AS TO THE ADMISSIBILITY OF

Application No. 27014/95
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 10 March 1995 by Josef FISCHER against Austria and registered on 7 April 1995 under file No. 27014/95;

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 8 November 1996 and the observations in reply submitted by the applicant on 4 December 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 background to the present case is set out in the judgment of the European Court of Human Rights in the applicant's first case (Eur. Court HR, Fischer v. Austria judgment of 26 April 1993, Series A no. 312, "Fischer judgment"). A second application, No. 26252/95, is pending before the Commission. The facts of the present case, as submitted by the parties, may be summarised as follows.

On 25 June 1991 the applicant made an application to the Lower Austrian Regional Government (Landesregierung). In it, he requested the Land to require the applicant's predecessors in title and the Austrian Federation (the Bund) to remove material which had been unlawfully

tipped at a site in Theresienfeld.

The Land replied on 25 July 1991. In the first part of its letter (Part I), it dismissed the application as made. In the subsequent parts (Parts II to VI) it required the applicant to execute specified works at the site by specific dates.

The applicant's appeal to the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft) was rejected on 20 December 1991, although time-limits for execution of the works were amended.

On 24 June 1992 the Constitutional Court (Verfassungsgerichtshof) declined to accept the applicant's constitutional complaint, pursuant to Article 144 para. 2 of the Federal Constitution. It found that the complaints were allegations that the ordinary law had been applied incorrectly, and remitted the case to the Administrative Court (Verwaltungsgerichtshof).

The Administrative Court gave its decision on the administrative complaint on 28 July 1994 (received by the applicant's representative on 12 September 1994). It quashed three minor aspects of the decision of the Ministry (concerning questions whether tipping at one part of the site was permitted; whether sewage slurry had to be removed, and the time-limits imposed) and dismissed the remainder.

In connection with the applicant's original application for measures to be taken against the Bund and the applicant's predecessors in title, the Administrative Court noted that the applicant's liability to measures under the provision at issue (Article 138 of the Water Rights Act - Wasserrechtsgesetz) was clear, and that it was not open to a person to whom such measures had been addressed to request similar measures against a third person. Moreover, it was not clear how the applicant could be a "person affected" by the acts of the third parties such as to be able to request measures.

In connection with the remainder of the administrative complaint, the Administrative Court continued that the question of the extent of the refuse-tipping licence granted in 1972 had been considered in its decision of 21 May 1991: as the administrative authorities had followed that decision, there was no reason to doubt the correctness of their decisions.

In reply to the applicant's contention that he should not be required to remove a specific type of waste, the Administrative Court noted that the original licence had prohibited the tipping of a series of types of waste. That list had been non-exhaustive, and the substance at issue was of a comparable potential danger to the ground water as the other substances on the list.

In reply to a complaint that the administrative authority had failed to establish who had tipped certain types of waste and when, the Administrative Court replied that the applicant was wrong in his contention that he was not responsible for part of the tip as it had been full when he took it over, because it was not in fact full at that time. Further, the Administrative Court noted that the responsibilities of the operator of a refuse tip were not limited to what was tipped, but extended to what was stored at the site. Therefore, the applicant was responsible for the contents of the tip (and could be required to remove it) even if he had not been responsible for putting it there.

Finally in connection with the applicant's liability for an order to execute works, the Administrative Court noted that the applicant had stored non-permitted substances at the site, and the storage of such substances is, itself, an administrative criminal offence. This gave the administrative authorities a further ground to order removal of

non-permitted waste.

As to an allegation by the applicant that the order to remove certain types of waste was also an order to remove permitted waste, as the two could not be separated, the Administrative Court noted that the mere fact that in removing non-permitted waste the applicant would also have to remove permitted waste, was not a fact which could affect the lawfulness of the authority's decision. In addition, the fact that carrying out the measures ordered might require further consents from other authorities could not affect the lawfulness of the measures under consideration.

Finally, the Administrative Court dealt with a complaint that the authorities had ordered measures under Article 138 (1) a of the Water Rights Act, rather than under the less stringent Article 138 (1) b (Article 138 (1) a requires removal; Article 138 (1) b requires only "appropriate measures"). It recalled that the expert at first instance had found that it was impossible to deal with the dangerous substances on site, and that only removal would suffice.

The Administrative Court refused to hold the hearing requested by the applicant, by reference to Section 39 (2) (6) of the Administrative Court Act (Verwaltungsgerichtshofgesetz).

COMPLAINTS

The applicant alleges a violation of Article 6 of the Convention in several respects. He claims that the whole of the proceedings were arbitrary and unfair. In particular, he claims that he was assured by his predecessors in title that the content of the barrels which were tipped was under constant review, that the principle of proportionality requires orders to remove waste to be financially tolerable, and that the "polluter pays" principle prevents the applicant from being required to remove all the non-permitted waste when his predecessors in title, too, were responsible.

The applicant sees a violation of Article 6 para. 1 in the absence of an oral hearing before the Administrative Court and the Constitutional Court, and repeats the complaints he made in his first application about the limited scope of review of the Administrative Court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 March 1995 and registered on 7 April 1995.

On 4 September 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 8 November 1996. The applicant replied on 4 December 1996.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention. He claims that the whole of the proceedings were arbitrary and unfair. In particular, he claims that he was assured by his predecessors in title that the content of the barrels which were tipped was under constant review, that the principle of proportionality requires orders to remove waste to be financially tolerable, and that the "polluter pays" principle prevents the applicant from being required to remove all the non-permitted waste when his predecessors in title, too, were responsible. He repeats the complaints he made in his first application about the limited scope of review of the Administrative Court.

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. ..."

The Commission first notes that it has not been suggested that the proceedings in the present case did not determine the applicant's "civil rights and obligations" within the meaning of Article 6 para. 1 (Art. 6-1). The Commission considers that the provision is applicable in the present case.

As to the scope of review afforded by the Administrative Court, the Commission recalls that even where an adjudicatory body determining disputes of "civil rights and obligations" does not comply with Article 6 para. 1 (Art. 6-1) in some respect, "no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (Art. 6-1)'". In assessing the sufficiency of a review, regard must be had to the way in which factual aspects are reviewed, and also to matters such as "the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal" (Eur. Court HR, Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 16, para. 40, and p. 17, para. 45). In connection with the "manner in which that decision was arrived at", the Commission must have regard to the proceedings which took place in arriving at the decision which was reviewed by the judicial body in question.

The administrative authorities in the present case considered all aspects of the case, but did not provide the guarantees of Article 6 para. 1 (Art. 6-1) of the Convention (see, by analogy, Eur. Court HR, Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268, p. 13, para. 29). They did, however, offer a number of guarantees, provided by the extensive procedural framework created by the Code of Administrative Proceedings (Allgemeines Verwaltungsverfahrensgesetz) and made applicable by the Introductory Act to the Administrative Proceedings Acts (Einführungsgesetz zu den Verwaltungs-verfahrensgesetzen). These texts deal with, inter alia, questions of who is entitled to be a party to administrative proceedings, the detailed procedure to be followed and the way in which investigations are to be carried out, and matters relating to time-limits and appeals.

The Administrative Court, which reviewed the authorities' decisions, had the requisite attributes of independence and impartiality, and the question is whether its scope of review satisfied the Convention requirement of "full jurisdiction".

The Administrative Court in the present case dealt with all the applicant's complaints to it. It was not required, or permitted, to establish the facts of the case for itself, but the very nature of "review" by a court precludes this. The test set up by the European Court of Human Rights in matters of this kind requires not that the body with the guarantees of Article 6 (Art. 6) itself decides every single issue, but that it review the decisions of the lower authorities. That is precisely what happened in the present case. Indeed, the Administrative Court in the course of its 24 page decision reviewed in some depth a number of findings of fact, considering for example that part of the tip had not been full when the applicant took it over, and that the applicant had stored non-permitted materials at the site.

Finally, the Commission notes that the subject matter of the dispute concerned the grant of a licence relating to waste disposal, an area in which citizens' conduct in typically regulated by the exercise of discretionary judgment by administrative authorities.

Accordingly, the Commission considers that the scope of review of the Administrative Court was sufficient to comply with Article 6 para. 1 (Art. 6-1).

As to the applicant's complaints concerning, in effect, the outcome of the proceedings and the tests of substantive law applied or not applied by the Administrative Court, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers, on this point, to its constant case-law (see eg. No. 458/59, X v. Belgium, Dec. 29.3.60, Yearbook 3, pp. 222, 236; No. 5258/71, X v. Sweden, Dec. 8.2.73, Collection 43, pp. 71, 77; No. 7987/77, X v. Austria, Dec. 13.12.79, D.R. 18, pp. 31, 45; No. 19890/92, Ziegler v. Switzerland, Dec. 3.5.93, D.R. 74, p. 234).

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.

2. The applicant also 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.

In the light of the judgment of the European Court of Human Rights in the case of Fischer v. Austria (judgment of 26 April 1995, Series A no. 312), the Government make no submissions on the admissibility of the complaint. The applicant, too, makes no further observations.

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.

For these reasons, the Commission, unanimously,

DECLARES 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
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber