AS TO THE ADMISSIBILITY OF

Application No. 21426/93
by Anton HÄMMERLE
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 16 November 1992 by Anton HÄMMERLE against Austria and registered on 25 February 1993 under file No. 21426/93;

Having regard to:

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

- the Commission's decision of 12 October 1994 to declare the application partly inadmissible and to communicate the remainder to the respondent Government for observations on its admissibility and merits;

- the observations submitted by the respondent Government on 10 January 1995 and the observations in reply submitted by the applicant on 21 March 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen. He lives in Mäder in Vorarlberg and is represented before the Commission by Mr. W. L. Weh, a lawyer practising in Bregenz. The facts of the application, as submitted by the parties, may be summarised as follows.

The applicant owned two egg production units, one in Ötz in the Tyrol with a capacity of 16,000 laying hens, and the other in Mäder, Vorarlberg, with a capacity of 27,000 laying hens.

On 12 August 1986 the applicant made an application to the Federal Ministry for Agriculture and Forestry for "an additional quota

of 16,000 laying hens in Mäder" and for permission for a "site transfer of these hens". In his request he explained how he wished to cease production at Ötz because it was situated some 100 kilometres from Mäder, he was unable to run both sites himself and because the tenant who had a lease of the Ötz site had terminated the lease because of the success of a frozen food business and a restaurant. He pointed out that he would continue to deliver eggs from Mäder to Ötz.

On 3 March 1988 the Ministry, after calling on the reports required by law and giving the applicant the opportunity to comment, dismissed the applicant's requests by reference to Section 13 of the Livestock Act 1983 (Viehwirtschaftsgesetz). Section 13 of the Livestock Act (so far as relevant) provided that consent for the keeping of over 10,000 laying hens was only to be granted if farm production was not endangered and if conditions in the relevant markets appeared stable.

The applicant's constitutional complaint of 27 April 1988 was dismissed by the Constitutional Court (Verfassungsgerichtshof) on 20 June 1989. The Constitutional Court had no doubt that the aims pursued by the Livestock Act - protection of domestic livestock markets, stabilisation of prices for meat animals and animal products, and the maintenance of the quality of supplies - were legitimate concerns of the legislator. The Livestock Act, in accord with the Agriculture Act 1976, aimed at maintaining a viable community of family farms which could ensure the supply of basic foodstuffs. The Constitutional Court did not disagree with the legislator's assumption that large scale animal production in the hands of a few businesses resulted in the loss of a large number of farms. The Constitutional Court also considered that the legislator had not interfered disproportionately with the constitutionally guaranteed right to commercial freedom, because it provided for large numbers of animals to be kept if certain conditions (no danger to farm production and stable markets) applied. Section 13 was therefore not in conflict with the right to commercial freedom.

In connection with the right to property, the Constitutional Court found a sufficient "public" or "general" interest to justify any restrictions. In connection with Article 6 of the Convention, the Constitutional Court considered that the review given by the Administrative Court (Verwaltungsgerichtshof) was adequate, at any rate when what was at issue, as here, was not disputes as to civil rights themselves, but merely disputes the effect of which could affect such rights. The Constitutional Court transferred the case to the Administrative Court on 4 August 1989 and the applicant completed his administrative complaint on 19 October 1989. The Ministry submitted observations in reply on 9 January 1990.

On 29 April 1992 the Administrative Court quashed the decision of the Ministry of 4 March 1988 for unlawfulness. It found that the Ministry had been wrong to consider questions of a transfer of the Ötz business to Mäder, because the business in Ötz was a separate entity and, as such, the permission which had been granted for the keeping of 16,000 laying hens there was only able to be operated from that site. Accordingly, it was wrong to consider the question of a transfer in connection with Section 13 of the Livestock Act because that provision could not apply to a transfer. The case was remitted to the Ministry for a new decision, without consideration of the applicant's further points.

On 16 December 1992 the Ministry took a second decision in the case. It rejected the applicant's requests in relation to transfer because the Ministry had no jurisdiction, and it dismissed the request for a new quota of 16,000 additional laying hens in Mäder.

COMPLAINTS

The applicant alleges violation of Article 6 para. 1 of the Convention in connection with the length of the proceedings and - insofar as they dealt with the question of the refusal to permit him to transfer his quota from Ötz to Mäder - their fairness.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 November 1992 and registered on 25 February 1993.

On 12 October 1994 the Commission decided to declare the application partly inadmissible and to communicate the remainder to the respondent Government for observations on its admissibility and merits.

The Government's written observations were submitted on 10 January 1995. The applicant replied on 21 March 1995.

THE LAW

1. The applicant alleges a violation of Article 6 (Art. 6) of the Convention in connection with the length of the proceedings. Article 6 (Art. 6) provides, so far as relevant, as follows.

> "1. 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 Government submit that the applicant has not exhausted domestic remedies in that he could have applied to the Administrative Court by way of a challenge to alleged failure on the part of the Minister to take a decision in time (Säumnisbeschwerde), both in respect of the initial decision of the Minister of 4 March 1988 and also in respect of the second decision of 16 December 1992. They consider that the proceedings did not determine "civil rights" because the key issue is whether a decision by an authority (as the relevant example) interfered with property rights, which is not the case here. They argue that the proceedings were delayed before the Minister by the applicant's repeated objections, and they note that the Minister is required to obtain comments from outside bodies. They consider that the period spent before the courts of public law was not excessive, having regard to the importance and scope of the tasks of those courts.

The applicant considers that a Säumnisbeschwerde could not possibly have accelerated the proceedings. He complains about the fact that the Minister is required to obtain outside reports (which delays the proceedings), and notes the inconsistency in the time taken for proceedings which deal with the transfer of live hens and second-hand machinery which has a limited life.

The Commission notes that the Government consider that the proceedings did not determine any rights which were civil, but it is not required to determine this question - nor the question whether the applicant has exhausted domestic remedies - as the complaint is in any event inadmissible for the following reasons.

Article 6 (Art. 6) of the Convention relates to proceedings which determine disputes concerning rights within the meaning of Article 6 (Art. 6), and this includes disputes over rights which can be said, at least on arguable grounds, to be recognised under domestic law (see, for example, Eur. Court H.R., Éditions Périscope judgment of 26 March 1992, Series A no. 234-B, p. 64, para. 35). Article 6 (Art. 6) cannot, however, apply to a period before there is a "dispute" within the meaning of the case-law to Article 6 (Art. 6) (see, for example, the approach of the Court in Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, p. 29, para. 88, and Eur. Court H.R., Schouten and Meldrum judgment of 9 December 1994, Series A no. 304,

para. 62, where the Court took as the starting point the date on which the respective applicants lodged an objection to a State organ and made requests for confirmation).

In the present case, the applicant applied to the Minister for Agriculture and Forestry for an additional quota of 16,000 hens in Mäder and for permission for a "site transfer" of hens from Ötz to Mäder. At that stage, there cannot have been a "dispute" between the applicant and the Minister because the Minister had done nothing with which the applicant could disagree.

The Minister's decision of 4 March 1988 was an administrative act which was capable of forming the subject matter of a dispute, and that dispute was put to the Constitutional Court on 27 April 1988, when the applicant made his constitutional complaint. The period to be considered by the Commission for the purposes of assessing whether the proceedings were determined within a "reasonable time" therefore begins on 27 April 1988.

The proceedings ended on 23 December 1992, when the applicant's representative received the Minister's decision of 16 December 1992.

The period to be considered by the Commission is therefore a little under four years and eight months.

In that period, the Constitutional Court dismissed the applicant's constitutional complaint on 20 June 1989 and transferred the case to the Administrative Court on 4 August 1989. The applicant then completed his administrative complaint on 19 October 1989, and the Ministry submitted observations in reply on 9 January 1990. The Administrative Court then quashed the Minister's decision of 4 March 1988 on 29 April 1992. A second decision was taken on 16 December 1992.

The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the case-law of the Convention institutions (the complexity of the case, the applicant's conduct and that of the competent authorities), and in the light of the circumstances of the case, which in this instance calls for an overall assessment (cf. Eur. Court H.R., Cesarini judgment of 12 October 1992, Series A no. 245-B, p. 26, para. 17).

The only time in the present case in which there was apparently a complete standstill in the proceedings was the period of some two years and three months before the Administrative Court, between the Minister's comments on the applicant's administrative complaint of 9 January 1990 and the decision of 29 April 1992. That period, for which the Government are responsible, appears rather long taken in isolation, but having regard to the overall length of the proceedings before the two courts of public law and again before the Minister, and to the absence of any special aspect which would call for a particularly speedy determination of the case, the Commission considers that the delays which occurred do not appear substantial enough for the total length of the proceedings to be regarded as excessive.

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 that the proceedings by which he was refused permission to transfer his chickens from Ötz to Mäder were unfair. He claims in particular that the Minister rejected the applicant's knowledge of the poultry market in favour of the official expert, and that the Administrative Court, by agreeing with the Minister in this respect, compounded the error. He also contends that the Administrative Court failed to deal with the problem of the effect on a producer of a law which prohibited transfer of a business from one site to another. The applicant again refers to Article 6 (Art. 6) of

the Convention.

In respect of the applicant's first complaint under the present head, that the proceedings before the Administrative Court were unfair because the applicant was not accepted as having the same qualifications to comment on the poultry market as the official expert, the Commission finds that the complaint is not relevant to the proceedings as they relate to the transfer of the quota, because the inability to transfer the quota was a question of law and not a matter connected to the credibility or qualifications of the expert and the applicant respectively.

As to the fairness of the proceedings in relation to effect of a prohibition on transfer of quotas, the Commission recalls that in its partial decision of 12 October 1994, it declared inadmissible the applicant's complaints under Article 1 of Protocol No. 1 (P1-1) concerning the failure of Austrian law to permit the transfer of his quota. The question of the effect on producers of a prohibition on quota transfer is not a matter which could be at issue before the Administrative Court, which could determine questions of whether the Livestock Act had been properly applied but not questions of the compatibility of the that law with constitutional law, including the Convention. The failure of the Administrative Court to consider the effect of a prohibition of quota transfer on producers cannot therefore raise issues as to the fairness of the proceedings.

It follows that this part of the application is also 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 REMAINDER OF THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (C.L. ROZAKIS)