AS TO THE ADMISSIBILITY OF

Application No. 16789/90
by Johanna GEYER
against Austria

The European Commission of Human Rights (Second Chamber) sitting in private on 13 October 1993, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO

Mr. K. ROGGE, 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 6 June 1990 by Johanna GEYER against Austria and registered on 28 June 1990 under file No. 16789/90;

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 facts of the case, as submitted by the applicant, may be summarised as follows.

The application was introduced by Mrs. J. Geyer, an Austrian national born in 1914 and residing in Steyrermühl (Austria). Before the Commission she was represented by Mr. K. Meingast, a lawyer practising in Gmunden (Austria).

Mr. Meingast informed the Commission that the applicant died on 2 February 1991 and that in the meantime the estate had been assigned to Mrs. G. Hutter as heir. Mrs. Hutter wishes to pursue the application.

A. Particular circumstances of the case

On 28 June 1974 the Upper Austria Regional Governor (Landeshauptmann) expropriated land owned by the applicant and her husband, who died meanwhile on 25 May 1987, for the purpose of constructing a new road.

On 18 November 1974 the Federal Minister for Construction and Technique (Bundesminister für Bauten und Technik) dismissed the applicant's appeal. The applicant did not file a complaint with the Constitutional Court (Verfassungsgerichtshof) or the Administrative Court (Verwaltungsgerichtshof).

On 29 October 1985 the applicant applied to the Regional Governor for retransfer of property over the expropriated land invoking Section 20a of the Federal Roads Act (Bundesstraßengesetz). She submitted that no construction work had so far been undertaken on the expropriated land, although 11 years had passed since the expropriation had taken place. This constituted an inappropriately long delay in the realisation of the planned road construction.

On 25 April 1986 the Regional Governor decided to interrupt the proceedings for retransfer of property and instructed the Federal Road Administration (Bundesstraßenverwaltung) to finish the road construction by 30 September 1987.

On 12 May 1986 the applicant appealed against this decision to the Federal Minister for Economic Affairs (Bundesminister für wirtschaftliche Angelegenheiten).

On 12 October 1987 the applicant lodged a complaint (Säumnisbeschwerde) with the Administrative Court against the inactivity of the Federal Minister for Economic Affairs in dealing with her appeal of 12 May 1986. The Administrative Court ordered the Minister to decide on the applicant's appeal.

On 18 January 1988 the Minister dismissed the applicant's appeal and fixed 30 July 1988 as the new time limit for finishing the construction works.

On 7 March 1988 the applicant introduced a complaint with the Constitutional Court.

On 27 September 1988 the Constitutional Court refused to entertain the applicant's complaint and transferred it to the Administrative Court.

On 26 January 1989 the applicant filed a supplementary complaint. She submitted that she had acquired an unconditional claim for retransfer of the expropriated land as the construction work had not been accomplished by the time limit set by the Regional Governor. The extension of the time limit by the Minister was unlawful. She further submitted that the Minister had in his decision referred to several appeals filed by her in administrative proceedings without identifying them. The Minister, therefore, could not conclude that the Federal Roads Authority was not responsible for the delays in the construction works. She also submitted that a note by the Federal Roads Authority according to which she had hindered the finishing of the road construction works had not been communicated to her.

On 14 September 1989 the Administrative Court dismissed the applicant's complaint. The Court held that the time limit for finishing the construction works had not expired on 30 September 1987, as it had been prolonged by the Minister's decision. This prolongation was lawful because the Regional Governor's decision had not come into force. The Court further held that it was not in dispute that the applicant did file several appeals in this matter and that this was the reason why the aim of the expropriation could not be achieved. The authority therefore was entitled to conclude that it was not the expropriator's fault if the expropriated land could not be used for the purpose of the expropriation so far. The applicant could not be blamed for filing these appeals; however, they had to be taken into account when deciding whether the Federal Roads Administration was responsible for the delays. The authorities were not bound to enumerate all the applicant's appeals because the applicant herself would know which appeals she had filed. Lastly as regards the complaint about a note by the Federal Roads Authority not having been communicated to her, she did not argue at which other conclusion the authority could have arrived if this alleged procedural mistake had not occurred.

Therefore, the Court did not consider this a relevant procedural mistake.

The Court's judgment was served on the applicant on 7 December 1989.

B. Relevant domestic law

Section 20a para. 1 of the Federal Roads Act (Bundesstraßengesetz) reads as follows:

<Translation>

> "If the expropriated land or a part of it has not been used for the purpose of the expropriation, the expropriated person may request a written decision on the retransfer of the property over this land or the part concerned. Such a request may be filed with the authority which decided on the expropriation after three years have elapsed from the time the decision on the expropriation had come into force. In deciding on the request the authority has to apply the provisions on the expropriation mutatis mutandis (Section 20). A claim for retransfer of property is heritable and saleable; it becomes extinct if the expropriated person does not file his claim with the authority within one year after having been invited by the expropriator to do so, but at the latest ten years after the expropriation order has come into force. The authority has to set a reasonable time limit for the realisation of the project, if the expropriator furnishes prima facie evidence that the use of the expropriated land for the purpose of the expropriation is imminent, or that, for reasons for which he is not responsible, it cannot be used for the time being, but will be used in the near future. The request has to be dismissed if the expropriator complies with the time limit. It is, however, inadmissible to set a time limit if the fault for not putting the land to its appropriate use lies with the expropriator."

<German>

> "Wird der Enteignungsgegenstand ganz oder zum Teil nicht für den Enteignungszweck verwendet, so kann der Enteignete die bescheidmäßige Rückübereignung des Enteignungsgegenstandes beziehungsweise dessen Teiles nach Ablauf von drei Jahren ab Rechtskraft des Enteignungsbescheides bei der Behörde beantragen, die unter sinngemäßer Anwendung der im Enteignungsverfahren zu beachtenden Bestimmungen (Paragraph 20) zu entscheiden hat. Dieser Anspruch ist vererblich und veräußerlich; er erlischt wenn der Enteignete dieses Recht nicht binnen einem Jahr ab nachweislicher Aufforderung durch den Enteigner bei der Behörde geltend macht, spätestens jedoch zehn Jahre nach der Rechtskraft des Enteignungsbescheides. Macht der Enteigner glaubhaft, daß die Verwendung des Enteignungsgegenstandes für den Enteignungszweck unmittelbar bevorsteht oder die Verwendung aus Gründen, die der Enteigner nicht zu vertreten hat, vorläufig nicht möglich ist, aber in absehbarer Zeit erfolgen wird, hat die Behörde dem Enteigner eine angemessene Ausführungsfrist zu bestimmen. Bei deren Einhaltung ist der Antrag auf Rückübereignung abzuweisen. Eine Fristsetzung ist jedoch in jedem Fall unzulässig, wenn den Enteigner an der bislang nicht entsprechenden Verwendung ein Verschulden trifft."

COMPLAINTS

1. The applicant complains that the proceedings were not conducted before an independent and impartial tribunal established by law as

required by Article 6 para. 1 of the Convention.

2. The applicant complains further under Article 6 para. 1 of the Convention that the administrative authorities which decided on her request were biased. She submits that the same authorities which were responsible for the construction works and delays occurring therein also decided in the proceedings on claims for retransfer of property, in which they had to assess whether delays which occurred in the construction works were attributable to them.

3. The applicant also complains under Article 6 para. 1 of the Convention that the proceedings before the Administrative Court were unfair. She submits that in these proceedings she was opposed by the Regional Governor and the Minister for Economic Affairs, though both were organs of the Republic of Austria. She complains in particular that she had to pay procedural costs to both the Regional Governor and the Minister.

4. Lastly, she complains under Article 1 of Protocol No. 1 that her right to property has been violated by the refusal of the retransfer of ownership over her expropriated property in unfair proceedings.

THE LAW

1. The applicant complains that the proceedings were not conducted before an independent and impartial tribunal established by law as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention provides, in so far as relevant for the case, 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. ..."

a) The Commission first notes that the original applicant died in 1991 after having introduced the application, that on 5 July 1991 her heir was put into possession of the estate and that this heir wishes to pursue the application. The Commission notes further that the present application concerns proceedings for the retransfer of ownership over expropriated land.

The Commission, having regard to its case-law, finds that the pecuniary nature of the claim allows that claim to be considered transferable (No. 10474/83, Dec. 6.5.86, D.R. 47 p. 106).

b) The Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention applies only to disputes over "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. Article 6 (Art. 6) does not in itself guarantee any particular content for "rights and obligations" in the substantive law of the Contracting States (see Eur. Court H.R., Lithgow and others judgment of 8 July 1986, Series A no. 102, p. 70, para. 192).

The Commission further recalls that the civil character of the right at issue is not to be interpreted solely by reference to the respondent state's domestic law and that it is enough that the outcome of the proceedings should be decisive for private rights and obligations (Eur. Court H.R., Allan Jacobsson judgment of 25 October 1989, Series A no. 163, p. 20, para. 72).

The Commission has already held that expropriation proceedings, notwithstanding their qualification under domestic law, were decisive for the very substance of the private rights and obligations of the person concerned in that these proceedings determined whether or not

he remains owner of the real property (Firma F.M. Zumtobel and Martin Zumtobel v. Austria, Comm. Report 30.6.92, para. 56 et seq., to be published in D.R.).

Having regard to Section 20a of the Federal Roads Act, the Commission notes that the applicant's claim for retransfer of property is under domestic law a public law claim. Section 20 a of the Federal Roads Act provides for a right of an expropriated person to retransfer of property over his land, subject to the fulfilment of the conditions laid down in this provision. The Commission notes further that the applicant had filed a request for retransfer of property and that in the following proceedings the fulfilment of the conditions laid down in Section 20a of the Federal Roads Act was at issue.

The Commission considers that if the applicant's claim had been successful she would again have become owner of the land. The right of ownership, however, is without doubt a civil right. Thus, the outcome of the proceedings in which the applicant was involved before the Administrative Court were decisive for her private rights and obligations.

Furthermore, the proceedings concerned a genuine and serious dispute ("contestation") over the return of ownership over previously expropriated land; hence, the dispute related to the actual existence of a "right" (see Eur. Court H.R., Bodén judgment of 27 October 1987, Series A no. 125-B, pp. 39 et seq., paras. 28 et seq.; Firma F.M. Zumtobel and Martin Zumtobel v. Austria, Comm. Report 30.6.92, paras. 56 et seq.).

The Commission thus finds that the applicant's claim for retransfer of property must be considered as being of a civil nature for the purpose of Article 6 para. 1 (Art. 6-1) of the Convention and concludes that this provision is applicable to the proceedings at issue.

The applicant complains under Article 6 para. 1 (Art. 6-1) that she did not have access to an independent and impartial tribunal.

The Commission considers that the procedures before the Regional Governor and the Federal Minister for Economic Affairs do not satisfy the requirements of Article 6 para. 1 (Art. 6-1) of the Convention. However, these requirements are satisfied if subsequently the applicant's civil rights have been determined before judicial bodies that have full jurisdiction (Eur. Court H.R., Zumtobel judgment of 21 September 1993, para. 29, to be published in Series A no. 268A; Ettl and others v. Austria, Comm. Report 3.7.85, Eur. Court H.R., Series A no. 117, p. 23, para. 78).

The Administrative Court fulfils the requirements of Article 6 para. 1 (Art. 6-1) of the Convention in matters which are not exclusively within the discretion of administrative authorities and where the Administrative Court considers the submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts. (Eur. Court H.R., Zumtobel judgment of 21 September 1993, paras. 31 and 32).

The Commission notes that in the present case it was not in dispute that the applicant had filed several appeals in administrative proceedings relating to the construction works on the expropriated land and that this was the reason why the purpose of the expropriation could not be realised. The primary issue in the proceedings before the Administrative Court was whether the resulting delay had to be attributed to the authorities. The second issue was whether the Federal Minister for Economic Affairs could lawfully extend the time limit for finishing the construction work. These were, however, essentially questions of law, which were duly considered by the Administrative Court.

As a result, the Commission considers that the requirements of a "tribunal" within the meaning of Article 6 para. 1 (Art. 6)1) of the Convention have been complied with. 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 further complains under Article 6 para. 1 (Art. 6-1) of the Convention that the administrative authorities which decided on her request were biased. She submits that the same authorities which were responsible for the construction works and delays occurring therein also decided in the proceedings on claims for retransfer of property, in which they had to assess whether delays which had occurred in the construction works were attributable to them.

The Commission recalls that when a dispute over civil rights and obligations has been successively examined by different organs, Article 6 para. 1 (Art. 6-1) does not demand that the first of these satisfy the requirements of that provision (Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 22 et seq., para. 51; No. 11179/84, Dec. 9.7.86, D.R. 48 p. 207 at 223).

The Commission notes that the applicant introduced a complaint with the Administrative Court against the decisions taken by the allegedly biased Regional Governor and Federal Minister for Economic Affairs. The Commission further notes that the Administrative Court reviewed the findings of the authorities as to whether delays which had occurred were attributable to the authorities or not. The applicant does not complain that the Administrative Court was biased.

The Commission thus finds that the applicant's claim was decided by a tribunal whose impartiality the applicant does not question. In these circumstances there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings before the Administrative Court were unfair. She submits that in these proceedings she was opposed by the Regional Governor and the Minister for Economic Affairs though both were organs of the Republic of Austria. She complains in particular that she had to pay procedural costs to both the Regional Governor and the Ministry.

The Commission recalls that the right to a fair hearing implies that the applicant be able to present her case under conditions which do not place her under a substantial disadvantage vis-a-vis her opponent (No. 9938/82, Dec. 15.7.86, D.R. 48 p. 21).

As the applicant does not substantiate that, apart from higher costs of procedure, she was put in such an unfavourable situation, the Commission cannot find that the mere participation of two organs as parties opposing the applicant in the proceedings at issue infringed her right to a fair hearing as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that also this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Lastly, the applicant complains under Article 1 of Protocol No. 1 (P1-1) that her right to property has been violated by the refusal of the retransfer of her expropriated property in unfair proceedings.

The Commission notes that the applicant was no longer owner of the land as the property had already been transferred to the Federal Road Administration and that her claim for retransfer was dismissed by the authorities and the Administrative Court on the ground that the conditions laid down by Section 20a of the Federal Roads Act were not met.

In these circumstances the Commission considers that the applicant has failed to show that she actually had a claim to retransfer of property under domestic law.

It follows that also this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)