CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 55193/00
by Richard SCHELLING
against Austria

The European Court of Human Rights (First Section), sitting on 25 November 2004 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 11 February 2000,

Having regard to the partial decision of 29 March 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Richard Schelling, is an Austrian national, who lives in Langenegg (Austria). He is represented before the Court by Mr W.L. Weh, a lawyer practising in Bregenz (Austria). The respondent Government were represented by their Agent, Ambassador H. Winkler, Head of the International Law Departement at the Federal Ministry for Foreign Affairs.

A. The circumstances of the case

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

On 16 August 1988 the applicant requested permissions under the Water Act (*Wasserrechtsgesetz*) and the Landscape Protection Act (*Landschafts-schutzgesetz*) which were necessary for putting a culvert through a drain on agricultural land owned by him.

On 14 September 1988 the Bregenz District Administrative Authority (*Bezirkshauptmannschaft*) conducted an oral hearing on the applicant's requests and inspected his land.

On 21 June 1990 the District Administrative Authority refused the requested permissions. The applicant appealed.

On 12 December 1990 the Vorarlberg Regional Governor (*Landes-hauptmann*) granted the requested permission under the Water Act.

On 2 April 1991 the Vorarlberg Regional Government (*Landes-regierung*) dismissed the applicant's appeal insofar as it concerned the request for permission under the Landscape Protection Act.

On 28 May 1991 the applicant filed a complaint with the Administrative Court (*Verwaltungsgerichtshof*) against the Regional Government's decision.

On 6 May 1996 the Administrative Court quashed the Regional Government's decision on the ground of procedural deficiencies and remitted the case to the latter. It found that the authorities had failed to obtain detailed information concerning nature conservancy issues which were raised by the applicant's project.

On 16 January 1997 the Regional Government invited the applicant to comment on the additional expert opinion on nature conservancy issues of the expert A. On 31 January 1997 the applicant submitted his comments, following which A. amended the expert opinion on 5 May 1997.

On 26 May 1997 the applicant lodged an application with the Administrative Court against the administrative authorities' failure to decide (*Säumnisbeschwerde*).

On 10 July 1997 the Administrative Court ordered the Regional Government to issue a decision within three months.

Subsequently, the Regional Government appointed an expert on agriculture and forestry issues, who, after inspecting the applicant's land on 19 August 1997, delivered his opinion on 22 August 1997.

On 4 November 1998 the Administrative Court requested the Regional Government to order expert A. to submit an additional expert opinion on nature conservancy issues, which A. delivered on 12 January 1999.

On 25 January 1999 the Regional Government invited the applicant to submit comments on the expert opinions on nature conservancy issues and on agriculture and forestry issues within two weeks.

On 24 February 1999 the applicant submitted comments on these opinions and requested an oral hearing. He also requested that the experts be summoned to the hearing and that the land be inspected by the court. He stressed that the project would improve the productivity of the agricultural land and that therefore public interest existed in the realisation of his project as required under the applicable law. He also challenged the expert A. for bias as he had already delivered an opinion upon a request by the Regional Government and that his independence was doubtful as he was a civil servant bound by instructions.

On 6 July 1999 the Administrative Court dismissed the applicant's appeal against the District Authority's decision of 21 June 1990 concerning the request for permission under the Landscape Protection Act. It found that the competence to decide on the merits had passed over to it as the Regional Government had failed to decide within the three-month time-limit set.

Further it found, in view of the expert opinions, that the applicant's project interfered with the objects of the Landscape Protection Act as it would spoil the character of the landscape and that there existed no public interest which would justify the measure. Moreover, the applicant had not disproved the expert's conclusion.

As regards the alleged bias of A., it found that the mere fact that the expert had already delivered an opinion at an earlier stage of the proceedings and that he was a civil servant was not in itself sufficient to raise doubts as to his independence and impartiality and that the applicant had failed to put forward any specific argument to cast doubt upon A.'s independence or impartiality.

Finally, the court held that it could abstain from an oral hearing and an inspection of the applicant's land since the proceedings had been carried out correctly and the facts, insofar as relevant in view of the applicable law, were undisputed. This decision was served on the applicant's counsel on 12 August 1999.

COMPLAINTS

The applicant complained under Article 6 § 1 of the Convention about the fairness of the proceedings. In particular he referred to the fact that he was denied a public hearing before the Administrative Court and that, therefore, he had no possibility to an adversarial questioning of the experts and that the Administrative Court's decision was only based on written evidence. He also complained of the fact that the Administrative Court failed to inspect the property concerned and that expert A. had been biased. He submitted that the Administrative Court failed to appoint a new expert as A. had been a civil servant bound by instructions, who already had delivered an opinion upon a request by the Regional Government.

THE LAW

1. The applicant complained under Article 6 of the Convention of alleged unfairness of the administrative proceedings. In particular, he complained about the lack of a public hearing before the Administrative Court, that the Administrative Court failed to inspect his property, that he had no possibility to question the experts in a hearing and that the Administrative Court's decision was only based on written evidence. Article 6 § 1 of the Convention, as far as material, reads as follows:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ..."

The Government argued that, in the specific circumstances of the case, the Administrative Court could abstain from holding an oral hearing. After the Regional Government's Office had failed to decide, the Administrative Court had to decide on the applicant's appeal against the District Administrative Authority decision of 21 June 1990. The administrative authorities, having held oral hearings, having inspected the applicant's land and having obtained expert opinions, were "quasi-judicial" authorities. In particular, the Administrative Court was called upon to determine a question of law, namely whether the realisation of the requested project affected landscape protection interests and whether any such interference would be outweighed by other public interests. Referring to the case of *Döry v. Sweden* (no. 28394/95, §§ 42-43, 12 November 2002), the Government pointed out that the question of law at issue could be decided on the basis of the file, in particular in view of the amended expert opinions, which the Administrative Court considered to be conclusive and comprehensible. Moreover, the Administrative Court, on 6 May 1996, had already quashed the Regional Government's decision and remitted the case to the latter authority for obtaining a supplementary expert statement to

determine the above-mentioned question of law. Subsequently, two experts delivered amended statements which were submitted to the applicant. In his comments of 24 February 1999 the applicant merely challenged the experts' findings without giving detailed reasons. In particular he made no concrete submission why the conduct of an adversarial hearing supported his view that the concurring expert opinions were incorrect nor had he submitted a counter-opinion.

The applicant contested the Government's view. He maintained that the special features of the case at issue required that an oral hearing be conducted by the Administrative Court, even more so because jurisdiction over his appeal against the District Administrative Authority's decision had passed on to the latter court. In particular, all questions of law had already been determined by that court's decision of 6 May 1996. In the subsequent proceedings it only had to establish the relevant facts for the assessment whether or not the applicant's project met the preconditions for granting the requested permission under the Landscape Protection Act. In the applicant's view, theses were rather simple questions of fact.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant further complained under Article 6 § 1 of the Convention that expert A. had been biased and that the Administrative Court failed to appoint a new expert as A. had been a civil servant bound by instructions, who already had delivered an opinion upon a request by the Regional Government.

The Government argued that the mere fact that expert A. had participated at an earlier stage of the proceedings did not cast into doubt A.'s impartial and unbiased attitude towards the case at issue. Further, they pointed out that there was no indication of bias from an objective point of view, since A. was an official expert of the Office of the Regional Government and only the decision on the merits issued by the District Authority was at stake before the Administrative Court. Rather, the Administrative Court acted in a reasonable way in the light of procedural efficiency by appointing the same expert to supplement his opinion. The applicant did not submit any concrete indication raising concerns as to A.'s subjective impartiality.

The applicant contested this view, repeated in essence the arguments set out in his application and submitted that another independent expert should have been appointed.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Søren NIELSEN
Registrar

Christos ROZAKIS
President