AS TO THE ADMISSIBILITY OF

Application No. 16036/90
by Wolfgang OCHSENREITER
against Austria

The European Commission of Human Rights sitting in private on 7 April 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, 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 5 January 1990 by Wolfgang Ochsenreiter against Austria and registered on 22 January 1990 under file No. 16036/90;

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

Having regard to the observations submitted by the respondent Government on 26 March 1992 and the observations in reply submitted by the applicant on 21 July 1993;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, an Austrian citizen residing in Fursach, Austria, is the owner of real estate which had previously been used as a clay pit. Before the Commission he is represented by Mr. W.L. Weh, a lawyer practising in Bregenz.

A. Particular circumstances of the case

In 1981 the applicant applied to the Bregenz District Authority (Bezirkshauptmannschaft) for permission under the Landscape Protection Act (Landschaftsschutzgesetz) to fill up an abandoned clay pit with waste material, mainly from road construction projects, as he intended to develop subsequently the land for industrial sites. In 1983 he withdrew his request. However, as he had in the meantime already filled up parts of the clay pit, the District Authority insisted that he applies for

permission. The applicant then renewed his request.

By decision of 13 June 1984 the District Authority granted him a permit for filling up parts of the pit, while refusing permission for other parts. The permission related in particular to those parts of the pit which the applicant had already filled up. The District Authority considered that the applicant's land was wetland (Feuchtgebiet) within the meaning of Section 5 of the Landscape Protection Act and therefore merited protection.

On 2 July 1984 the applicant appealed to the Vorarlberg Regional Government (Landesregierung). He submitted that he did not need a permit for filling up his land as it was no wetland within the meaning of Section 5 of the Landscape Protection Act and, in any event, his project did not run counter to the interests of landscape protection.

On 30 October 1985 the applicant's lawyer agreed with the Regional Government that further enquiries on the situation of the flora and fauna on the applicant's land during the vegetation period in spring 1986 were necessary. For that purpose an oral hearing on the applicant's land in the time between 15 and 30 April 1986 was scheduled.

On 21 April 1986 this oral hearing took place.

On 16 May 1986 the Regional Government dismissed the applicant's appeal of 2 July 1984. It found that even if the applicant's real estate did not qualify as wetland he would, according to Section 3 para. 1 (l) of the Landscape Protection Act, need a permit for dumping waste on an area larger than 100 m².

On 10 November 1986 the Administrative Court (Verwaltungs-gerichtshof), upon the applicant's further appeal, quashed the decision of the Regional Government on account of procedural mistakes.

Proceedings were then resumed before the Regional Government. On 29 December 1986 an official expert for landscape protection, employed by the Regional Government, presented a written expert opinion, which was served on the applicant on 14 January 1987.

On 28 January 1987 the applicant requested an extension of the time-limit for commenting on the expert's opinion until 31 March 1987 which was granted by the Regional Government on 4 February 1987.

On 30 March 1987 the applicant submitted his comments.

On 13 May 1987 the Regional Government held an oral hearing in the presence of the expert, the mayor as representative of the municipality, the Deputy Landscape Protection Officer (Landschaftsschutzanwalt-Stellvertreter), the applicant and his counsel.

On 31 July 1987 the expert was again questioned by the authority, this time in the absence of the applicant's counsel. The expert's statements were served on the applicant on 4 August 1987.

On 31 August 1987 the applicant's counsel objected in writing to the fact that the authority had heard the expert in his absence.

By decision of 14 September 1987 the Regional Government

again dismissed the applicant's appeal. This time the Regional Government, referring to Section 3 in connection with Section 10 of the Landscape Protection Act, found that the waste dump envisaged by the applicant on an area of approximately 2000 m² was subject to a permit, which could not be granted because the project ran counter to the interests of landscape protection.

On 17 March 1988 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof), which the latter rejected on 9 June 1988. Upon the applicant's request the Constitutional Court referred the case to the Administrative Court on 26 September 1988.

On 30 October 1988 the applicant supplemented his complaint to the Administrative Court. He did not ask for an oral hearing.

On 22 May 1989 the Administrative Court dismissed the applicant's complaint. The Administrative Court held that the Regional Government had correctly assumed that the applicant's project to fill up his land with waste material required a permit under Section 3 para. 1 (l) of the Landscape Protection Act. The Administrative Court considered further that the refusal of the permit was in accordance with Section 20 para. 1 of the Regional Planning Act (Raumplanungsgesetz) and the relevant Area Zoning Plan (Flächenwidmungsplan), according to which the applicant's land was marked as "agricultural land" (Landwirtschaftsgebiet). The applicant's project, however, did not concern agriculture. The Administrative Court concluded that, under these circumstances, it need not consider further the applicant's complaint on the hearing of the expert in the absence of the applicant's counsel.

B. Relevant domestic law

1. Section 3 para. 1 (l) of the Landscape Protection Act reads as follows:

> "A permit of the authority is required for the erection and for important changes affecting the interests of landscape protection of:
>
> (l) Storage places with a surface of more than 400 square metres and dumps with a surface of more than 100 square metres."

Section 4 para. 2 of the Landscape Protection Act reads as follows:

> "The authority may allow exemptions from paragraph 1 if it is secured that such changes would not violate the interests of landscape protection and, in particular, would not hinder the view on the lakes, or if they are necessary for reasons of public safety. The authority may further allow exemptions if the interests of landscape protection are outweighed by other public interests. In such a case the violation of the interests of landscape protection must be kept to a minimum by imposing conditions."

Section 5 of the Landscape Protection Act reads as follows:

> "Filling, draining, ditching and other measures which endanger the habitat of plants and animals are prohibited within riparian forests, low moors with the exemption of marshland, high moors and pools. The provisions of Section 4 paragraph 2 apply mutatis mutandis."

Section 10 paras. 1 and 2 of the Landscape Protection Act reads as follows:

> "(1) A permit may only be granted if it is ensured that the interests of landscape protection will not be violated.
>
> (2) A permit must not be refused if the reason for its refusal can be eliminated by imposing conditions. A permit may be granted notwithstanding a violation of the interests of landscape protection when they are outweighed by other public interests. In such a case the violation of the interests of landscape protection must be kept to a minimum by imposing conditions."

2. Section 20 paras. 1 and 2 of the Regional Planning Act reads as follows:

> "(1) Decisions which are based on Regional Acts must not be in contradiction with the Area Zoning Plan, if not provided otherwise by the respective Act.
>
> (2) Decisions made contrary to paragraph 1 are null and void."

COMPLAINTS

1. The applicant complains that the decision on his application for permission to fill up the clay pit was not taken by an independent and impartial tribunal, as required by Article 6 para. 1 of the Convention. In any event, he did not have a public hearing before the Administrative Court.

2. Under Article 6 para. 1 he further complains that the proceedings were conducted in an unfair manner. He submits that the landscape protection expert consulted lacked independence as he was an employee of the Regional Government and that this expert was heard in his absence on 31 July 1987. He also submits that the Constitutional Court's refusal to deal with his complaint and to decide on its merits rendered the proceedings unfair.

3. Finally the applicant complains that the proceedings were not conducted within a reasonable time, as required by Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 January 1990 and registered on 22 January 1990.

On 14 October 1992 the Commission decided to communicate the application to the respondent Government and to request them to submit their written observations on admissibility and merits.

The Government's observations were submitted on 26 March 1993 and a supplement to these observations on 16 April 1993. On 21 June 1993 the applicant submitted his observations in reply.

In his observations the applicant, for the first time, raised the complaints that the Constitutional Court's refusal to deal with his complaint and not to decide on its merits rendered the proceedings unfair and that contrary to Article 6 para. 1 of the Convention no hearing took place before the Administrative Court.

THE LAW

1.a. The applicant complains that the decision on his application for permission to fill up the clay pit was not taken by an independent and impartial tribunal as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as relevant, reads as follows:

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

The Commission considers that the proceedings in question concerned the determination of the applicant's civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention and that this provision was thus applicable (cf. Skärby judgment of 28 June 1990, Series A no. 180-B, p. 36, paras 27 et seq.; Fredin judgment of 18 February 1991, Series A no. 192, p. 20, para. 63).

Moreover, in the present case there was a "genuine and serious" dispute (contestation) between the applicant and the authorities regarding the question whether the applicant needed a permit under the Landscape Protection Act for his project and whether he fulfilled the conditions for obtaining such a permit and the outcome of this dispute was directly decisive for that right. Accordingly, the applicant's right to fill up the abandoned pit on his land in accordance with the applicable laws and regulations constitutes a civil matter within the meaning of Article 6 (Art. 6) of the Convention.

The Government submit that the applicant's case was decided by an impartial and independent tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention as the Administrative Court met the requirements of a tribunal.

In the applicant's view the Administrative Court did not fulfil the criteria of such a tribunal. In any event, he did not have a public hearing before the Administrative Court as required by Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission considers that while the proceedings before the District Authority and the Regional Government did not comply with the requirements of Article 6 para. 1 (Art. 6-1) of the Convention, it is sufficient for the purpose of this provision if the decisions taken by the lower instances were subject to subsequent control by judicial bodies which exercised full jurisdiction in conformity with this provision (Eur. Court H.R., Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29).

The Commission notes that further proceedings were conducted before the Administrative Court.

The Commission recalls that the Administrative Court fulfils the requirements of Article 6 para. 1 (Art. 6-1) of the Convention in matters which are not exclusively within the discretion of administrative authorities and where the Administrative Court considers the submissions on their merits, point by point, without declining jurisdiction in replying to them or ascertaining various facts (Eur. Court H.R., Zumtobel

judgment of 21 September 1993, para. 31 and 32, to be published in Series a no 266-A).

The Commission further notes that in the present case the Administrative Court, when deciding on the applicant's second complaint on 22 May 1989, found that the applicant's project was subject to a permit which had, in accordance with the relevant law, to be refused. The Administrative Court did not have to decline jurisdiction in dealing with the applicant's complaint.

As a result, the Commission considers that the requirements of a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention have been complied with.

b. As regards the applicant's further complaint about the lack of a hearing before the Administrative Court, the Commission, even assuming that the applicant complied with the time-limit as stipulated in Article 26 (Art. 26) of the Convention, notes that he did not request such a hearing. The Commission, recalling the practice of the Administrative Court not to hear the parties unless one of them expressly requests it to do so, finds that the applicant must be deemed to have waived unequivocally his right to a hearing (see Zumtobel judgment, loc. cit., para. 34).

c. It follows that the above complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention that the proceedings were conducted in an unfair manner.

a. He complains in particular that the landscape protection expert lacked independence as he was an employee of the Regional Government and that this expert was heard in his absence on 31 July 1987.

The Government submit that the applicant did avail himself of the opportunity to comment on the expert's statements. In any way, the expert's report was of no relevance in the further proceedings as it was limited to issues under Section 5 of the Landscape Protection Act, whereas the Administrative Court dismissed the applicant's complaint under Sections 3 and 10 of the said Act.

The Commission recalls that in order to determine whether the aim of Article 6 (Art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (Eur. Court H.R., Imbroscia judgment of 24 November 1993, para. 38, to be published in Series A no. 275).

The Commission notes that on 22 May 1989 the Administrative Court dismissed the applicant's complaint holding that his application for a permit under the Landscape Protection Act had to be refused under Section 20 para. 1 of the Regional Planning Act as it contradicted the Area Zoning Plan. It did not, therefore, take the issues under Section 5 of the Landscape Protection Act into account, to which the expert opinion related. The Administrative Court concluded that under these circumstances it need not consider further the applicant's complaint that the expert had, on one occasion, been heard in the absence of the applicant's counsel.

b. As regards the applicant's complaint that the Constitutional Court's refusal to deal with his complaint and to decide on its

merits rendered the proceedings unfair, the Commission observes that the applicant has raised this complaint for the first time in his observations in reply of 21 June 1993.

Moreover, the Commission, even assuming that the applicant complied with the time-limit as stipulated in Article 26 (Art. 26) of the Convention, finds no indication that the proceedings before the Constitutional Court affected the fairness of the proceedings in general.

c. Under these circumstances the Commission, looking at the proceedings as a whole, finds that there is no appearance of a violation of the applicant's right to a fair hearing.

This part of the application, therefore, is again manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. Finally the applicant complains that the proceedings were not conducted within a reasonable time as required by Article 6 para. 1
(Art. 6-1) of the Convention.

The Government contend that the proceedings were concluded within a reasonable time. They submit in particular that the Administrative Court dealt twice with the case and that delays, if any, were attributable to the applicant.

The applicant refers in particular to delays in the proceedings before the administrative authorities. Thus between 2 July 1984, when he lodged his appeal, and 21 April 1986, when an oral hearing took place, the Regional Government made no steps to further the proceedings.

The Commission finds that this complaint must be examined on its merits. This part of the application cannot, therefore, be declared

manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission unanimously

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint regarding the length of the proceedings;

and

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)