AS TO THE ADMISSIBILITY OF

Application No. 12484/86
by R.G.
against Austria

The European Commission of Human Rights sitting in private on 7 June 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. DANELIUS
G. BATLINER
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS

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 19 September 1986 by R.G. against Austria and registered on 13 October 1986 under file No. 12484/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to:

- the Commission's decision of 19 January 1989 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 30 March 1989, the observations in reply submitted by the applicant on 27 May 1989 and his further submissions of 19 February 1990;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, an Austrian citizen born in 1942 and residing in Vienna, is a practising lawyer.

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

The applicant owns an apartment house in the centre of Vienna. The premises on the ground floor are shops which have been let to two commercial firms since 1940 and 1958 respectively. At those dates

they came within the scope of the rent restrictions under Section 16 of the 1929 Rent Act (Mietengesetz, Fed. Law Gazette No. 210/1929) which provided for a freeze of rents by reference to the level of rent in 1914. On this basis the rent was fixed at AS 1,592.80 and AS 4,538.39 respectively. One lease contained a clause according to which the rent should be re-negotiated in case of abolition, the other in case of amendment of the legal restrictions on the amount of rent (Zinsanpassungsklausel).

By an amendment of the 1929 Rent Act which entered into force on 1 January 1968 (Mietrechtsänderungsgesetz, Fed. Law Gazette No. 281/1967) the rent restrictions were continued only for earlier tenancy contracts. New contracts were no longer subject to any restrictions on the amount of rent even in respect of premises which had previously been subject to rent control.

The 1929 Rent Act was subsequently abrogated and replaced by a new Rent Act (Mietrechtsgesetz, Fed. Law Gazette No. 520/1981) which entered into force on 1 January 1982. It involved an overall reform of the rent legislation and provided inter alia for the continued application of the previous rent restrictions in respect of existing tenancy contracts (Section 43 para. 2).

Following the introduction of the new legislation, different chambers of the Supreme Court (Oberster Gerichtshof) came to different conclusions as to the validity of rent adjustment clauses such as the ones contained in the above leases. In some decisions the view was expressed that such clauses were to be regarded as valid and the conditions for re-negotiating the rent on the basis of an appropriate amount were met by the introduction of the new legislation, notwithstanding the fact that the legislation for new leases had been liberalised already by the 1967 Act. In other decisions, however, the Supreme Court adopted the opposite view, namely that the clauses were invalid if they contained no indication of the criteria according to which the rent should be re-negotiated. The Government claim that the latter view was the Supreme Court's constant case-law.

In the summer of 1984 the applicant, invoking the rent adjustment clauses in the two agreements, asked his tenants to pay henceforth an appropriate amount of rent fixed in accordance with Section 16 para. 1 of the 1981 Rent Act. He claimed a monthly rent of AS 42,000 from one and AS 65,000 from the other tenant. The tenants refused, following which the applicant brought two separate actions against them before the District Court of Vienna City (Bezirksgericht Innere Stadt Wien) seeking consent orders modifying the rent agreements to the effect that they would have to pay the above sums as from 1 July 1984.

In the case concerning the tenancy agreement of 1940 where the clause referred to the abolition (Aufhebung) of legal rent restrictions, the District Court rejected the action by a decision of 14 February 1985. It accepted that a rent adjustmement clause was as such admissible, but considered that the conditions for such a clause were not met. Even in respect of new leases for business premises the Rent Act still contained restrictions, namely the criterion of appropriateness of the rent according to Section 16 para. 1. The restrictions concerning existing contracts continued to apply by virtue of Section 43 para. 2 of the Act. Moreover, the contractual clause was not sufficiently precise to allow the determination of a specific amount of rent. It therefore had to be regarded as invalid (als dem Vertrag nicht beigesetzt).

The applicant's appeal (Berufung) against this decision was rejected by the Regional Civil Court (Landesgericht für Zivilrechtssachen) of Vienna on 3 July 1985. It confirmed the District Court's view that a rent adjustment clause was admissible and found it not necessary to examine whether the 1981 Rent Act had

abolished the former rent restrictions or whether it had merely replaced them by new regulations. The contractual clause was invalid because it lacked sufficient precision concerning the amount of rent to be paid under a newly negotiated contract. Even if the parties had indicated more precise criteria, the agreement would not be compatible with Section 43 para. 2 of the 1981 Rent Act which was based on the principle that the freeze of rents continued to apply as regards existing contracts.

The Regional Court granted leave to appeal to the Supreme Court on points of law (Zulässigkeit der Revision), observing that the Supreme Court had not yet established a consistent case-law on the question of the interpretation of rent adjustment clauses and the required precision of such clauses having regard to the 1981 Rent Act.

In the second case, concerning the tenancy agreement of 1958 where the rent adjustment clause referred to the amendment (Abänderung) of the legal provisions on rent control, the District Court rejected the applicant's action by a decision of 15 January 1985, finding that the clause in question lacked sufficient precision.

The applicant's appeal against this decision was rejected by the Regional Court on 29 May 1985. It confirmed the District Court's view that the clause lacked sufficient precision indicating that it did not share the Supreme Court's opinion expressed in a decision of 29 February 1984 according to which such a clause may be supplemented by having recourse to the hypothetical will of the parties. The clause therefore had to be regarded as a mere declaration of intent which was not binding (unverbindliche Absichtserklärung). The increase of the rent was furthermore excluded by Section 43 of the 1981 Rent Act. The Regional Court granted leave to appeal to the Supreme Court also in this case.

The applicant lodged appeals on points of law (Revision) in both cases on 5 and 6 September 1985 respectively. The time-limits for filing these appeals expired on 20 September 1985 and thereafter the applicant could not amend or supplement the appeals. However, before the Supreme Court decided the appeals, an amendment to the 1981 Rent Act was adopted by Parliament on 12 December 1985 (Fed. Law Gazette No. 559/1985). It entered into force on 1 January 1986. The following new provision (Section 16a) was inserted in the 1981 Rent Act: "Invalidity of rent adjustment clauses and rent agreements

(1) Stipulations in a contract concluded before 1 January 1982 which provide for an increase of the basic rent in case of the amendment of the legal provisions concerning the amount of the basic rent shall be invalid. This also applies to agreements stipulating a duty to renegotiate the rent in case of the amendment of the legal provisions concerning the amount of the basic rent.

(2) If a rent agreement is being or has been concluded on the basis of a rent adjustment clause within the meaning of para. 1, the agreement shall be invalid and the former rent agreement shall continue to apply."

By virtue of Article IV of the Amendment Act the above new provision is applicable also in contentious and non-contentious court proceedings which at the time of the entry into force of the Act have not been finally concluded.

By application of these new provisions the Supreme Court rejected the applicant's appeals on 13 February and 16 January 1986 respectively, finding that notwithstanding its earlier case-law the rent adjustment clauses were now legally invalid. The decisions were served on the applicant on 28 March and 1 April 1986 respectively.

COMPLAINTS

The applicant complains that, by the application of the new Section 16a of the Rent Act, he has been subjected to an unjustified interference with his property rights, contrary to Article 1 of Protocol No. 1 to the Convention, and that he has furthermore been discriminated against, contrary to Article 14 of the Convention.

The applicant states that he was unable to raise the above complaints under the Convention in the domestic proceedings. As the new legislation was enacted only after the filing of his appeals to the Supreme Court and after the expiration of the time-limit for filing these appeals, he could neither challenge this legislation in his appeals nor suggest to the Supreme Court that the matter be referred to the Constitutional Court (Verfassungsgerichtshof) for constitutional review. As the new legislation was applied to the applicant by virtue of a judicial decision, it was also impossible to lodge a direct complaint against this legislation with the Constitutional Court, because this was excluded by the terms of Article 140 of the Federal Constitution (Bundes-Verfassungsgesetz).

PROCEEDINGS

The application was introduced on 19 September and registered on 13 October 1986.

On 19 January 1989 the Commission decided to give notice of the application to the respondent Government and to invite them, pursuant to Rule 42 para. 2 (b) of the Rules of Procedure, to submit written observations on the admissibility and merits.

The Government submitted their observations on 30 March 1989 and the applicant replied thereto on 22 May 1989.

Further examination of the case was adjourned pending the judgment of the European Court of Human Rights in the case of Mellacher and Others which also concerned rent restrictions under the 1981 Rent Act. On 19 December 1989 the Court pronounced its judgment in that case (to be published in Series A no. 169), finding that the rent restrictions in question did not violate Article 1 of Protocol No. 1 to the Convention.

On 20 December 1989 this judgment was transmitted to the applicant who was invited to state whether he wished to pursue his application. On 19 February 1990 the applicant replied that he maintained the application which in his view could be clearly distinguished from the Mellacher and Others case.

THE LAW

The applicant complains of violations of Article 1 of Protocol No. 1 (P1-1) to the Convention and of Article 14 (Art. 14) of the Convention. These provisions read as follows:

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

"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."

Article 14 (Art. 14) of the Convention:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The applicant claims that by the enactment of Section 16a of the Rent Act in 1985 he was retroactively deprived of his contractual right to re-negotiate the rents with his tenants following the abolition or amendment of the earlier legal restrictions. In his view this amounted to expropriation contrary to the first paragraph of Article 1 (Art. 1-1). The continued freeze of rent by virtue of Section 43 para. 2 of the Rent Act 1981 furthermore constituted a control of the use of his property which in the applicant's view was not in the general interest and thus infringed the second paragraph of Article 1 (Art. 1-2). He finally complains that the co-existence of frozen and freely negotiated rent contracts is discriminatory and therefore contrary to Article 14 (Art. 14) of the Convention.

The Government claim that the applicant failed to exhaust the domestic remedies in accordance with the requirements of Article 26 (Art. 26) of the Convention. He could have challenged Section 16a of the Rent Act directly before the Constitutional Court under Article 140 of the Federal Constitution in the special circumstances of his case where he could not plead unconstitutionality in the civil proceedings. He could also claim compensation under Article 13 of the Administrative Proceedings Consolidation Act 1925, invoking the alleged unconstitutionality of Section 16a of the Rent Act. Finally he could challenge the constitutionality of Section 43 of the Rent Act in the context of civil proceedings instituted with a view to fixing an appropriate amount of rent by the civil courts.

The applicant contests that these remedies were actually available or that they would have been effective.

The Commission may leave this point undecided, as the application is in any event manifestly ill-founded for the following reasons.

The applicant claims that there has been an expropriation contrary to the first paragraph of Article 1 of the Protocol No. 1 (P1-1) in that he was deprived of his contractual right to re-negotiate the rent.

The Government submit that this was only a partial aspect of the right of property which as such remained unaffected. Moreover, the re-negotiation clauses in the contracts concerned were not sufficiently precise and therefore would have been found invalid even if Section 16a of the Rent Act had not been adopted. The right to re-negotiate the rent therefore did not represent any financial value. Insofar as it was affected by Section 16a of the Rent Act, this was necessary to restore legal security in respect of divergent case-law of different chambers of the Supreme Court. The legislative measure furthermore constituted a regulation of the use of property in the general interest. Section 16a ensured continuity of the applicable rent for long-term leases of business premises so that the tenants could continue their commercial activities without the economic viability of their activities being undermined. This also served consumer interests in the preservation of existing commercial enterprises.

The Commission considers that, as in the case of Mellacher and Others (Eur. Court H.R., judgment of 19 December 1989, to be published in Series A no. 169, para. 44), the legislative measure complained of

in the present case did not amount to either a formal or to a de facto expropriation. There was no transfer of the applicant's property nor was he deprived of his right to use, let or sell it. The applicant was not even deprived of a part of his income from the property, but only prevented from negotiating a new rent by which his income would have increased. Accordingly, the measure must be qualified as a control of the use of property which falls to be considered under the second paragraph of Article 1 (Art. 1-2).

As regards the justification of this measure as being in the general interest, the Commission recalls the wide margin of appreciation which the domestic legislature enjoys in the field of housing. The Commission must respect the legislature's judgment as to what is in the general interest unless that judgment be manifestly without reasonable foundation (cf. Eur. Court H.R., Mellacher and Others judgment, loc. cit., para. 45 and James and Others judgment of 21 February 1986, Series A no. 98, p. 32 para. 46).

Having regard to the legal uncertainty concerning the admissibility and legal validity of rent re-negotiation clauses which existed prior to the enactment of Section 16a of the Rent Act, the Commission considers that this legislative measure was not manifestly without reasonable foundation. As its aim was primarily to restore legal security, it cannot be criticised that the law was given retroactive effect and that it also applied in cases pending before the courts. The new legislation was an authentic interpretation of the existing law.

Following legal invalidation of the rent re-negotiation clauses the applicant could not claim an increase of rent on the basis of these clauses and the previous rent restrictions applied, as stipulated in Section 43 para. 2 of the Rent Act. Insofar as the applicant complains of the impossibility to increase the rent for the business premises in question, he thus challenges the combined application of Section 16a and Section 43 para. 2 in his case.

The Commission notes that the relevant rent restrictions had existed since before the leases were concluded. Nevertheless, such restrictions and their continued application, despite a change in the general legal framework, require justification under the second paragraph of Article 1 to Protocol No. 1 (P1-1). As the Commission held in Application No. 8003/77 (Dec. 3.10.79, D.R. 17 pp. 80, 82) a person may claim to be a victim of pre-existing rent control measures if, and insofar as, he claims that he has to submit to an Act which is as such contrary to the Convention. The justification of such measures may in fact cease with the lapse of time and changing factual and legal circumstances.

However, in this respect, too, the State enjoys a wide margin of appreciation. In the Mellacher and Others case the Court held that a considerable reduction of contractually agreed rents may be justified under the second paragraph of Article 1 (Art. 1-2). Neither the fact that the original rents were agreed upon and corresponded to the then prevailing market conditions, nor the fact that the reductions were striking in their amount, prompted the Court to find that the measures in question were disproportionate. It accepted that the legislature could reasonably decide as a matter of policy that rents agreed according to market conditions were unacceptable from the point of view of social justice (cf. Mellacher and Others judgment, loc. cit., para. 56).

The present applicant complains that he is not allowed to raise the rent to the level which could be achieved on the market without the application of the restrictive legislation. The above principles established by the Court also apply here. It does not make a difference whether a restriction is newly imposed or maintained if only it pursues a legitimate aim and is not as such manifestly

unreasonable or disproportionate.

It is true that the rent restrictions complained of in the present case did not concern apartments as in the case of Mellacher and Others, but business premises for which other criteria may be appropriate as the applicant rightly observes. However, this does not mean that business premises may not be subjected to any rent restrictions. The Government claim that it was necessary to maintain the previous level of rent in order to preserve the economic viability of commercial enterprises in the interest both of these enterprises and of consumers. The Commission accepts that within its wide margin of appreciation the Austrian legislature could reasonably consider these aims to be in the general interest, and that no disproportionate burden was thereby placed on the applicant.

It remains to be examined whether the measure was discriminatory and contrary to Article 14 (Art. 14) of the Convention as alleged by the applicant. The Government submit that it is reasonable to differentiate between rent contracts according to the date when they were concluded, and to provide for different legal regimes for new contracts and for contracts which have been concluded a long time ago.

The Commission notes that the legal restrictions complained of apply to every lease contracted at a time when the rents were frozen. There is no distinguishing criterion based on the personal status of the house-owner. Also the present applicant will not be subjected to such restrictions in respect of contracts which date from a different period. There is consequently no appearance of discrimination contrary to Article 14 (Art. 14) of the Convention.

The applicant's complaints must accordingly be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)