AS TO THE ADMISSIBILITY OF

Application No. 23792/94
by Thomas HOCHSTAFFL
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 15 May 1996, 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 11 January 1994 by Thomas HOCHSTAFFL against Austria and registered on 5 April 1994 under file No. 23792/94;

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, a retired farmer, is an Austrian citizen born in 1930. He resides in Gerlos. In the proceedings before the Commission he was initially represented by Mr. G. Mory, a lawyer practising in Salzburg and is now represented by Messrs. E. Proksch and D. Schimmer, lawyers practising in Vienna.

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

The applicant is the owner of agricultural land situated in Gerlos (Tyrol) which comprises, inter alia, parcel No. 500/4 of the Gerlos land register (Grundbuch). The applicant inherited the land from his uncle J.H. in 1957, who had acquired the land from the Federal Forestry Administration (Bundesforste) in 1956. The applicant's land is in the vicinity of the Gerlos hydroelectric power station. A pipe-line which brings water from the Schwarzachbach to the Gmünd storage lake is running under parcel No. 500/4. The power station was built between 1939 and 1948.

In 1990 the Tauernkraftwerke AG (TKW), the owner of the Gerlos power station, requested the Federal Minister for Agriculture and Forestry (Bundesminister für Land- und Forstwirtschaft) to a grant

permit under the Water Act (Wasserrechtsgesetz) for construction works relating to the barrage, which comprised, inter alia, the replacement of the pipe-line under the applicant's land. On 7 March 1991 the Minister granted the permit. Since no complaint with the Constitutional Court (Verfassungsgerichtshof) or Administrative Court (Verwaltungs-gerichtshof) was lodged, this decision became final.

On 16 November 1992 the TKW requested the Minister to issue an order against the applicant to tolerate the construction works on his land and relied on Section 72 of the Water Act.

Under Section 72 of the Water Act the owner of land had to tolerate its temporary use for the purpose of constructing and maintaining waterworks on his land. This comprises in particular the entering of his property, the storing of building materials, transport to and from the construction site and the examination of the ground to the extent which is strictly necessary. Prejudice caused to the owner of land by these measures must be compensated.

The applicant opposed the request. He submitted that the replacement of the pipe-line could only take place under a new servitude agreement since the old servitude would not cover the use of a pipe-line of a larger bore and, in any event, no servitude for a pipe-line encumbering parcel No. 500/4 had been entered in the land register.

On 15 January 1993 the Minister ordered the applicant pursuant to Section 72 of the Water Act to tolerate that a strip of nine metres on both sides of the pipe-line be used for the purpose of replacing the pipe-line on parcel No. 500/4. The Minister also instructed the TKW to terminate the works before 31 March 1993, to restore the land to its previous state after the termination of the construction work and to compensate the applicant for any damage caused by the construction works.

The Minister found that the construction permit of 7 March 1991 had become final and included the replacement of the pipe-line which was partly situated on the applicant's land. However, the permit only concerned the pipe-line itself and did not entitle the TKW to the temporary use of the land in its vicinity during the time of the construction works. Under Section 72 of the Water Act the owner of the land had to tolerate its temporary use for the purpose of constructing and maintaining waterworks on their land. Since it was apparent that for the replacement of the pipe-line a strip of land on both sides of the pipe-line on the applicant's land had to be used temporarily, the request had to be granted.

As regards the applicant's argument that the TKW had failed to conclude an agreement with him the Minister noted that the construction permit provided that the TKW had to conclude private agreements with certain owners of land, however this clause only applied in a case where no previous (servitude) agreements existed and was therefore not relevant to the applicant's case. As regards the applicant's argument that no servitude for a pipe-line encumbered his land, the Minister found that even if a servitude for a pipe-line had not been formally entered in the land register, the TKW had acquired such a servitude by prescription (Ersitzung). As regards the applicant's argument that the existing servitude would not cover a pipe-line of a larger dimension, the Minister found that the difference in size would be minimal and the mere replacement of an existing pipe-line did not affect the nature and purpose of the servitude.

On 27 January 1993 the construction works for the pipe-line on the applicant's land started.

On 4 February 1993 the applicant introduced a civil law action against the TKW before the Zell District Court (Bezirksgericht). He requested the court to order the TKW to refrain from further trespassing on his land and to stop the construction works. He also requested the court to issue a temporary injunction. The applicant submitted that the TKW was not the holder of a servitude for a pipe-line on his land and therefore had no right to carry out construction works thereon.

On 5 February 1993 the applicant filed a complaint against the Minister's order of 15 January 1993 with the Administrative Court (Verwaltungsgerichtshof). He submitted that Section 72 of the Water Act was not a sufficient legal basis for interfering with his property rights. Whether a third person had a right to use his land was a civil law issue and the Minister could not oblige him to tolerate the constructions works. He also requested that suspensive effect be granted to his complaint.

On 22 February 1993 the applicant lodged an action for interference with possession (Besitzstörungsklage) against the TKW in which he requested the District Court to find that the TKW had trespassed on his possession.

On 26 February 1993 the District Court dismissed the applicant's action of 4 February 1993. The Court found that in 1954 the Federal Forest Administration and the TKW had concluded a servitude agreement, which concerned, inter alia, the pipe-line on the applicant's land. It had been forgotten to enter the servitude in the land register when parcel No. 500/4 had been created in 1956 and transferred to J.H. In 1991 a construction permit which concerned the replacement of the pipe-line on the applicant's land had been issued and on 15 January 1993 an order against the applicant obliging him to tolerate construction works on his land had been made. In this order the Minister found that the TKW had acquired a servitude to construct and maintain a pipe-line on the applicant's land by prescription. The Minister had been competent to examine the preliminary question whether a servitude for a pipe-line encumbered the applicant's land and the District Court was therefore bound by the minister's decision of 1993. The District Court concluded that in such circumstances the TKW had succeeded in proving that they had the right to interfere with the applicant's property and to carry out construction works on his land.

The applicant appealed against this judgment.

On 23 March 1993 the Administrative Court refused to grant suspensive effect. It found that the prejudice which the applicant would allegedly suffer, namely a deterioration of the quality of his land due to the construction works, could be compensated in money, while a suspension of the construction works could result in serious damage to the power lines.

On 7 May 1993 the District Court dismissed the action for interference with possession. The District Court noted that when parcel No. 500/4 was registered in the land register, the servitude was not registered but the Register Court's decision referred to it. The applicant, who inherited the farm from J.H., had grown up on the farm and worked there since 1945. When the applicant, 14 years ago, wanted to level the land at issue the TKW had opposed and explicitly referred to the pipe-line in the ground. Therefore, the applicant's action was unfounded because he had known for at least 14 years of the existence of the pipe-line under his land and had not objected to it. Thus the TKW had used the applicant's land for a pipe-line since at least 14 years with his knowledge. The TKW had to be considered as a lawful possessor (im ruhigen Rechtsbesitz) and had not interfered in an unlawful manner with the applicant's possession.

Against this decision also the applicant appealed.

On 22 June 1993 the Administrative Court discontinued the proceedings on the applicant's complaint. It found that the subject of the Minister's decision was only the applicant's obligation to tolerate the construction works. However, these works had meanwhile been terminated and applicant was no longer under the obligation to tolerate any measures taken by the TKW. What the applicant therefore sought was an abstract review of the lawfulness of the decision which was not the task of the Administrative Court.

On 20 August 1993 the Innsbruck Regional Court (Landesgericht) dismissed the applicant's appeal against the District Court's decision of 7 May 1993. It found that the construction works on the applicant's land concerned the replacement of an already existing pipe-line and could not be qualified as interference with possession. The TKW already enjoyed a protected right of possession.

On 9 September 1993 the Innsbruck Regional Court dismissed the appeal against the District Court's judgment of 26 February 1993. The Regional Court found that the civil courts were not bound by the Minister's order of 15 January 1993. It also found that for the purpose of the present proceedings it was not necessary to resolve the question whether the TKW actually had a servitude for a pipe-line on the applicant's land since the applicant had only attacked the replacement of the pipe-line and the works related thereto, but had not requested a declaration by the courts that no servitude was encumbered his land or that the pipe-line should be removed therefrom. The applicant's action was unfounded because Section 72 of the Water Act was a sufficient legal basis for the carrying out the construction works. Under this provision the TKW had been entitled directly to use the applicant's land for the construction works and did not need to rely on the Minister's decision of 15 January 1993. This judgment was served on the applicant on 8 October 1993.

On 21 December 1993 the Supreme Court (Oberster Gerichtshof) rejected the applicant's appeal on points of law against the Regional court's judgment of 9 September 1993. It found that no further appeal laid against the Regional Court's judgment.

COMPLAINTS

1. The applicant complains that his claim that the TKW should not interfere with his property without being authorized to do so had not been properly decided by the courts in fair proceedings as required by Article 6 para. 1 of the Convention. He submits that the TKW laid the pipe-line on his land although no servitude had been entered in the land register which would have allowed it to do so. The Minister's order of 15 January 1993 was arbitrary, since Section 72 of the Water Act was not a legal basis for granting the TKW the right to have permanently a pipe-line on his land. The Administrative Court refused to take a decision on his complaint, the District Court found itself bound by the Minister's decision and the Regional Court incorrectly applied Section 72 of the Water Act.

2. He further complains that the laying of a pipe-line on his land violated his right to property as protected by Article 1 of Protocol No. 1.

THE LAW

1. The applicant complains that his claim that the TKW should not interfere with his property without being authorized to do so had not been properly decided by the courts in fair proceedings as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, provides as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. ..."

The Commission notes that the dispute between the applicant and the TWK related to the question whether or not the latter interfered lawfully with the applicant's property and possession rights. The Commission therefore finds that these proceedings involved a determination of the applicant's civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

As regards compliance with this provision, the Commission observes that the applicant is the owner of a parcel of land under which a pipe-line, owned by the TKW, runs. In 1991 the TKW was granted a construction permit to replace this pipe-line by a new one. In January 1993 the competent Minister issued an order against the applicant to tolerate construction works on his land in connection with the replacement of the pipe-line. In February 1993 the applicant introduced court proceedings before the ordinary courts, in which he claimed that the TKW unlawfully interfered with his property and possession and had no right to carry out construction works on his land. The District Court dismissed the applicant's action holding essentially that the Minister's order empowered the TKW to interfere with the applicant's property and that it was bound by this decision. The Regional Court, upon appeal, found that the interference with the applicant's property right was lawful since the TKW could rely on Section 72 of the Water Act. Moreover, it found that the courts need not decide the question whether the TKW actually had a servitude for pipe-line on the applicant's land as he had not requested the court to declare that no servitude was incumbent on his land. The Administrative Court discontinued proceedings against the Minister's order of January 1993 since the construction works on his land had meanwhile been terminated.

The Commission finds that the Austrian courts in two different proceedings carefully examined the applicant's claims against the TKW and dismissed them as unfounded, as the TKW was entitled under Section 72 of the Water Act to use the applicant's land. The applicant does not argue that in these proceedings any specific procedural requirements had been disregarded by the courts which could have given rise to a violation of Article 6 (Art. 6) of the Convention. He essentially attacks the interpretation by the domestic courts of the substantive provisions of the Water Act.

However, in this respect the Commission recalls that under Article 19 (Art. 19) of the Convention its sole task is to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention. It is not competent to examine applications concerning errors of law or fact allegedly committed by the competent national authorities, to whom it falls, in the first place, to interpret and apply domestic law (No. 11826/85, Dec. 9.5.89, D.R. 61 p. 138; No. 19890/92, Dec. 3.5.93, D.R. 74, p.234).

The Commission therefore finds that there is no appearance of a violation of the applicant's rights under Article 6 para. 1 (Art. 6-1) of the Convention. 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 that the laying of a pipe-line on his land violated his right to property as protected by Article 1 of Protocol No. 1 (P1-1).

Article 1 of Protocol No. 1 (P1-1) reads 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 observes that the question whether the TKW was entitled to use the applicant's land was a question which was determined by the Austrian courts in the actions introduced by the applicant against the TKW. In this respect, the Commission recalls that the mere fact that an individual was the unsuccessful party to private litigation concerning the determination of his civil rights and obligations is not sufficient to engage state responsibility for an alleged violation of Article 1 of Protocol No. 1 (P1-1) (No. 11949/86, Dec. 1.12.86, D.R. 51 p. 195 at p 211).

Moreover, even assuming that the construction permit of 7 March 1991 by which the TKW was allowed to replace the existing pipe-line on the applicant's land amounted to an interference with the applicant's property rights, the Commission observes that the applicant failed to introduce a complaint with the Constitutional Court or Administrative Court against this decision.

The Commission finds that, in the circumstances of the present case, the impugned Austrian court decisions do not disclose any appearance of a violation of the rights protected by Article 1 of Protocol No. 1 (P1-1).

It follows that also 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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

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