AS TO THE ADMISSIBILITY OF

Application No. 31698/96
by J. F.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 14 January 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

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 4 April 1996 by J. F. against Austria and registered on 3 June 1996 under file No. 31698/96;

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 1940 and residing in Grünau (Upper Austria). Before the Commission he is represented by Mr. K. Meingast, a lawyer practising in Gmunden (Upper Austria).

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

A. Particular circumstances of the case

In February 1989 the applicant bought two parcels of land situated in Scharnstein (Upper Austria) of a surface of approximately 1,9 hectares which are forest. Subsequently he replaced a forest hut of a surface of 5 per 6 metres by one of a surface of 6 per 8,20 metres. The new hut was erected at a distance of 20 metres from the place where the old one stood.

On 5 October 1992 the Gmunden District Administrative Authority (Bezirkshauptmannschaft) ordered the applicant to remove the forest hut

and to re-plant trees on the place where it is situated. The Authority found that in 1991 the applicant had erected the forest hut without any permission and that an expert for forestry had found that given the size of the applicant's forest and its accessibility (Aufschließung) a hut was not necessary for the cultivation of his forest. The applicant therefore used forest soil for other purposes than forestry, which was prohibited by Section 17 para. 1 of the Forest Act (Forstgesetz).

On 28 December 1992 the applicant appealed. He submitted that on his land there had been a forest hut before, and that he had merely replaced this hut by a more modern one. On the soil he used for the construction of the hut there had not been trees but gravel. Furthermore, in view of his health conditions, he needed the hut for cultivating the forest. He lived 10 kilometres away from the forest, suffered from pain in the back and had to lie down after working in the forest. He also needed a place to change his clothes and to keep his tools. The forest hut was therefore absolutely necessary for the cultivation of his forest.

On 13 September 1993 the Upper Austria Regional Governor (Landeshauptmann) dismissed the applicant's appeal. He observed that on 17 June 1993 a further report by an official expert for forestry had been obtained. According to this expert opinion the applicant's hut was not strictly necessary for the purpose of cultivating his forest in view of the forest's geographic situation, its size and its average yield of 20 Fm. timber (Festmeter = cubic metre of solid timber) per year. In the Regional Governor's view the question of necessity of the hut had to be assessed on the basis of objective criteria, like the ones used by the expert. Whether in view of his health situation the applicant found it useful to use a hut was therefore of no relevance. Moreover, the hut was built and equipped in a manner which indicated its use as a weekend house. The Regional Governor therefore concluded that the building of the hut on the applicant's land constituted use of forest soil for other purposes than forestry (Rodung) which was prohibited by Section 17 para. 1 of the Forest Act. Accordingly the applicant had to remove the hut and replant trees on the place where it had been built.

On 3 November 1993 the applicant filed a complaint with the Constitutional Court (Verfassungsgerichtshof), complaining that the order to remove the hut violated his right to property as guaranteed by the Federal Constitution.

On 28 November 1994 the Constitutional Court declined to deal with the applicant's complaint for lack of prospect of success and, upon the applicant's request, referred the case to the Administrative Court (Verwaltungsgerichtshof) on 31 January 1995.

On 24 March 1995 the applicant supplemented his complaint to the Administrative Court and also requested that an oral hearing be held.

On 25 September 1995 the Administrative Court decided on the applicant's complaint. Insofar the order concerned the removal of the forest hut the Administrative Court dismissed the complaint. It found that according to the findings of the expert the hut had not been strictly necessary for cultivating the applicant's forest and had given rather the impression of a weekend house. The Administrative Court did not accept the applicant's argument that Section 17 of the Forest Act should be understood as to allow for buildings in forests which were useful for the cultivation of forests. Rather, it was in accordance with its previous case-law that only such building may be erected which are strictly necessary for the cultivation of a forest. Insofar the order concerned the re-cultivation of the soil on which the hut is erected the Administrative Court quashed the order. It noted that in the course of the administrative proceedings the applicant had maintained that before he had erected the hut no trees had been standing on the ground but that it had been covered with gravel.

Taking these arguments into account the Administrative Court found that the authorities had failed to establish whether the order for planting trees on this particular piece of land had been necessary. The Administrative Court also rejected, in accordance with Section 39 para. 2 (6) of the Administrative Court Act (Verwaltungsgerichtshofgesetz), the applicant's request for an oral hearing. Referring to the European Court of Human Rights judgment in the Fischer case (Fischer v. Austria judgment of 26 April 1995, Series A no. 312), the Administrative Court found that also Article 6 of the Convention did not require the holding of a hearing in the present case because the essential facts had not been in dispute and the legal questions to be decided had already been resolved in the Administrative Court's previous case-law.

On 2 April 1996 the Regional Governor decided again on the applicant's appeal against the District Administrative Authority's order of 5 October 1992, insofar it concerned the order to re-plant trees and quashed this part of the order. The Regional Governor referred to a further expert opinion by an expert for forestry who had found that while planting trees on this part of the applicant's land was not necessary for the preservation of the forest, in view of its position at the end of a forest road the space could be used as a turning area for tractors and lorries.

On 28 November 1995 the Gmunden Administrative Authority warned the applicant that if he did not remove the hut within three months, it would arrange for the hut to be removed at the applicant's expense. On 29 September 1997 the Gmunden District Administrative Authority ordered the enforcement of the order to remove the forest hut (Ersatzvornahme) and requested the applicant to advance a sum of 290 000 ATS for the works to be carried out by a private firm.

B. Relevant domestic law

Section 39 para. 1 of the Administrative Court Act (Verwaltungs-gerichtshofgesetz) provides that the Administrative Court is to hold a hearing after its preliminary investigation of the case where a complainant has requested a hearing within the time-limit. Section 39 para. 2 (6), which was added to the Act in 1982, provides however:

[Translation]

> "Notwithstanding a party's application, the Administrative Court may decide not to hold a hearing when
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> ...
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> 6. It is apparent to the Court from the written pleadings of the parties to the proceedings before the Administrative Court and from the files relating to the prior proceedings that an oral hearing is not likely to contribute to clarifying the case."

[German]

> "Der Verwaltungsgerichtshof kann ungeachtet eines Parteiantrages nach Abs. 1 Z. 1 von einer Verhandlung absehen, wenn
>
> ...
>
> 6. die Schriftsätze der Parteien des verwaltungsgerichtlichen Verfahrens und die dem Verwaltungsgerichtshof vorgelegten Akten des Verwaltungsverfahrens erkennen lassen, daß die mündliche Erörterung eine weitere Klärung der Rechtssache nicht erwarten läßt."

COMPLAINTS

The applicant complains that in the proceedings under the Forest Act the Administrative Court did not hold a public hearing as required by Article 6 para. 1 of the Convention. He further complains that the order to remove the forest hut violated his right to property as guaranteed by Article 1 of Protocol No. 1. Lastly he complains that this order also violated his right to respect for his home as guaranteed by Article 8 of the Convention.

THE LAW

1. The applicant complains that in the proceedings under the Forest Act the Administrative Court did not hold a public hearing as required by Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of this complaint to the respondent Government.

2. The applicant further complains that the order to remove the forest hut violated his right to property and relies on Article 1 of Protocol No. 1 (P1-1), which provides as follows:

> "(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.
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> (2) 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 prohibition under Section 17 of the Forest Act to use forest land for other purposes than forestry on which the order to remove the applicant's forest hut was based constitutes a measure for the control of use of property within the meaning of paragraph 2 of Article 1 of Protocol No. 1 (P1-1). However, the decision to order the removal of the applicant's hut on the ground that this building was not strictly necessary for the purpose of cultivating the forest - the only reason for which the erection of a building in a forest is permitted - did not alter the existing authorised use of the land. In this respect the Commission observes that the applicant's land was a forest and not designed as building land. The Commission also recalls that, as a general rule, the rights secured by Article 1 of Protocol No. 1 (P1-1) cannot be invoked in order to extend property rights in domestic law by requiring planning permissions for purposes which have never been permitted (No. 19178/91, Dec. 14.10.93, unpublished). Thus, the decisions complained of do not disclose any appearance of a violation of the applicant's right to property as guaranteed by Article 1 of Protocol No. 1 (P1-1).

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.

3. Lastly the applicant complains that the order to remove the forest hut also violated his right to respect for his home as guaranteed by Article 8 (Art. 8) of the Convention.

However the Commission is not required to determine whether or

not the facts alleged by the applicant disclose any appearance of a violation of Article 8 (Art. 8) of the Convention as, under Article 26 (Art. 26) of the Convention it may only deal with a matter after all domestic remedies have bee exhausted according to the generally recognised rules of international law.

The Commission recalls that to exhaust domestic remedies the person concerned must have raised before the national authorities, at least in substance, the complaint he puts before the Commission (No. 16810/90, Dec. 9.9.92, D.R. 73, p. 136; Eur. Court HR, Ahmet Sadik v. Greece judgment of 15 November 1996, Reports-V, no. 20, para. 30). The Commission observes that the applicant in his complaint to the Constitutional Court neither referred expressly to Article 8 (Art. 8) of the Convention nor relied on this provision in substance.

It follows that this part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the complaint as regards the lack of a public hearing in the proceedings on the applicant's request under the Real Property Transaction Act;

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber