AS TO THE ADMISSIBILITY OF

Application No. 22097/93
by Johann MAYR
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 September 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

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 14 June 1993 by Johann MAYR against Austria and registered on 21 June 1993 under file No. 22097/93;

Having regard to:

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

- the Commission's decision of 31 August 1994 to communicate the application;

- the observations submitted by the respondent Government on 13 January 1995 and the observations in reply submitted by the applicant on 2 March 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1936 and living in St. Johann. He is represented by Mr. R. Kaan, a lawyer practising in Graz. The applicant is a farmer and quarry entrepreneur.

The facts as submitted by the parties are as follows:

1. On 7 October 1971 the community of Kirchdorf was granted a permit by the Regional Authorities (Landeshauptmann) to construct a community water pipe system. Thereby the community was, inter alia, authorised drainage from a spring designated as Q8 and situated on a real estate plot belonging to the Austrian Republic (Federal Forest Administration). Among other conditions the order of 7 October 1971 provided that the water pipe system should be terminated by 30 June 1973. It further mentioned that previously the community of Kirchdorf

had been granted the right to use the water from the spring Q8 by the owner, namely the Federal Forest Administration.

In 1981 the applicant acquired the land in question.

2. In 1990 the applicant made a request to be authorised to run a quarry on his land. The community of Kirchdorf opposed his request. In nature conservation proceedings (Naturschutzverfahren) a negative decision was given with regard to the applicant's request and a constitutional appeal was rejected by the Constitutional Court (Verfassungsgerichtshof) on 27 September 1994. The matter was referred to the Administrative Court where it is still pending.

Also the Ministry for Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft) decided on 30 August 1994 against the applicant's project refusing to allow the necessary cutting of trees. This decision was, inter alia, based on the reasoning that there existed no public interest in a quarry.

3. By letter of 11 September 1990 the community informed the applicant that it had the right to use the water from Q8 and intended to start the necessary drainage works by the end of the month. The applicant thereupon brought a civil action against the community of Kirchdorf claiming that as the owner of the premises he alone had the right to use the spring while any user right the community might have had was forfeited because the drainage works had not been completed before 30 June 1973 as provided for in the order of 7 October 1971.

The action was dismissed by the Innsbruck Regional Court (Landesgericht) on 23 December 1991 and on 30 April 1992 the applicant's appeal (Berufung) against this judgment was rejected. The Regional Court found that the community's public law water-right had ex lege expired (erloschen) in accordance with Sec. 27 (1) lit. f of the Water Rights Act 1959 (Wasserrechtsgesetz - WRG) because the drainage works had not been carried out within the time-limit fixed in the order of 7 October 1971. On the other hand the community had a civil law user right (Dienstbarkeit) which although it was not entered in the land register (Grundbuch) but in the water register (Wasserbuch) at Kitzbühel could be invoked against the applicant as its existence was obvious (offenkundig).

The Court of Appeal of Innsbruck found that the question as to whether the public law water-right had in fact expired depended, according to an exception provided for in Sec. 121 (1), last sentence of the Water Rights Act, exclusively on a decision of the competent Water Authority. Private parties had no claim that such a decision be taken. In any event it was not for the civil courts to take such decision. Therefore the action had been correctly dismissed. The appellate court further confirmed that the defendant community could invoke against the plaintiff a civil law user right.

The applicant lodged an extraordinary appeal on points of law (ausserordentliche Revision) which the Supreme Court (Oberster Gerichtshof) declared inadmissible (unzulässig) on 14 July 1992.

4. By order of 28 April 1992 the Regional Governor (Landeshauptmann) extended the time-limit for construction of the water pipe system relating to spring Q8 which according to the order of 7 October 1971 had expired on 30 June 1973.

The applicant's appeal (Berufung) against this order was rejected by the Federal Ministry of Forestry and Agriculture on 23 June 1992.

Insofar as the applicant had submitted that the right of the community to use spring Q8 had been forfeited in accordance with Section 27 para. 1 lit. (f) and also lit.(g) of the Water Rights Act it is stated in the decision that even if the extension of the

time-limit for the construction of the water pipe system was unlawful, this unlawfulness could not be invoked by third persons.

The applicant lodged another appeal (Beschwerde) which was rejected by the Administrative Court (Verwaltungsgerichtshof) on 22 September 1992 and served on the applicant on 17 December 1992. The court confirmed that although the extension of the time-limit for the construction of the water pipe system was, from an objective point of view, unlawful, this unlawfulness could be invoked only by the body requesting the permit (Bewilligungsbewerber) not however by the applicant as no substantive rights could be derived by him from the Water Rights Act. The applicant's complaint that the Regional Governor had not been competent to decide on the extension of the time-limit was rejected as being unfounded.

5. On 25 June 1993 the applicant requested the Regional Governor to institute proceedings in accordance with Sections 29, 70 and 138 of the Water Rights Act with a view to obtaining a decision that the community's water right relating to his premises had expired. The request was rejected on 4 August 1993. This decision was confirmed by the Federal Ministry for Agriculture and Forestry on 16 August 1994. The Ministry pointed out that while the order of 7 October 1971 had fixed a time limit for the termination of the construction works it had not contained any clause providing for the automatic expiry of the community's water right in case of non-respect of this time-limit. In addition the Ministry referred to the Administrative Court's decision of 22 September 1992 according to which the applicant had no substantive right to claim a finding that the community's water rights had expired. Furthermore it was pointed out that the community had informed the Regional Governor by letter of 27 May 1993 that the construction works relating to spring Q8 had been terminated. In these circumstances the water rights could not have expired in accordance with Sec. 27 (1) lit. f of the Water Rights Act regardless of whether the spring was used or not.

Relevant Provisions of the Water Rights Act

[Translation]

Section 27 (1) Water-use rights expire:

...

f) by failure to start building works or to terminate the authorised installation within the time-limit fixed in the permit or within any subsequently extended time-limit.

g) by non-use or destruction of the installation necessary for the water use, if the interruption of the water-use has lasted more than three years ...

Section 29 (1) The expiry of a water-use right is to be established by the appropriate water authority ...

Section 70 (1) When a water-right permit expires, all unregistered user rights granted in accordance with Sections 63 to 67 or conceded by way of agreement in the course of the water-right proceedings expire, to the extent that they have become superfluous on account of the expiry of the water-right. If however the right is registered, both the owner of the property concerned and the holder of the right may request the water authority expressly to annul this right.

Section 121 (1) Once any installation which requires a permit is completed, the first instance authority which granted the permit shall carry out proceedings in accordance with Sections 44 - 44 AVG 1950 (Code of Administrative Proceedings) ... in order to establish that the installation ..., corresponds to the permit ...

If a time-limit has been exceeded the installation is nevertheless considered to have been completed on time unless the permit is expressly declared to have expired.

[German]

§ 27 (1) Wasserbenutzungsrechte erlöschen:

...

f) durch Unterlassung der Inangriffnahme des Baues oder der Fertigstellung der bewilligten Anlagen binnen der im Bewilligungsbescheide hiezu bestimmten oder nachträglich verlängerten Frist;

g) durch den Wegfall oder die Zerstörung der zur Wasserbenutzung nötigen Vorrichtungen, wenn die Unterbrechung der Wasserbenutzung über drei Jahre gedauert hat ...

§ 29 (1) Den Fall des Erlöschens eines Wasserbenutzungsrechtes hat die zur Bewilligung zuständige Wasserrechtsbehörde festzustellen ...

§ 70 (1) Mit dem Erlöschen einer wasserrechtlichen Bewilligung erlöschen alle nach den §§ 63 bis 67 eingeräumten oder aus Anlaß des wasserrechtlichen Verfahrens durch Übereinkommen bestellten, nicht im Grundbuch eingetragenen Dienstbarkeiten, soweit sie durch das Erlöschen des Wasserrechtes entbehrlich geworden sind. Ist jedoch eine solche Dienstbarkeit im Grundbuch eingetragen, so kann sowohl der Eigentümer des belasteten Gutes als auch der bisherige Wasserberechtigte die ausdrückliche Aufhebung der Dienstbarkeit bei der Wasserrechtssbehörde verlangen.

§ 121 (1) Unmittelbar nach erfolgter Ausführung einer nach diesem Bundesgesetze bewilligungspflichtigen Wasseranlage hat sich die zur Erteilung der Bewilligung in erster Instanz zuständige Wasserrechtsbehörde in einem nach den Bestimmungen der §§ 40 bis 44 AVG. 1950 ... durchzuführenden Verfahren von der Übereinstimmung der Anlage mit der erteilten Bewilligung ... zu überzeugen ...

Wird bei einer Fristüberschreitung die Bewilligung nicht ausdrücklich für erloschen erklärt, so gilt die Anlage als fristgemäß ausgeführt.

COMPLAINTS

The applicant considers that by extending the time-limit for the construction of the water pipe system on his land the community of Kirchdorf was granted a right which seriously affected his own property rights. Despite this interference with his property rights he did not have any possibility to defend his own interests. He considers that he was denied access to a court and that in addition his right to the peaceful enjoyment of possessions as guaranteed by Article 1 of the First Protocol was violated. He submits that in consequence of the community's right to use his spring his real estate has become practically useless for himself but he has received no compensation.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 June 1993 and registered on 21 June 1993.

On 31 August 1994 the Commission decided to communicate the application to the Austrian Government and to ask for written observations on its admissibility and merits.

After extension of the time-limit, the Government's observations

were submitted on 22 December 1994 and the applicant's reply was submitted on 2 March 1995. In their observations the Government supplemented the facts by what is set out under points 2., 3. and 5. above.

THE LAW

The applicant alleges that he was denied access to a court to defend his interests vis-à-vis the community of Kirchdorf whose right to use a spring on his real property he intends to put in question. He considers that the fact that it is not possible for him to invoke the expiry of the community's user right deprives him of his possession and violates Article 1 of Protocol No. 1 (P1-1).

The Government first argue that the applicant could have lodged a constitutional complaint against the order of the Federal Ministry of Forestry and Agriculture given on 23 June 1992.

They further submit that the question of whether or not the community had a user right with regard to the applicant's property was thoroughly examined and affirmed by the civil courts. Consequently, there was no violation of Article 6 (Art. 6) of the Convention.

On the other hand the question of authorisation under the Water Rights Act did not relate to any civil rights. Furthermore, the user right had been agreed upon in a private law contract concluded between the previous owner and the community and consequently there was no violation of Article 1 of Protocol No. 1 (P1-1) either. In addition it is pointed out that the user right served a public interest in providing drinking water for the inhabitants of the community.

The applicant replies that a constitutional complaint would have offered no chances of success.

The Commission considers that it is not required to examine the question whether the applicant's right to the peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1) was respected.

Nor is it required to examine the question whether the applicant's right of access to a tribunal in matters relating to a civil right or obligation guaranteed in Article 6 para. 1 (Art. 6-1) of the Convention was observed.

Article 26 (Art. 26) of the Convention reads:

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

The Commission notes that the Convention is directly applicable in Austrian domestic law and enjoys the rank of constitutional law. The applicant therefore could have raised in a constitutional complaint against the decision of the Federal Ministry of Forestry and Agriculture of 23 June 1992 the provisions of the Convention he now invokes with the present application. In such a constitutional complaint the applicant could also have claimed that certain provisions of the Water Rights Act applied in his case were unconstitutional and contrary to the Convention. The case-law referred to by the applicant in support of his argument that a constitutional complaint would have offered no chances of success does not relate exactly to the same legal and factual situation. Consequently it is difficult to argue that in fact a constitutional complaint would have been ineffective. Mere doubts, however, as to the effectiveness of a domestic remedy do not absolve an applicant from making use of it (No. 10148/82, Dec. 14.3.85, D.R. 42 p. 98 with further references on p. 122).

The applicant, therefore, cannot be considered to have exhausted the available domestic remedies in Austrian law. Furthermore, neither an examination of the case as presented nor even the ex officio examination undertaken by the Commission have disclosed any special circumstances which might have absolved the applicant, under the generally recognised principles of international law in this field, from exhausting the domestic remedies.

It follows that the applicant has not complied with the condition requiring the exhaustion of domestic remedies and that his application must be dismissed in accordance with Article 27 para. 3 (Art. 27-3) 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) — (C.L. ROZAKIS)