AS TO THE ADMISSIBILITY OF

Application No. 14699/89
by Georg and Helmut MEUSBURGER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

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 17 January 1989 by Georg and Helmut MEUSBURGER against Austria and registered on 27 February 1989 under file No. 14699/89;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 6 April 1993 to declare the application inadmissible;

Having regard to the submissions of the applicants' counsel of 10 August 1993 and the subsequent correspondence;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are brothers, born in 1936 and 1938 respectively. They are Austrian citizens, living in Dornbirn and Schwarzach respectively. In the proceedings before the Commission they are represented by Mr. W. Weh, a lawyer practising in Bregenz.

On 20 September 1984 the applicants offered the highest bid (Meistgebot) for the forced sale (Zwangsversteigerung) of farmland situated in Hörbranz.

Under the applicable Real Property Transaction Act (Grundverkehrsgesetz) the transfer of agricultural property requires approval by a Real Property Transaction Commission (Grundverkehrs-kommission).

On 29 January 1985 the competent Commission refused approval of the applicant's bid. In these and the subsequent proceedings the applicants were represented by Mr. Weh.

On 9 July 1985 the Provincial Real Property Transaction Senate (Grundverkehrs-senat) dismissed the applicants' appeal. It found that the first applicant was the owner and general manager of a medium-size commercial enterprise, in which the second applicant also held a management position. Given their present profession and the fact that their time was taken by the management of their enterprise, they had failed to show that they would use the property at issue for farming purposes. The purchase was, thus, contrary to the Real Property Transaction Act.

On 27 August 1985 the applicants lodged a constitutional complaint. They complained inter alia about the composition of the Provincial Real Property Transaction Senate and the way it was set up. They submitted in particular that the Senate had its seat in the Office of the Land Government, where it also held its meetings, and argued that this created the impression that the Senate was not independent from the executive. Further they argued that it was contrary to the Real Property Transaction Act to appoint a civil servant of the Land as President. At present there existed the impression among practising lawyers that the President of the Senate sometimes held meetings with the competent member of the Land Government before the sessions of the Senate. Further, the said Act provided that the Rapporteur had to be a civil servant of the Land, which also cast doubt on the independence of the Senate. There were no objections as regards the two judges who were members of the Senate. As to the representatives of different interest groups, it was not clear, which interests they had to defend in the Senate. Finally, one member had to be an expert for agriculture and forestry. There were doubts as to his impartiality as he had to give an expert opinion first and then had to vote on it. In the present case, this expert was a senior civil servant at the District Agrarian Authority (Agrarbezirksbehörde) and as such the subordinate of the chairman of the Real Property Transaction Commission, who was head of the District Agrarian Authority. In conclusion, the applicants found that the Provincial Agrarian Senate could not be regarded as an independent and impartial tribunal within the meaning of Article 6 of the Convention. The applicants also complained that the Senate's decision violated their right to property.

Meanwhile, the applicants requested anew that their bid be approved. They claimed that new facts had arisen in that the Hörbranz community had bought the adjacent plot of land. They claimed that the said community intended to change the designation of the neighbouring land. The Real Property Transactions Commission refused the request on the ground that it concerned the same matter as had already been decided.

On 25 March 1996 the Provincial Real Property Transaction Senate dismissed the applicants' appeal. It found that there were no relevant new facts.

On 14 May 1986 the applicants lodged a constitutional complaint against this decision. They referred to their complaint in the first set of proceedings. They added in particular that their request that the major of Hörbranz be heard had been refused.

On 17 May 1986 the applicants supplemented their complaint of 27 August 1985. They referred to their submissions as regards the impression that the President of the Provincial Real Property Transaction Senate sometimes discussed matters with the competent member of the Land Government and stated explicitly that they had reported a personal impression and not alleged a fact. However, there was a certain basis for this impression: Following the hearing of 30 January 1986 in the proceedings relating to their second request for approval of their bid, they had confronted the President of the Senate with their allegation that he had had a conversation with the member of the Land Government responsible for agricultural matters exactly one

year ago. The President had remembered such a conversation and that it had concerned the interpretation of the term "farmer", but without any connection to particular proceedings. They further complained that they felt that the Senate's decision was arbitrary in the sense that stricter measures were applied in their case than in other cases. Thus, they had requested access to two files. However, the Senate had refused their request without giving reasons.

On 1 December 1986 the Constitutional Court (Verfassungsgerichtshof) quashed the Senate's decisions of 9 July 1985 and 25 March 1986. It noted that in principle the Senate's organisation was in conformity with Article 6 of the Convention. The Real Property Transactions Act provided that its members were not to be given instructions from the executive. They were appointed for a period of five years, during which they could not be removed from office. There were no objections from a constitutional point of view against appointing a civil servant of the Land as Rapporteur. However, in the present case there were legitimate reasons to fear a lack of impartiality as regards one of the members of the Senate. The court found in particular that the said member was in a subordinate position to the chairman of the Real Property Transaction Commission, i.e. the authority of first instance. Moreover, the same member had in his function as a civil servant given an expert opinion on the value of the property at issue.

The case was referred back to the Provincial Real Property Transaction Senate for a new decision.

On 4 February 1987 the applicants requested that an oral hearing be held, and that the mayor of Hörbranz be heard as a witness. Further, they requested to have access to two particular decisions of the Senate.

On 19 March 1987 the Provincial Real Property Transaction Senate, recomposed, held an oral hearing, in presence of the second applicant and the applicants' counsel. Counsel for the applicants submitted their arguments, in particular that they grew up on their parents' farm where they also worked as adolescents and that they intended to breed horses on the property at issue. At the close of the hearing counsel for the applicants stated that his request that the mayor of Hörbranz be heard had been dealt with, whereas his request for access to two particular decisions of the Senate was still open.

On 22 May 1987 the Provincial Real Property Transaction Senate again dismissed the applicants' appeal. It confirmed the reasons given in its earlier decision. As regards the applicants' request for transmission of decisions of the Senate, it pointed out that there was no obligation under constitutional law to make its decisions available to the public.

On 10 July 1987 the applicants again lodged a constitutional complaint. Inter alia, they complained again about the composition of the Provincial Real Property Transaction Senate and submitted that the fact that the Rapporteur was a civil servant of the Land raised doubts as to his independence. As regards the Senate's President, they referred to their first constitutional complaint. He had, while their case was pending, discussed the main legal issue raised by their case with a member of the Land Government. They also alleged that the presence of members of various interest groups was contrary to Article 6 of the Convention. Further, they argued that the Senate's decision was arbitrary and that the proceedings violated their right to a fair trial as the Senate's decisions are not published and they could, therefore, not consult decisions which, in their view, concerned comparable cases. Thus, they had no possibility to show that the Senate had decided differently in similar cases. They requested that the court order the Senate to submit three files, which they specified. They also complained that the Senate's decision violated their right to property.

On 31 May 1988, after the Senate had made submissions in reply, the applicants supplemented their complaint. They argued in particular that the Senate's case-law conceded that the purchaser of agricultural property did not already have to be a farmer by profession but could become one by starting a farming activity. This followed from the three decisions which they had requested and which the Senate had now submitted to the Constitutional Court. With a view to these decisions, the refusal to approve their bid was arbitrary.

On 10 June 1988 the Constitutional Court dismissed the complaint. It found that there were no doubts as regards the independence and impartiality of the members of the Provincial Real Property Transaction Senate. The applicants had failed to mention specific circumstances which would show that this body's composition was contrary to Article 6 of the Convention. Further, as regards the applicant's complaint that the contested decision was arbitrary, the court found that the Provincial Real Property Transaction Senate had carried out comprehensive proceedings to establish the relevant facts and had given detailed reasoning for its view that the applicants did not intend to use the property at issue for agricultural purposes. There were no indications that the Senate had decided arbitrarily. As regards the applicants' reference to other proceedings, the court, having inspected the respective files, found that they partly did not concern comparable cases. Further, it referred to its constant case-law according to which an authority's misguided decision in one case did not entitle anyone to a misguided decision in another case. As regards the applicants' right to peaceful enjoyment of their possessions, the court referred to the reasons given for the refusal to approve the property transaction, finding that they did not disclose any arbitrariness.

COMPLAINTS

The applicants allege several violations of Article 6 of the Convention.

Firstly, they complain about the composition of the Provincial Real Property Transaction Senate and claim that it is not independent from the executive. They submit that it applies administrative procedural law, that it has its headquarters and holds its meetings in the Office of the Land Government and that its members are appointed by the Land Government. Further, they submit in particular that the President of the Senate was a retired civil servant of the Land and that its Rapporteur was a civil servant of the Land. They claim that, on 30 January 1986, these two members had a conversation with the competent member of the Land Government about the legal issue raised by their case, allegedly just before one of the sessions in which their case was on the Senate's agenda. As regards the members belonging to various interest groups they submit that it is not clear whose interests they represent.

Further they complain that the proceedings before the Senate were not fair. In particular, they submit that they had no possibility to question the mayor of Hörbranz and that they were refused inspection of files relating to similar cases.

THE LAW

1. The Commission recalls that, by its decision of 6 April 1993 it declared inadmissible for non-observance of the six-months-rule the applicants' complaint about the alleged lack of independence and impartiality of the Provincial Real Property Transaction Senate and the alleged unfairness of the proceedings.

The Commission notes that it has been brought to its attention that the facts on which this decision was based were incorrect.
It follows that the decision of 6 April 1993, insofar as it

declared the applicants' complaints under Article 6 (Art. 6) inadmissible for non-observance of the six-months-rule cannot be maintained.

2. The applicants allege several violations of Article 6 para. 1 (Art. 6-1) of the Convention which, so far as relevant, reads as follows:

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

a. As regards the applicants' complaints about the composition of the Provincial Real Property Transaction 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 HR., Ringeisen v. Austria judgment of 16 July 1971 , Series A no. 13, p. 39, para. 95; Sramek v. Austria 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 of HR., Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, p. 20, paras. 25-27), the Commission observes the following:

The mere fact that the President of the Senate was a retired civil servant of the Land cannot bear out a challenge of bias: the subjective impartiality of a judge is presumed until the contrary is proven (Eur. Court HR., Hauschildt judgment v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 47). Furthermore, this fact is in itself not sufficient to warrant legitimate doubts as to his impartiality.

As regards the Rapporteur of 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 (Ringeisen judgment loc. cit., pp. 39-40, paras. 95-97). Moreover, in the present case, the Land Government was not a party to the proceedings (Sramek judgment loc, cit., pp. 19-20, paras. 41-42).

The applicants further allege that the President and the Rapporteur of the Senate had a conversation with the competent member of the Land Government about the legal issue raised by their case, allegedly just before one of the sessions in which their case was on the Senate's agenda. The Commission firstly notes that there are some inconsistencies between the applicants' submissions before the Commission and those before the domestic authorities, as regards the date of this conversation (30 January 1986 or a year earlier, as indicated in the applicants' submissions of 17 May 1986 to the Constitutional Court), the persons participating (only the President or also the Rapporteur) and the issue discussed. In any case, the Commission, referring to its above finding that the Land Government was not a party to the proceedings and having regard to the lapse of time between the conversation at issue and the Senate's final decision of 22 May 1987, finds that the applicants' fear as regards a lack of impartiality of the Senate cannot be regarded as objectively justified.

Finally, the Commission does not consider that the applicants' further submissions of a more general nature, including the complaint that the Senate's members are appointed by the Land Government raise any issue as to either the objective or the subjective impartiality or independence of the Senate (Sramek judgment loc. cit., p. 18, para. 38).

b. The applicants also complain that the proceedings before the Senate were not fair. In particular, they submit that they had no possibility to question the mayor of Hörbranz and that they were refused inspection of files relating to similar cases.

The Commission recalls that its task is to ascertain whether the proceedings, considered as a whole, were fair (Eur. Court HR., Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43).

As regards the questioning of the mayor of Hörbranz, the Commission notes that the applicants' counsel at the end of the hearing of 19 March 1987 stated that his request as regards hearing the mayor had been dealt with. He did not claim that the applicants had had no possibility to question him, nor did the applicants raise this complaint with the Constitutional Court. As regards the inspection of files relating to similar cases, the Commission notes that the Senate submitted the decisions requested by the applicants to the Constitutional Court. It follows from the applicants' submissions of 31 May 1988 that they had access to these decisions and in fact referred to them to support their argument that the Senate had taken different decisions in comparable cases. In these circumstances, the Commission finds that there is no indication that the applicants, represented by counsel, could not duly present their arguments or that the proceedings were otherwise unfair.

It follows that the applicants' complaints under Article 6 (Art. 6) of the Convention are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECIDES TO RE-OPEN THE PROCEEDINGS IN THIS CASE, insofar as the application concerned the applicants' complaint about the alleged lack of independence and impartiality of the Provincial Agrarian Senate and the alleged unfairness of the proceedings;

DECLARES THIS COMPLAINT INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber