, and appropriate supervision measures must be made. The Administrative Court agreed with the applicant that the Ministry had not given any details of how waste technology had developed since 1986, but noted that the Ministry had also based its decision on the inappropriateness of the applicant's site. The Administrative Court here referred to its judgment of 21 September 1989 in the case concerning withdrawal of the applicant's licence (see Fischer judgment, pp. 8-11, paras. 12 and 13). The Administrative Court referred to a summary of an expert's report in that case. It accepted that those proceedings had been concerned with the withdrawal of a licence, rather than the present measures and request for a licence, but found that the report had dealt with the same tip and contained clear and reasoned statements which were relevant to the present case. The statements were admissible before the administrative authorities.

The Administrative Court found that, as a licence could only be granted where there was no danger of water pollution, and as such danger was present, the applicant's project could not be permitted. The complaint was dismissed pursuant to Section 42 (1) of the Administrative Court Act (Verwaltungsgerichtshofgesetz).

The applicant's request for an oral hearing was refused by reference to Section 39 (2) (6) of the Administrative Court Act.

COMPLAINTS

The applicant alleges a violation of Article 6 of the Convention in two respects. He alleges, first, that proceedings were not fair

because the Administrative Court relied on an expert's report which had been prepared for different proceedings. Secondly, he alleges that the absence of an oral hearing before the Administrative Court denied him the "public hearing" guaranteed by Article 6.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 December 1994 and registered on 19 January 1995.

On 28 February 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 16 July 1996. The applicant replied on 22 November 1996.

THE LAW

1. The applicant alleges a violation Article 6 para. 1 (Art. 6-1) of Convention as regards the failure by the Administrative Court to give the applicant the hearing he had requested.

Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, as follows:

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

As to the applicability of Article 6 (Art. 6) in the present case, the Government refer to their observations in the applicant's first case, and add that the present case does not relate to the revocation of a tipping licence, but to the prohibition of an illegal activity. The applicant points out that he was seeking a licence to transfer waste from one part of his tip to another. He adds that the outcome of the proceedings had a direct effect on his livelihood as the then current licence holder, and therefore determined his civil rights within the meaning of Article 6 (Art. 6) of the Convention.

As to the merits of the case, the Government point out that the applicant's administrative action raised no issues of fact which could have been clarified, such that the absence of an oral hearing did not violate Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant considers that the Government's comments on the question of an oral hearing are wrong in law - that is, that the case law of the Convention organs does not permit an oral hearing to be excluded on the ground that no facts were at issue - but that in any event there were factual matters in the case, in particular the question of the suitability of the location for carrying out the project to clear up the tip.

The Commission recalls that in its Fischer judgment, the European Court of Human Rights did not expressly consider the applicability of Article 6 (Art. 6) to the proceedings in question. The Commission, in its Article 31 Report in that case, found that Article 6 para. 1 (Art. 6-1) of the Convention applied to those proceedings as, inter alia, the revocation of the applicant's licence may well have had adverse effects on the value of the applicant's business and of the goodwill, and there were thus direct links between the revocation of the licence and applicant's commercial activities (Eur. Court HR, Series A no. 312, p. 45, para. 39).

The Commission further recalls that in the second Fredin case, the applicant, whose licence to extract gravel had earlier been revoked, applied for a special extraction permit, so that he could

comply with a plan restoration of the pit. There was no doubt in that case that Article 6 (Art. 6) applied to the proceedings which followed the refusal of the application (Eur. Court HR, Fredin (No. 2) v. Sweden judgment of 23 February 1994, Series A no. 283, p. 10, para. 18).

In the present case, too, the applicant made an application for permission to undertake works which could lead to the grant of a fresh tipping licence, and which had a clear link both with the applicant's previous proceedings and with his commercial activities.

The Commission therefore finds that Article 6 para. 1 (Art. 6-1) applies to the proceedings in question.

As to the question of the absence of an oral hearing before the Administrative Court, the Commission considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant also alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention as regards the proceedings before the Administrative Court were not fair. In particular, he complains that the Administrative Court relied on an expert's report which had been prepared for different proceedings.

The Commission first notes that Article 6 (Art. 6) is applicable in the present case.

The applicant's complaint as to the fairness of the proceedings is limited to a complaint that the Administrative Court, in its decision of 21 June 1994, referred to an expert's report in different proceedings.

The Commission recalls that questions of the admissibility of evidence are in principle for the domestic authorities: the Convention organs are concerned with the fairness of the proceedings, that is, the way the evidence is used in the proceedings, rather than whether a particular piece of evidence should or should not be admissible.

The mere fact that the Administrative Court found the expert's report admissible cannot therefore affect the fairness of the proceedings as such. Moreover, the present proceedings concerned the same tip as the former proceedings, the applicant had been a party to those former proceedings, the report had been discussed in the present administrative proceedings, and the applicant was able to comment on it in the (written) proceedings before the Administrative Court. The reference by the Administrative Court to that report therefore discloses no unfairness within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

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.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits, the applicant's complaint that he was deprived of a public hearing before the Administrative Court;

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO J. LIDDY

Secretary
to the First Chamber

President
of the First Chamber