PARTIAL

AS TO THE ADMISSIBILITY OF

Application No. 16922/90
by Josef FISCHER
against Austria

The European Commission of Human Rights sitting in private on 7 January 1991, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ RUIZ
Mrs. J. LIDDY
MM. J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

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 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, lawyer, of Vienna.

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 1959 Act").

The licence was originally granted to a company, Waxina, on 21 September 1972, and related to the tipping of distillation residue on the whole of the site. 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The licence of 30 July 1973 was revoked on 5 December 1986 by the Provincial Governor (Landeshauptmann) of Lower Austria.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 reasons given 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 the (practically full) eastern parts 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.

The Constitutional Court (Verfassungsgerichthof) 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.

The Administrative Court (Verwaltungsgerichthof) rejected the applicant's complaint on 21 September 1989 on the ground that it was ill-founded. The Court found that there had been no procedural errors, that the revocation took 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 also alleges a violation of Article 1 of Protocol No. 1 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 states that he has spent a large amount of money in preparing the western part of the tip and that there are now no toxic substances there. He also sees a violation of Article 1 of Protocol No. 1 in that he can no longer perform the contracts he entered into with local authorities for the tipping of the domestic waste, and in that he

cannot use the groundwater as he wishes. He has a certified opinion which puts his loss at AS 18,000,000.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention. The Commission considers that it cannot, on the basis of the file, determine whether there has been a violation of this provision without the observations of both parties.

The Commission therefore adjourns this part of the application.

2. The applicant also alleges a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention in respect of the revocation of the licence. This provision 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 recalls that Article 1 in substance guarantees the right of property. It comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property by enforcing such laws as they deem necessary in the general interest. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see Tre Traktörer judgment of 7 June 1989, Eur. Court H.R., Series A no. 159, para. 54, p. 21 with further references).

The Commission finds that, severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant, although he could no longer operate the site as a dump, retained ownership of the western part, and the eastern part, of which he remains lessee, is, in any event, practically full. There was accordingly no deprivation of property within the meaning of Article 1 of the Protocol (P1-1). The Commission considers, however, that the withdrawal of the licence constituted a measure of control of the use of property, which falls to be considered under the second paragraph of Article 1 of the Protocol (P1-1).

The applicant does not contest the lawfulness and purpose of the interference, and the Commission is not required to consider them.

As to the proportionality of the interference, the Commission recalls that the second paragraph of Article 1 of the Protocol (P1-1) has to be construed in the light of the general principle set out in the first sentence of this Article (P1-1). This sentence has been interpreted by the European Court of Human Rights as including the requirement that a measure of interference should strike a "fair balance" between the

demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole and hence also in the second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the above-mentioned Tre Traktörer judgment, p. 23, para. 59 with further references).

The Commission agrees with the applicant that the financial repercussions for him were serious and that the revocation of the licence was a severe measure.

However, the "burden" placed on the applicant as a result of the revocation of the licence, though heavy, must be weighed against the general interest of the community. In this context, States enjoy a wide margin of appreciation. The Commission notes that the dump formed part of a site which fed the groundwater reservoir for drinking water for over half a million people, that considerable quantities of toxic chemicals had been found on the site, and that the domestic authorities found the revocation of the licence (i.e. the total cessation of tipping at the site) was the only way to prevent further long-term damage to the groundwater and to enable the cleaning up operation to proceed effectively. Even if, as the applicant suggests, less severe measures could have been taken, the Commission, having regard to the wide margin of appreciation enjoyed by States in this context, to the legislative aim of Austrian policy for protecting groundwater supplies and to the extensive and increasing awareness of the importance to the community at large of protecting scarce natural resources, finds that the respondent State did not fail to strike a "fair balance" between the economic interests of the applicant and the general interest of Austrian society.

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 INADMISSIBLE
the complaint under Article 1 of Protocol No. 1;

unanimously,
DECIDES TO ADJOURN its examination of the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)