CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 42057/98
by Gertrude SPEIL
against Austria

The European Court of Human Rights (Third Section), sitting on 5 September 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 23 March 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Gertrude Speil, an Austrian national, was born in 1932 and lived in Frauendorf/Schmida. She was represented before the Court by Mr E. Proksch, a lawyer practising in Vienna.

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

The applicant owned a plot of land in Sitzendorf/Schmida, on which a building from the 17th century is situated. The applicant lived in this building and ran a wine production and a distillery there. In 1976 she obtained a permit under the Water Rights Act (*Wasserrechtsgesetz*) to construct a waste water disposal system on the property and to discharge waste water into a nearby stream.

On 29 April 1996 the Sitzendorf Municipality, without holding a hearing, ordered the applicant to connect her property to the newly constructed public sewerage system. It found that the conditions required by section 56 § 2 of the 1976 Lower Austria Building Act (*niederösterreichische Bauordnung*, "the Building Act") were met, namely, that the connecting canal between the border of the property and the public canal would be no longer than fifty meters and that no pump appliance was necessary. It further noted that under section 17 of the 1977 Lower Austria Canal Act (*niederösterreichisches Kanalgesetz*) property owners had the obligation to obtain the necessary building permit for the part of the canal situated on their property which they had to construct at their own cost. They were further obliged to carry out any necessary changes to the sewerage system of any building situated on the property at their own expense.

The applicant, represented by counsel, appealed claiming that the municipality should have inspected her property and should have heard an expert on waste disposal. Further, she claimed that the obligation to connect her property to the public canal was at variance with the permit under the Water Rights Act. Finally, she alleged that the Water Rights Act would prohibit the discharge of waste water from her commercial enterprise to the public canal and that the costs of carrying out the necessary construction works, estimated at 1,5 million Austrian schillings, would be excessive.

On 27 June 1996 the Sitzendorf Municipal Council (*Gemeinderat*), sitting in camera, dismissed her appeal. It found that it followed from the existing files and maps that the requirements of section 56 § 2 of the Building Act were met and that the permit under the Water Rights Act was not relevant for establishing the obligation to connect a property to the

public sewerage system. As to the applicant's argument that she would have to bear excessive costs, it found that the above provision did not contain any general principle of proportionality.

On 22 November 1996 the Lower Austria Regional Government (*niederösterreichische Landesregierung*), sitting in camera, dismissed the applicant's further appeal in which she had repeated her arguments. In particular, the Regional Government found that the permit under the Water Rights Act only gave the applicant a right to discharge waste water as long as this was not contrary to other legal obligations, such as the obligation to connect her property to the public canal. It further noted that the fulfilment of the legal requirements laid down in section 56 § 2 of the Building Act clearly followed from the existing files and maps, and found that the applicant had failed to show any need for the taking of further evidence.

In her complaint to the Constitutional Court (*Verfassungsgerichtshof*) the applicant again repeated her arguments and alleged in particular that the obligation to connect her property to the public canal violated her right to property. She maintained that the Water Rights Act would prohibit the discharge of waste waters from her wine production and distillery to the public canal. She would therefore have to separate these waste waters which would entail excessive costs. The necessary changes would endanger the 17th century building.

On 24 February 1997 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success and referred the case to the Administrative Court (*Verwaltungsgerichtshof*).

On 30 September 1997 the Administrative Court dismissed the applicant's complaint, rejecting at the same time her request for a hearing. As to the applicant's argument that the obligation to connect her property to the public canal was at variance with the permit under the Water Rights Act, the Administrative Court, referring to the Constitutional Court's case-law, found that the discharge of waste water could be regulated under different aspects and that it was for the legislator to determine the cases in which a property owner was obliged to connect his property to the public canal. As to the applicant's argument that the authorities failed to inspect her property and to hear an expert on waste disposal, the applicant had, in her appeal, failed to challenge the first instance authority's finding of the facts according to which the conditions laid down in section 56 § 2 of the Building Act were met. Thus, the appellate authorities were not required to take further evidence. The Administrative Court held that it could abstain from an oral hearing pursuant to section 39 § 2 (6) of the Administrative Court Act since the proceedings have been carried out accurately and the facts were undisputed.

On 5 January 2001 the applicant died. On 30 November 2001 the applicant's husband, who inherited the estate, informed the Court that he wished to pursue the application.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention about the lack of a public oral hearing before the Administrative Court.

She further complains under Article 6 § 1 that the domestic authorities decided arbitrarily in that they failed to inspect her property or to hear an expert on waste disposal, and that they disregarded the fact that she had a permit under the Water Rights Act to discharge waste water into the nearby stream.

The applicant also complains under Article 1 of Protocol No. 1 that the obligation to connect her property to the public sewerage system and, in particular, the entailed separation of the waste water required for technical reasons would destroy, damage and endanger the 17th century building situated on her property. She further alleges that the administrative authorities had failed to assess the proportionality of the ensuing costs for the connection to the public canal and that the costs incurred were excessive.

THE LAW

1. The Court notes at the outset that the applicant died after the introduction of the application and that the applicant's husband, who is also her heir, has informed the Court that he wished to pursue the application.

The Court recalls that it has accepted on a number of occasions that the close relatives of a deceased applicant may be entitled to take his or her place (see for instance the Scherer v. Switzerland judgment of 25 March 1994, Series A no. 287, p. 14-15, § 31 with further references). In the present case, the Court accepts that the applicant's husband may pursue the application.

2. The applicant's first complaint relates to the alleged unfairness of the proceedings and the lack of an oral hearing before the Administrative Court under Article 6 § 1 of the Convention. Article 6 § 1, as far as material, reads as follows:

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

a. As to the applicant's complaint about the lack of an oral hearing in the proceedings relating to the order to connect her property to the public sewerage system, the Government accept that Article 6 applies. As regards compliance with Article 6, the Government argue, referring to Fejde v. Sweden (judgment of 29 October 1991, Series A no. 212-C, § 33), Jan-Åke Andersson v. Sweden (judgment of 29 October 1991, Series A no. 212-B,

§ 29) and Allan Jacobsson v. Sweden (no. 2) (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I), that the applicant did not raise issues of fact and law that would have required an oral hearing before the Administrative Court.

The applicant contests the Government's view. She maintains that she was entitled to a hearing before the Administrative Court.

The Court considers that Article 6, under its civil limb, is applicable to the proceedings.

The Court recalls that Austria's reservation under Article 6 was found to be invalid (*Eisenstecken v. Austria*, no. 29477/95, §§ 24-30, ECHR 2000-X) and the Court is therefore called upon to examine whether the requirements of this provision were complied with.

The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This requirement protects litigants against the administration of justice in secret, with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 14–15, § 33; *Malhous v. the Czech Republic* [GC], no. 33071/96, § 55, 12 July 2001).

The Court recalls that, according to its case-law, in proceedings, as here, before a court of first and only instance the right to a "public hearing" under Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, the Fredin v. Sweden (no. 2) judgment of 23 February 1994, Series A no. 283-A, pp. 10–11, §§ 21–22; the Fischer v. Austria judgment of 26 April 1995, Series A no. 312, pp. 20–21, § 44; and the Stallinger and Kuso v. Austria judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-II, pp. 679–80, § 51; Allan Jacobsson (no. 2) judgment cited above, p. 168, § 46).

The Court has already considered that in the course of proceedings where exclusively legal or highly technical questions are at stake, the requirements of Article 6 may be fulfilled even in the absence of an oral hearing. Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 19, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002).

In the present case the applicant was in principle entitled to a public hearing as none of the exceptions laid down in the second sentence of

Article 6 § 1 applied (see the Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64).

The Court notes, however, that the administrative authorities, i.e. the Municipal Council and the Regional Government, are not "tribunals" within the meaning of Article 6. The Court further notes that the applicant does not contest that the Administrative Court is a tribunal, and there is no indication in the file that the Administrative Court's scope of review was insufficient in the circumstances of the case (see for instance, the Fischer judgment cited above, p. 17-18, §§ 30-34 with further references). Thus, the Administrative Court was the first and only tribunal which examined the merits of the applicant's case. Moreover, the applicant had explicitly requested a hearing before the Administrative Court.

The Court observes that the Administrative Court dismissed this request on the ground that it found that the administrative authorities had not committed any procedural error and that the facts were undisputed in view of the applicant's failure to challenge the first instance authority's findings of fact. The Court notes that where the facts are not disputed and a tribunal is only called upon to decide on questions of law of no particular complexity, an oral hearing may not be required under Article 6 § 1 (see *Varela Assalino,* cited above, with further references). The Court considers that such was the situation in the present case as the Administrative Court only had to decide on questions of law which did, however, not raise complex issues. Taking further into account national authorities' demands of efficiency and economy (see the Schuler-Zgraggen judgment cited above, p. 20, § 58), the Court concludes that the Administrative Court could abstain from holding an oral hearing.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

b. The applicant further complains about the unfairness of the proceedings. She submits in particular that the domestic authorities failed to inspect her property and to hear an expert and that they disregarded the fact that she had a permit under the Water Rights Act to discharge waste water to the nearby streamlet.

The Court notes that the applicant, when appealing against the first-instance decision, failed to challenge the authority's finding on the facts and to specify which relevant facts should be established by the inspection of her property or the hearing of an expert. The Administrative Court noted that, thus, the appellate authorities were not called upon to take the evidence requested. Thus, in this respect, the applicant has not exhausted domestic remedies.

It follows that this part of the complaint must be rejected under Article 35 §§ 1 et 4 of the Convention for non-exhaustion of domestic remedies.

c. As to the remainder of the complaint, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (*Garcia Ruiz v. Spain* [GC], no. 30544/96, p. 109, § 28, ECHR 1999-I). In the present case there is no indication that the applicant, represented by counsel, could not duly forward her arguments or that the proceedings were otherwise unfair.

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicant further complains that the obligation to connect her property to the public sewerage system was in breach of Article 1 of Protocol No. 1, in particular because it entailed a danger to the 17th century building on her estate. She further alleges that the cost of the connection was excessive and that the authorities had failed to assess their proportionality when imposing the connection order. Article 1 of Protocol No. 1 provides 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 Government contend that the obligation imposed on the applicant to connect her property to the public sewerage system was lawful and served the general interest in securing a modern and environmentally-friendly waste-water disposal. Moreover, considering the wide margin of appreciation enjoyed by Contracting States under Article 1 of Protocol No. 1, it was also proportionate that property owners bear the costs involved. They also point out that the applicant's property was, in the meantime, connected to the public sewerage system and that there was no damage to the 17th century building. In the Government's view, the value of the applicant's property has even increased due to its connection with the canal system. As to the applicant's further complaint that the administrative authorities had failed to assess whether the costs of the connection were

proportionate, the Government maintain that the applicant raised the disproportion complaint for the first time on 25 September 2001 when her property was already connected to the sewerage system. Moreover, she failed to specify the amount of costs incurred.

The applicant contests the Government's view and maintains that the authorities were obliged to observe the principle of proportionality inherent in Article 1 of Protocol No. 1, regardless of whether or not the obligation to connect the property to the public sewerage system had already been met.

Under the Court's case-law, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II; *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V).

The Court considers that Article 1 of Protocol No. 1 applies to the proceedings at issue since they concerned the control of the use of the applicant's property. This is also undisputed by the parties.

The Court considers that the order to connect the applicant's property to the public sewerage system was lawful and served the general interest. It further holds that the obligation of a property owner to bear the costs involved in the connection of his property to a public sewerage system does not in principle appear to be disproportionate. The Court notes that the applicant had vaguely raised the complaint about the proportionality of these costs in the application form. However, she failed to substantiate her claim that the costs were disproportionate in her case or to submit any proof of her allegation that the connection works caused damage to the 17th century building.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Georg RESS
President