AS TO THE ADMISSIBILITY OF

Application 18991/91
Ferdinand and Maria-Thérésia KOHLER
against Austria

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

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA

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 8 October 1991 by Ferdinand and Maria-Thérésia KOHLER against Austria and registered on 24 October 1991 under file No. 18991/91;

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 applicants are the mayor of Andelsbuch and his wife. They are both Austrian citizens and own and exploit an agricultural estate in Alberschwende-Müselbach, Austria. Before the Commission the applicants are represented by Mr. Ludwig Weh, a lawyer practising in Bregenz, Austria.

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

On 6 March 1989 the applicants applied to the Vorarlberg Regional Real Property Transactions Commission (Landesgrundverkehrs-kommission), hereinafter the Property Commission, for permission to buy another, almost adjacent, forestry estate of 5251 m2 for a price of approx. 400.000 ÖS, i.e. 76 ÖS per m2.

As a result of the application, the Property Commission had an official expert, Dipl. Ing. Z., Head of the Forestry Department of the Agricultural Authority (Leiter der Abteilung Forstwesen bei der Agrarbezirkbehörde) of Bregenz, valuate the property. The valuation, dated 25 August 1989, indicated that the land was worth 125.740 ÖS based on its yield capacity, i.e. 24 ÖS per m2, with a possible increase of 10 ÖS per m2 if certain opening up measures were taken. In his reply the applicant criticised the valuation inter alia as regards the price of wood chosen, which was based on the very low wood prices in 1990 following important wind fellings, as a basis for the valuation and the absence of any consideration of sales of similar properties in

the region. The applicants furthermore pointed at their personal interests in acquiring the property, which was conveniently located, in order to leave a viable estate to their 19 year old son.

By decision of 10 April 1990 the Property Commission refused the application after having received the negative opinion of the local real estate commission (Grundverkehrs-Ortskommission) of Alberschwende and of the two local valuers, because of the purchase price which it found excessive in the light of the provisions contained in section 5, para. 1, and section 6 sub-para. (d) of the Vorarlberg Real Property Transaction Act (Grundverkehrsgesetz, LGBl. Nr. 18/1977, as amended LGBl 63/1987). These provisions read :

(translation)

> "An acquisition in accordance with section 1, para. 1, sub-para. (a) may only be approved if it promotes the general interest in having an efficient farming structure and, to the extent this is not possible to achieve, if it does not go against the creation or maintenance of an economically sound structure of small and middle-size farming entities, and furthermore, if the acquisition concerns land to be used exclusively for forestry purposes, only if it does not go against the general economic well-being of the country."
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> "The authorisation is in particular to be refused if
> ...
>
> (d) the price considerably exceeds the ordinary local price of the property in question."

The applicant appealed to the Vorarlberg Real Property Transactions Senate (Grundverkehrssenat), a body presided over by a former member of the Land Government and consisting of two judges, four members nominated by special interest organisations (the regional agricultural chamber (Landwirtschaftskammer), the industrial chamber (Kammer der gewerblichen Wirtschaft) and the chamber for workers and employees (Kammer für Arbeiter und Angestellte) and one member nominated by the regional association of municipalities (Voralberger Gemeindeverband)) and an employee of the Land Government as rapporteur.

In their appeal the applicants stressed the high quality of the new estate and the fact that several regions in the vicinity had accepted prices of the same, and even higher, level as that in question in the case at bar.

A new valuation dated 5 July 1990 and carried out by Dipl. Ing. D., the responsible forest officer at the Vorarlberg local government (Leiter der Forstabteilung beim Amt), stated the value of the land to be 172,000 ÖS or 33 ÖS per m2, calculated on the basis of yield. The forest officer pointed out that the increase in value was only due to the planned construction of a new road which would facilitate access to the land.

At the oral hearing held on 25 July 1990, the applicants criticised the new valuation on the ground that it had not attempted any comparison with other similar transactions in the region as they claimed it should have done according to constant case-law in valuation matters. Stating that they had not had time to organise a private valuation in time for the hearing, the applicants requested the Senate to be allowed two months to submit a private valuation of the property.

On 8 August 1990 the Senate rejected the appeal.

The Senate found no reason to grant the applicant's request to be allowed to submit a private valuation. On the one hand the Senate had already two valuations at its disposal; on the other, the applicant

had already had sufficient time to submit a private valuation since he had been aware of the first instance valuation already in March 1990 and since he had received the second official valuation already two weeks before the oral hearing held on 25 July 1990. In addition, neither the General Administrative Procedure Act (Allgemeines Verwaltungsverfahrengesetz) nor the Real Property Transactions Act contained any right for the parties to submit such requests. It was for the Senate to decide, ex officio, about the procedure to be followed (section 39, para. 2 of the General Administrative Procedure Act).

As to the official valuations made, it found no reason to question either the impartiality or competence of the valuers or the conclusions they had reached. It pointed out that the higher value mentioned in the latest certificate was caused by the fact that the property had been improved after the first valuation had been made and that the wood price used by both valuers was the average price over the last few years and not the low prices occasioned by the wind fellings in 1990 as the applicants had alleged. It found that the ordinary local price of the land was best represented by the last valuation and noted that the purchase price exceeded this price by more than 100 %. It concluded that the requested acquisition permission could not be granted as this would, as had been found already at first instance, increase the price level in the region so much that small and middle size farm units would no longer be able to acquire the necessary land at economically justifiable prices.

The applicants availed themselves of their right of appeal to the Constitutional Court (Verfassungsgerichthof). They first complained about a lack of independence on the part of the official valuers pointing out that the first instance valuer was hierarchically subordinate to the President of the Property Commission, who, in his turn, was subordinate to the second instance valuer. None of them, so alleged the applicants, were protected by law against orders from their superior in the accomplishment of their task in the applicants' case. In addition, the applicants complained of the refusal to allow them two months to file a private valuation of the land in question. Furthermore they maintained that the composition of the Senate violated Article 6 of the Convention: its President had been a member of the local government for 25 years before his appointment to the Senate; one of its members was President of the local farmers' union; the rapporteur was an official of the regional government and under the orders of this government. The applicants, finally, complained about the valuation method used by the Senate. In support of the last claim they submitted a new valuation, dated 10 October 1990, and signed by Ing. S., according to which the market value of the land in question should be evaluated mainly by comparison with other sales of similar land. The new valuation concluded that the piece of land which the applicants' wished to buy was worth in between 65 and 100 ÖS in the light of six other transactions and valuations made in the region.

The Constitutional Court rejected, after having heard the applicants and the Senate, the appeal. As regards the composition of the Senate it referred to its earlier case-law on the point which had rejected similar complaints. It added that there were no particular circumstances in the case at bar warranting another conclusion. As regards the valuation method chosen the Court noted that there was nothing in the relevant legislation to prohibit a valuation method based on yield. The Court found it outside its jurisdiction to go into the details of the valuation in the instant case.

COMPLAINTS

1. The applicants allege several violations of Article 6 para. 1 of the Convention. They maintain that the Senate could not be considered as an independent and impartial tribunal in view of its composition: its President had previously been a member of the Land Government for

25 years, one of its members was also president of the regional agricultural chamber, an organisation with a vested interest in low prices, and the rapporteur was at the same time an employee of the Land Government.

They also claim that they did not receive a fair trial before either the Regional Commission or the Senate because the official experts engaged by these bodies were not impartial and because the Senate refused to accord them the time necessary to submit a valuation of an expert of their own choice.

2. The applicants also allege a violation of their right to the peaceful enjoyment of their property guaranteed in Article 1 of Protocol No. 1.

THE LAW

1. The applicants allege several violations of Article 6 para. 1 (Art. 6-1) of the Convention which provision reads, in its relevant parts:

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

As regards the complaints related to the composition of the Senate, the Commission recalls at the outset that the Convention organs have on several occasions found that the organisation of the authorities responsible for the control of land acquisition in Austria does not, in principle, raise any problems regarding the judicial character or the independence of these authorities (see, inter alia, Eur. Court of H.R., Ringeisen judgment of 16 july 1971, Series A No. 13, p. 39, para. 95; and Sramek judgment of 22 October 1984, Series A No. 84, pp. 17-20, paras 36-42). As regards the question whether the members of the Senate in the applicants case satisfied the requirements of impartiality, both subjectively and objectively (see Eur. Court H.R., Langborger judgment of 22 June 1989, Series A No. 155, p. 16, para. 32), the Commission observes the following :

The mere fact that the President of the Senate had previously been a member of the Land Government for 25 years cannot bear out a challenge of bias: the subjective impartiality of a judge is presumed until the contrary is proven (Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A No. 154, p. 21, para. 47); furthermore this fact in itself is not sufficient to warrant legitimate doubts as to his impartiality.

As regards the Senate member who was at the same time president of the regional agricultural chamber, the Commission finds no proof of any absence of subjective impartiality on his part. The Commission also finds no reason to question his objective impartiality. The European Court of Human Rights found no element of bias in respect of another comparable body, the Regional Real Property Transactions Commission (Landesgrundverkehrskommission) of Upper Austria, on account of the fact that one of its members had been nominated by the local chamber of agriculture (Eur. Court H.R., Ringeisen judgment of 16 July 1971, Series A No. 13, p. 40, para. 97). The fact that, in the present case, it was the president of the chamber who had been appointed does not, in the opinion of the Commission, warrant a different conclusion. This fact is not enough to create any legitimate doubts that the balance of interests inherent in the composition of the Senate was upset in the applicants' case (cf. Eur. Court H.R., Langborger judgment of 22 June 1989, Series A No. 155, p. 16, para. 35). In this context the Commission notes in particular that the protection of the interests of

the local farmers was explicitly recognised by the legislation in question as a legitimate interest under the law (cf. De Moor v. Belgium, Comm. Report 8.1.93, paras. 58-59).

As regards the rapporteur on the Senate, the Commission recalls that the Court has held that the presence of civil servants on the comparable Upper Austrian Regional Commission was compatible with the Convention (see the above mentioned Ringeisen judgment, Series A No. 13, pp. 39-40, paras. 95-97) and that the Land Government itself was not a party to the present proceedings (cf. Eur. Court H.R. above mentioned Sramek judgment, pp. 19-20, paras 41-42). In the light hereof the Commission does not consider that this complaint raises any issue as to either the objective or subjective impartiality or independence of the Senate.

The Commission, accordingly, finds no indication of any violation of the applicants' right to an impartial tribunal.

As regards the applicants' complaint that they did not receive a fair trial, the Commission limits its examination to the Senate as this body was the last national organ to determine both the questions of fact and the legal issues in dispute (see, Eur. Court H.R., above mentioned Langborger judgment, Series A No. 155, p. 15, para. 30). The Commission observes that if it were established that the applicants could have entertained legitimate doubts as to the impartiality of the officially appointed valuers in their case, the applicants ought, in principle, to have been entitled to submit to the Senate a valuation by an expert of their own choice and to have this new valuation considered on equal footing with the others (cf. Eur. Court H.R., Brandstetter judgment of 28 August 1991, Series A No. 211, pp. 25-27, paras. 61-63; also Firma F.M. Zumtobel and Martin Zumtobel v. Austria, Comm. Report 30.6.1992, paras. 84-88). The Commission notes, however, that the Senate did not exclude such an entitlement on the part of the applicants, although it rejected the applicants' request to be allowed to submit such a valuation on procedural grounds as it had been formulated too late. The Commission sees no reason to question the Senate's assessment on this point and concludes, accordingly, that there is no appearance of a violation of the applicants' right to a fair trial in Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that the complaints under Article 6 para. 1 (Art. 6-1) have to be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also allege a violation of Article 1 of Protocol no. 1 (P1-1) to the Convention, which reads:

> "Every natural and 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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> 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 to secure the payment of taxes or other contributions or penalties."

The Commission finds that there may, in the present case, be a question whether the contract for the sale of the land at issue really gave the applicants a right protected by Article 1 of Protocol No. 1 (P1-1) before its approval by the competent authorities (cf. Eur. Court H.R., Van der Mussele judgment of 23 November 1983, Series A No. 70 p. 23, para. 48). The Commission does not, however, find it necessary to examine this problem in the circumstances of the present case as it has

found that, in any event, the applicants' complaints under the said Article 1 (Art. 1) are manifestly ill-founded and this for the following reasons.

It is clear that, as a result of the approval system in force, the applicants cannot reasonably have expected to obtain more than a conditional title to the property through the contract which they entered into with the sellers of the land. The possibility that approval could eventually be refused must have been reasonably foreseeable. The Commission notes in particular that the refusal was found to be lawful by the Constitutional Court. Furthermore, there are no indications to the effect that the refusal imposed any disproportionate burden on the applicants or otherwise upset the fair balance which has to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (cf. Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A No. 52, p. 26, para. 59).

The Commission, accordingly, finds no indication of any violation of Article 1 of Protocol No. 1 (P1-1). It follows that this complaint must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)