AS TO THE ADMISSIBILITY OF

Application No. 16445/90
by Josef STEINER
against Austria

The European Commission of Human Rights (Second Chamber) sitting in private on 10 February 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
MM. F. MARTINEZ
J.-C. GEUS

Mr. K. ROGGE, Secretary to the Second 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 29 March 1990 by Josef Steiner against Austria and registered on 17 March 1990 under file No. 16445/90;

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 born in 1938. He is represented before the Commission by Mr. A. Friedberg, a lawyer practising in Vienna.

The applicant is in dispute with his neighbours. There have been two sets of proceedings which are the subject of the present application, the facts of which, as submitted by the applicant's representative, may be summarised as follows.

I.

On 27 June 1988 the Liesing District Court (Bezirksgericht) ordered the applicant to consent to an amendment to the plan of the house belonging to the applicant's neighbours. The amendment involved changing a garage into a store and providing for access from what had been the garage to the stair-well of the building. It was not the first alteration the neighbours had undertaken.

The applicant's appeal to the Vienna Regional Court (Landesgericht) was rejected on 3 January 1989 by a Senate comprising, inter alia, a Mr. Reitermaier as reporting judge. Because the

proceedings were "non-contentious" (Außerstreitverfahren), and because there had not been a hearing on appeal, the applicant only became aware of the names of the judges on 9 February 1989, when the judgment was served on him. With service, the judgment became final.

The applicant applied to the Vienna Regional Court by way of request for the proceedings to be re-opened (Wiedereinsetzungsantrag) and an application (Ablehnungsantrag) alleging bias on the part of Mr. Reitermaier on the ground that he was a member of an association of students and former students (K.Ö.H.V. Amelungia) to which one of the neighbours (the husband of a married couple) also belonged. Membership involved addressing fellow members by the familiar form (duzen), mutual oaths of loyalty and support in cases of need, and undertakings not to take any action which could have negative consequences for another member. The judge had joined the association in 1963 and the neighbour had joined in 1958. The applicant added details of the meeting places of the association, and pointed out that, apart from students and retired persons, there were some 200 members. He considered that it was inevitable that Mr. Reitermaier would know the neighbour so closely that he could not be seen to be wholly impartial.

The applicant's requests were rejected by the Vienna Regional Court on 4 April 1989. The Court noted that the function of re-opening proceedings (Wiedereinsetzung) was to rectify procedural errors made by a party: as the applicant had made no error, the request could not be granted. As to the judge's alleged lack of impartiality, the court found that, apart from the fact that mere membership of an association to which a party belonged was not of itself evidence of bias, a judge could only be challenged up to the moment where the decision became final: as the decision in the present case became final when the

applicant received it, he was not able to challenge the judge. The court pointed out that the position was different in the case where a judge was excluded from participating by the law.

The Vienna Court of Appeal (Oberlandesgericht) refused the applicant's appeal (Rekurs) to it on 7 September 1989, the judgment being received by the applicant's representative on 29 September 1989.

II.

On 21 April 1989 the neighbours' request for planning permission for the works in their house was granted. The decision noted that the applicant's consent had been replaced by the Vienna Regional Court's decision of 3 January 1989, so the consent was deemed to have been granted.

The applicant, who received the planning decision as an owner of the parcel, appealed to the Vienna Planning Authority (Bauoberbehörde) which, on 28 September 1989, confirmed the grant of planning permission. The planning authority noted that it could only consider the question whether a "subjective public-law right" (subjektiv-öffentliches Recht) of the applicant had been violated. The only subjective public-law right which the applicant had was the right to ensure that no grant of planning permission was made unless he had given his consent. As the applicant's consent had been replaced by the deemed consent of the court, that subjective public-law right had not been violated.

The applicant's complaint to the Administrative Court (Verwaltungsgerichtshof) was dismissed on 12 December 1989 as being ill-founded, the Administrative Court agreeing with the planning authority.

COMPLAINTS

The applicant considers that, because his neighbours' planning consent was issued without his, the applicant's, agreement, it is invalid.

With regard to the proceedings before the ordinary civil courts, the applicant complains that a judge who was not clearly impartial took part in the proceedings, and that because of the nature of the proceedings, the applicant was unable to challenge that alleged partiality.

With regard to the administrative proceedings which culminated in the decision of the Administrative Court of 12 December 1989, the applicant considers that that decision is contrary to Austrian law, as every party to a dispute has a right to appeal, and he further alleges a violation of his rights to a fair trial (Article 6 para. 1 of the Convention) and to peaceful enjoyment of his possessions (Article 1 of Protocol No. 1 to the Convention). He considers that the Administrative Court's decision leads to the result that a joint owner who initially consents to a proposed amendment to a building and then withdraws that consent, is in a better procedural position than a joint owner who refuses consent from the very beginning.

THE LAW

1. The applicant alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention in that a judge took part in the appeal judgment in his case before the Vienna Regional Court (Landesgericht) in respect of whom the applicant had reason to fear that the judge was not completely impartial as the judge was a member of an association to which one of the plaintiffs in the case also belonged. In respect of these proceedings the applicant further alleges that he was deprived of any possibility to complain of this alleged lack of impartiality because the judgment became final on service, and it was only at that stage that the applicant became aware of the composition of the appeal court.

Article 6 para. 1 (Art. 6-1) of the Convention provides, so far as relevant, 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 applicant complains that, because the appeal judgment became final when it was served on him, he was unable to challenge one of the judges who took part in the appeal judgment, and he further complains of partiality. This complaint itself raises the question of whether the six months time-limit set out in Article 26 (Art. 26) of the Convention has been complied with, as the appeal judgment became final on 9 February 1989 whereas the application was only introduced on 29 March 1990. However, the Commission is not required to decide this question as the complaint is in any event inadmissible for the following reasons.

The Commission notes, still assuming that the applicant has complied with Article 26 (Art. 26) of the Convention, that the Vienna Regional Court in its judgment of 4 April 1989 commented that mere membership of an association to which a party to litigation belonged was not of itself evidence of bias.

The Commission recalls that, as to "the question of impartiality, a distinction must be drawn between a subjective test, whereby it [is] sought to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge

offered guarantees sufficient to exclude any legitimate doubt in this respect" (Eur. Court H.R., Langborger judgment of 22 June 1989, Series A no. 155, p. 16, para. 32, also a civil case). The present applicant's contention is that because the judge in question was a member of an association to which one of the plaintiffs also belonged, ascertainable facts - both men's membership of the association - exist which may raise doubts as to his impartiality (cf. Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

The Commission notes that the applicant does not allege that the judge actually knew the plaintiff, or even - given that there had been no hearing on the appeal - that it was inevitable that the judge would recognise the name of the plaintiff as a fellow member of the large association concerned. Given these considerations the Commission findsthat, although the applicant may have had misgivings when he found out that both men were members of that association, that fear of lack of impartiality was not objectively justified.

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

2. The applicant also alleges a violation of Article 6 (Art. 6) of the Convention in connection with the administrative proceedings which ended with the Administrative Court's decision of 12 December 1989. He further alleges a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention in this respect.

The Commission recalls that the Vienna Planning Authority (Bauoberbehörde) in its decision of 28 September 1989 found that the only right which the applicant could claim in the administrative proceedings was the right to ensure that planning permission would not be granted without his consent, but that this consent had been replaced by the courts' decisions. The Administrative Court (Verwaltungsgerichtshof) agreed with the Planning Authority.

The Commission finds that the only question for determination by the administrative authorities was the question of the applicant's consent to the development proposed by the applicant's neighbours. In the absence of any indication that the applicant's own property will be affected - adversely or at all - by the planning permission, and given that this question had already been canvassed by the civil courts, the Commission finds that no "possessions" of the applicant's were at issue in the administrative proceedings for the purposes of Article 1 of Protocol No. 1 (P1-1) of the Convention, and the questions which required a determination in accordance with Article 6 (Art. 6) of the Convention were considered by the civil courts in the proceedings before the Liesing District Court (Bezirksgericht) and the Vienna Regional Court (Landesgericht).

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

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)