AS TO THE ADMISSIBILITY OF

Application No. 40477/98
by Helene MUSA
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 10 September 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. PERENIČ
	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 20 October 1997 by Helene MUSA against Austria and registered on 26 March 1998 under file No. 40477/98;

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 residing in Vienna. Before the Commission she is represented by Mr J. Patzak, a lawyer practising in Vienna.

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

A. Particular circumstances of the case

The applicant owned, together with a real estate managing company, an apartment house in the centre of Vienna. Her share was two thirds, the company's share one third.

In 1994 the applicant filed an action for division of property against the company. The action was successful and on 17 May 1994 the Vienna Enforcement Court, upon the applicant's request, granted the enforcement of the judgment by selling the apartment house at an auction. On 20 July 1995 the applicant acquired the house at the auction as she made the highest bid (Meistbot) in the amount of 42 million ATS.

On 7 September 1995 the Vienna Municipal Office (Magistrat) ordered the applicant to pay auction tax. The Municipal Office found that it was the applicant who had requested the sale of the building at the auction, that the basis of assessment was the highest bid and that there were no incumbrances on the land. Accordingly the tax was fixed at 840 000 ATS.

On 17 October 1995 the applicant appealed against the tax order insofar it exceeded the amount of 280 000 ATS. She submitted that the intention of the legislature had been to tax the profit obtained through an auction and that Section 2 of the decision of Vienna Municipal Council of 26 April 1985 should be interpreted in that manner. Since she had already owned two thirds of the building the auction tax should only be levied on the amount of 14 mio. ATS.

On 7 December 1995 in a preliminary decision (Berufungs-vorentscheidung) the Municipal Office dismissed the applicant's appeal. Thereupon, on 11 January 1996, the applicant requested that her appeal be submitted to the appeal authority.

On 19 April 1996 the Tax Appeal Board (Abgabenberufungs-kommission) dismissed her appeal. The Board found that the object of the sale was the whole building and that also the highest bid concerned the whole building. Section 2 of the decision of Vienna Municipal Council of 26 April 1985 was unambiguous in this respect and this had also been confirmed by the Administrative Court's case-law.

On 7 June 1996 the applicant filed a complaint with the Constitutional Court (Verfassungsgerichtshof). She argued that the relevant provisions of the decision of Vienna Municipal Council of 26 April 1985 were unconstitutional. The levying of a tax of two percent calculated on the basis of the whole highest bid violated her property rights and the principle of equality because she had only acquired additional property

rights with respect to one third of the building. In respect of the other share she was her own debtor and did not obtain any additional benefit. The legislature therefore should have distinguished between the acquisition of property at an auction by a former joint owner and by a third person not having any previous ownership rights concerning the object of the auction.

On 10 June 1997 the Constitutional Court refused to deal with the applicant's complaint for lack of prospect of success. The Constitutional Court referred to its previous case law on this matter (Collection of Decisions of the Constitutional Court Nos. 4454/1963, 8596/1979, 10284/1984). According to this case-law the fact that the highest bid was taken as the basis of assessment of the tax liability and no other circumstances were taken into account did not infringe the right to property or the principle of equality. The legislature was not bound to take into account whether or not the purchaser had to pay actually this highest bid in full or could compensate with other claims he had.

B. Relevant domestic law

The relevant provisions of the decision of the Vienna Municipal Council of 26 April 1985 on the levying of a tax on voluntary sales at auctions taking place in Vienna (Beschluß des Wiener Gemeinderates vom 26. April 1985 über die Ausschreibung einer Abgabe von in Wien stattfindenden freiwilligen öffentlichen Versteigerungen) read as follows.

Section 2:

<German>

"Die Abgabe beträgt 2 Prozent des bei der Versteigerung erzielten Erlöses. Der Versteigerungserlös besteht aus dem Meistbot und dem Wert jener Lasten, die vom Ersteher zusätzlich zum Meistbot zu übernehmen sind. ..."

<translation>

"The tax rate is 2 percent of the price obtained at the auction. The price obtained at the auction consists of the highest bid and the value of those incumbrances which the purchaser has to accept in addition to the highest bid."

Section 3:

<German>

"Abgabepflichtig ist derjenige, der die Sache versteigern läßt. Ist er nicht der Eigentümer der Sache, so haftet der Eigentümer mit ihm zur ungeteilten Hand für die Entrichtung der Abgabe. Sämtliche Miteigentümer einer zu versteigernden Sache sind Gesamtschuldner."

<translation>

"The person who has the object sold at auction is liable for payment of the tax. If he is not the owner, the owner is also liable for payment of the tax. All joint owners of an object to be sold at an auction are jointly liable for payment of the tax."

COMPLAINTS

The applicant complains under Article 1 of Protocol No. 1 about the auction tax imposed on her. The fact that she had to pay tax calculated on the basis of the whole best bid and not on the basis of the share of property acquired in addition to the shares she already owned constituted expropriation contrary to that provision.

Relying on Article 14 of the Convention taken together with Article 1 of Protocol No. 1 she complains about discrimination prohibited by the Convention in that the legislature failed to distinguish between acquisition in an auction by joint owners and persons who had no previous ownership rights over the object of the auction.

THE LAW

The applicant complains under Article 1 of Protocol No. 1 about the auction tax imposed on her. The fact that she had to pay tax calculated on the basis of the whole best bid and not on the basis of the share of property she acquired in addition to the shares she already owned constituted expropriation contrary to that provision.

Article 1 of Protocol No. 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 applicant has not filed a complaint with the Administrative Court. However, the Commission need not determine whether or not the applicant has complied with the requirement of exhaustion of domestic remedies under Article 26 of the Convention as the application is, in any event, manifestly ill-founded for the following reasons.

The Commission recalls the principle that taxation is an interference with the rights guaranteed in Article 1 para. 1 of Protocol No. 1, but that this interference is

justified under the second paragraph of that Article which provides expressly for an exception in respect of taxes or other contributions (see No. 11089/84, Dec. 11.11.86).

The Commission observes, however, that despite this, an issue of this nature does not escape the Commission's power of review, since the Convention organs must ensure that Article 1 of Protocol No. 1 has been correctly applied.

The Commission recalls that "the second paragraph of Article 1 of Protocol No. 1 has to be construed in the light of the general principle set out in the first sentence of that Article". It follows that the interference in question should strike a fair balance between "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... the concern to achieve this balance is reflected in the structure of Article 1 as a whole ... and hence also in the second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised " (see Eur. Court HR, Tre Traktörer Ab v. Sweden judgment of 7 July 1989, Series A no. 159, p. 23, para. 59; see also James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 29 and 34, paras. 37 and 50, and Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, para. 69). Consequently, "the financial liability arising out of the raising of tax or contributions may adversely affect the guarantee secured under this provision if it places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position" (see No. 13013/87, Dec. 14.12.88, D.R. 58, pp. 163, 186; No. 15117/89, Dec. 16.1.95, D.R. 80-B, p. 5).

The Commission recalls that it is in the first instance for the national authorities to decide on the type of tax or contributions they wish to levy. Decisions in this area normally involve, in addition, an assessment of political, economic and social problems which the Convention leaves to the competence of the member states, for the domestic authorities are clearly better placed than the Commission to assess such problems (see No. 11089/84, Dec. 11.11.86, D.R. 49, p. 181; No. 15117/89, Dec. 16.1.95, D.R. 80-B, p. 5).

In the present case the building partially owned by the applicant was sold at an auction on the applicant's request. At the auction she made the highest bid of 42 mio. ATS which related to the building as a whole. On the basis of this highest bid the applicant's liability for auction tax was fixed in the amount of 840 000 ATS. The tax applied was 2 percent of the highest bid.

The Commission cannot find that the amount of tax claimed from the applicant seriously undermined her financial situation or that it placed an excessive burden on her.

Accordingly, there is no appearance of a violation of the applicant's property rights as protected by Article 1 of Protocol No. 1.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant further complains about discrimination prohibited by the Convention in that the legislature failed to distinguish between acquisition at an auction by joint owners and persons who had no previous ownership rights over the object of the auction. Together with Article 1 of Protocol No. 1 she invokes Article 14 of the Convention.

The Commission recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (Eur. Court HR, Marckx v. Belgium judgment o 13 June 1979, Series A no. 31; Karlheinz Schmidt v. Germany judgment of 18 July 1994, p. 32, para. 22).

Having regard to its above findings, the Commission considers that the auction tax order issued against the applicant constitutes an interference with the applicant's rights under Article 1 of Protocol No. 1. Accordingly Article 14 taken together with Article 1 of Protocol No. 1 is applicable.

The Commission recalls that Article 14 safeguards individuals placed in analogous situations from discrimination (Eur. Court HR, Van der Mussele v. Belgium judgment of 23 November 1983, Series A no. 70, p. 22, para. 46). A difference in treatment is discriminatory for the purpose of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (Eur. Court HR, Petrovic v. Austria judgment of 27 March 1998, para. 30, to be published in Reports 1998). Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Eur. Court HR, Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291, p. 32, para. 24; The National and Provincial Building Society and others v. the United Kingdom judgment of 23 October 1997, Reports 1997-VII, para. 88).

In the present case the applicant's tax liability was assessed on the basis of her highest bid at the auction in accordance with Section 2 of the decision of Vienna Municipal Council of 26 April 1985 on the levying of a tax on voluntary sales at auctions taking place in Vienna.

The Commission finds that it comes within the margin of appreciation afforded to the Contracting States to establish the basis of assessment for the levying of taxes or other contributions. The applicant, with the assistance of her lawyer who had represented her in the domestic proceedings, ought to have forseen the tax liability she had to encounter in case of making the highest bid at the auction.

In the Commission's opinion the fact that the legislature had chosen the highest bid made at the auction as the basis for the tax assessment and not another basis for assessment which would have been more favourable to the applicant does not amount to treatment lacking objective and reasonable justification. The legislature's decision to take

the highest bid as the basis for the tax assessment and not to take into account rights previously acquired by the purchaser or claims he or she might be able to set off against the price constitutes a regulation of general application which neither appears arbitrary nor to be based on any criteria of personal status incompatible with Article 14 of the Convention.

The Commission finds that there is no appearance of a violation of the applicant's rights under Article 14 of the Convention taken together with Article 1 Protocol No. 1.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber