AS TO THE ADMISSIBILITY OF

Application No. 15591/89
by Karl and Stefanie WEISS
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 1 September 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
N. BRATZA

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 15 September 1989 by Karl and Stefanie Weiss against Austria and registered on 10 October 1989 under file No. 15591/89;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 20 December 1991 and the observations in reply submitted by the applicant on 13 February 1992;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicants, an Austrian couple, are farmers residing in St. Pölten. Before the Commission they are represented by Messrs. W.L. Weh and J. Lindlbauer, lawyers practising in Bregenz and Enns respectively.

The applicants own real property in Stattersdorf in Austria.

On 24 May 1977 the Provincial Governor (Landeshauptmann) of Lower Austria expropriated 12.155 m2 of their real property and fixed the compensation for the expropriation at AS 611.293.

On 14 March 1979 the Federal Minister for Construction and Technology (Bundesminister für Bauten und Technik) dismissed the applicants' appeal against the Provincial Governor's decision.

On 31 August 1979 the applicants filed a claim before the St. Pölten District Court for compensation in the amount of AS 1.397.600.

On 29 February 1980 the District Court asked the parties whether they would agree to the appointment of Mr. X. as expert. On 24 March 1980 the Attorney General's Department (Finanzprokuratur) raised objections and requested the appointment of another expert.

On 23 May 1980 Mr. X was appointed court expert and on 25 July 1980 submitted his written opinion suggesting that compensation should be granted to the amount of AS 1.240.811.

On 24 March 1981 the Attorney General's Department submitted observations and requested the appointment of a second expert. Alternatively it asked for a hearing to discuss the first expert's report. In these observations it argued inter alia that the expert had not taken relevant literature into account and that his determination of the market value was arbitrary and unfounded.

On 6 April 1982 the District Court fixed a hearing for 26 May 1982. This hearing was first postponed to 9 June 1982 on request of the expert and then cancelled on request of the applicants.

On 21 May 1982 the District Court requested the expert to complete his report in the light of the written observations of the Attorney General's Department of 24 March 1981.

On 3 August 1982 the expert completed the report, now suggesting the amount of AS 1.378.008 as compensation.

On 18 May 1983 the District Court fixed a hearing for 8 September 1983.

On 27 and 28 July 1983 the applicants submitted observations alleging that the compensation as proposed by the expert was too low.

On 16 August 1983 the expert gathered new evidence, and on 19 August 1983 recommended compensation of AS 2.118.249,20.

On 24 August 1983 the Attorney General's Department challenged the expert for bias, submitting that the expert criticized and discriminated against the Attorney General's Department in an article published in a law journal ("Österreichische Juristenzeitung" 1983).

On 8 September 1983 a court hearing took place before the District Court during which also the expert was heard. The Court then dismissed the challenge of the Attorney General's Department, while also deciding to appoint a second expert.

On 4 October 1983 the St. Pölten Regional Court dismissed the appeal filed by the Attorney General's Department against the District Court's decision of 8 September 1983.

On 4 November 1983 the District Court asked the parties whether they would agree to the appointment of Mr. Y. as second expert. The applicants agreed on 1 December 1983 and the Attorney General's Department on 2 January 1984. The applicants also submitted a list of questions to be put to the expert.

On 27 June 1984 Mr. Z was appointed as second expert. On 5 March 1985 his expert's report was served on the applicants. While it was officially dated 19 September 1984, the expert, according to his own report, only took evidence on 23 November 1984. The expert suggested a compensation of AS 749.549,71.

On 14 and 25 March 1985 the applicants commented on the second expert's report.

On 18 April 1985 the District Court fixed a hearing for 15 May 1985. Subsequently the hearing was postponed first to 14 June 1985, then to 12 July 1985 and finally to 6 September 1985.

On 15 August 1985 the first expert drew up a new report in which he commented on the second expert's report.

At the court hearing on 6 September 1985 the Attorney General's Department challenged the first expert for bias submitting that he had claimed official liability (Amtshaftung) of the Republic of Austria and that had criticized again the Attorney General's Department in a law journal ("Österreichische Juristenzeitung" 1984).

On 16 September 1985 the first expert submitted comments on the objections of the Attorney General's Department and on 6 November 1985 the Attorney General's Department gave further reasons for challenging the first expert.

On 5 December 1985 the District Court terminated the appointment of the first expert. The Court found that the first expert had criticized the second expert's opinion and the Attorney General's Department in an inappropriately harsh manner. He had claimed for instance that the second expert's report had made it far more difficult to ascertain the truth and that the second expert completely lacked qualification. He even went so far to submit that if the second expert was a civil engineer he would submit his extremely poor and unsatisfactory report to the Chamber of Engineers (Ingenieurkammer) for disciplinary review. The Court referred to an article the first expert had published in a law journal ("Österreichische Juristenzeitung") in 1984 and found that in this article he had insinuated that the Attorney General's Department was only trying to serve the interests of a party but not to act in the interest of justice. In the court's view the first expert also had insinuated that the Attorney General's Department indirectly provoked unjust decisions up to the highest level, i. e. the Supreme Court. The Court further referred to official liability proceedings the expert had introduced against the Republic of Austria claiming the full payment of expert fees which had been reduced by the courts following appeals of the Attorney General's Department.

The Court concluded that the expert showed a hostile attitude against the Attorney General's Department which demonstrated that he had a clearly negative opinion against one of the parties. The Court also found that the expert had the intention to increase compensation for expropriation in Austria, adjusting it to average international standards. By doing so he made the interests of a party to his own interests and failed to comply with his role to assist the court in its tasks which is to make it easier for the judge, who is not an expert, to establish the true facts on which in the end the court's judgement was to be based.

The applicants and the first expert appealed against this decision. The first expert also challenged the chairman of the St. Pölten District Court for bias.

On 20 January 1986 the applicants challenged the second expert for bias.

On 19 March 1986 the St. Pölten Regional Court dismissed a further challenge for bias by the first expert of the members of the Regional Court's Chamber which had to deal with the first expert's appeal against his dismissal. The first expert appealed against this decision. His appeal was dismissed by the Vienna Court of Appeal (Oberlandesgericht) on 17 September 1986.

On 1 October 1986 the St. Pölten Regional Court rejected the applicants' appeal against the dismissal of the first expert and on

21 January 1987 the first expert's appeal against his dismissal.

On 28 April 1987 the District Court dismissed the applicants' challenge of the second expert for bias. On 8 July 1987 the Regional Court dismissed the applicants' appeal against this decision.

Meanwhile, the District Court had fixed a hearing for 6 July 1987. This hearing was first postponed to 4 September 1987 on request of the applicants and then postponed to 18 September 1987 on request of the Attorney General's Department.

On 15 September 1987 the applicants submitted all reports of the dismissed first expert as a private expert opinion ("Privat-gutachten") and requested the Court to appoint a third expert.

On 18 September 1987, a court hearing took place in which the second expert's report was discussed. As the applicant's lawyer put complex and voluminous questions to the second expert, he was requested to submit a detailed list of questions within two weeks. The Court also granted a partial compensation of AS 550.000. In the course of the hearing the second expert submitted a written statement in which he criticized the "unfactual and annoying conduct" of the first expert and objected to the applicants' request for his dismissal.

On 30 September 1987 the applicants challenged the second expert as he had allegedly disclosed biased opinions at the court hearing on 18 September 1987.

On 1 October 1987 the applicants' lawyer submitted the requested questions.

On 30 December 1987 the St. Pölten District Court fixed the compensation in the amount of AS 809.839,71 and dismissed the applicants' challenge of the second expert for bias. The Court held further that the first expert's report could no longer be considered the report of a court's expert as the expert meanwhile had been dismissed. The Court also refused the applicants' request for having the first expert heard as a witness as it found that this was not necessary. Both parties appealed against this decision.

On 11 May 1988 the St. Pölten Regional Court partly granted the applicants' appeal and quashed the decision fixing the amount of compensation on the ground that procedural errors had occurred in the first instance proceedings. As regards the challenge of the second expert the Court dismissed the applicants' appeal. However, the Court found that the applicants possibly had a right to a third expert opinion, at any rate that it would be appropriate to hear a third expert. Both parties appealed to the Supreme Court (Oberster Gerichtshof) against this decision.

On 15 December 1988 the Supreme Court granted the parties' appeals against the Regional Court's decision concerning the amount of compensation and referred the case back to the Regional Court as the District Court's decision on compensation had entered into force in respect of AS 550.000. The Supreme Court, however, rejected the applicants' appeal concerning the challenge of the second expert.

On 3 March 1989 the Regional Court fixed the compensation at AS 809.839,71 and dismissed the applicants' further claim. Again, both parties appealed to the Supreme Court. On 3 April 1989, however, the Attorney General's Department withdrew its appeal.

On 20 April 1989 the District Court dismissed the applicant's claim for reimbursement of their costs for submitting observations on the Attorney General's Department's appeal which subsequently had been withdrawn. The applicants appealed against this decision.

On 7 September 1989 the Supreme Court dismissed the applicants' appeal.

On 27 June 1990 the Regional Court partly granted the applicant's appeal against the District Court's decision of 20 April 1989.

Meanwhile, on 30 October 1987 the first expert had brought a private action against the second expert for libel with regard to the second expert's statements in his written submissions to the St. Pölten District Court on 18 September 1987. At a hearing on 8 February 1989 before the Lilienfeld District Court the second expert apologized for the defamatory remarks made in his statement and withdrew them as completely unfounded. Thereupon the first expert withdrew his private action and the case was dropped.

COMPLAINTS

1. The applicants complain under Article 6 para. 1 of the Convention that in these proceedings they did not have a fair hearing within a reasonable time. They also complain under this provision that the dismissal of the first expert and the refusal to consider his reports and opinion constituted a violation of the Convention.

2. The applicants furthermore complain under Article 1 of Protocol No. 1 that they did not obtain adequate compensation as the compensation granted did not include interests on the compensation or compensation for the costs to replace the expropriated real property.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 September 1989 and registered on 10 October 1989.

On 1 July 1991 the Commission decided to communicate the application to the respondent Government and requested them to submit their written observations on the admissibility and merits.

The Government's observations were submitted on 20 December 1991. On 13 February 1992 the applicants submitted their observations in reply.

THE LAW

1. a) The applicants complain under Article 6 para. 1 (Art. 6-1) of the Convention that in the civil proceedings instituted by them they did not have a fair hearing within a reasonable time.

Article 6 para. 1 (Art. 6-1) of the Convention, as far as relevant, provides 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 Government submit that the case on which the domestic courts had to decide was a complex one as the courts were confronted with particular difficulties in determining basic questions concerning the assessment of real property.

The Government submit further that also the applicants' conduct contributed to the length of proceedings. The applicants made excessive use of their right to question the experts by submitting

extensive lists of questions to the second expert. This led to a detailed and comprehensive discussion of the experts' reports and thus to delay in the proceedings. They submit further that also the conduct of the dismissed first expert, who even challenged the judges, has caused a delay in the proceedings. As regards the Attorney General's Department's conduct in the proceedings, the Government submit that like the applicants cannot be blamed for their excessive use of their right to question the experts, the Attorney General's Department cannot be blamed for making ample use of remedies, as basic questions of real property assessment of particular relevance in similar cases were at stake.

The applicants submit that no exceptional circumstances exist which would justify the duration of the proceedings which exceeded ten years. They submit that the case was not complex, as the courts' task was to give a discretionary judgment on the basis of undisputed facts. The submit further that delays which were caused by the conduct of the experts and the defendant, the Attorney General's Department, were attributable to the Government.

The Commission finds that this complaint raises complex issues of law under the Convention, the determination of which must be reserved to an examination of the 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.

b) The applicants further complain under Article 6 para. 1 (Art. 6-1) of the Convention that the dismissal of the first expert and the refusal to consider his reports and opinion constituted a violation of the Convention.

The Government submit that in view of the statements and behaviour of the first expert, which were taken into consideration by the District Court when it decided to dismiss him, the applicants' right to a fair hearing was not affected by the first expert's dismissal. In the Government's view Article 6 (Art. 6) does not imply an obligation for the Contracting states and the competent courts to make reports of experts whom courts no longer consider unbiased, a basis for their decision. Thus, the dismissal of the first expert clearly showed the court's effort to guarantee a fair trial by excluding all possibility of doubt with regard to the impartiality of the expert, i. e. the person responsible for establishing the facts on which the decision is based.

The Government submit further that the expert's opinion was not a private expert's opinion but an opinion ordered by court and prepared by an expert who was later on dismissed. The applicants, however, were free to bring arguments made by the dismissed expert in his report to the attention of the court e. g. by asking specific questions to the second expert.

The applicants submit that the reasons given by the first instance court for dismissing the expert were not convincing. They submit that it was never argued that the first expert was biased against the defendant in the domestic court proceedings, which was the Republic of Austria, the Attorney General's Department merely acting as the defendant's lawyer. In any event, there were no sufficient reasons to assume that the first expert was biased. The court's argument that the expert was biased because he had the intention to raise the level of compensation for expropriation to the international average and in doing so he made the interests of a party to the litigation his own cannot be regarded as sufficient to dismiss him.

They further submit that by the first expert's dismissal the second expert was so intimidated that he did not dare to deliver an objective report, but one which was acceptable to the Attorney General's Department. The dismissal of the first expert therefore constituted an unfair step in the proceedings, the effect of which also rendered the second expert's report unfair.

The Commission recalls that the admissibility of evidence is primarily a matter for regulation by national law, and, as a general rule, it is for the national courts to assess the evidence before them. Accordingly, the Convention organ's task under the Convention is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken were fair (see Eur. Court H.R., Delta judgment of 19 December 1990, Series A no. 191-B, p. 15, para. 35).

The Commission notes that from the beginning of the proceedings the Attorney General's Department opposed the appointment of the first expert; that a first request for terminating the appointment was dismissed by the Court; and that only a second request in which the Attorney General's Department presented further arguments led to the expert's dismissal.

The Commission cannot find that the Court had acted arbitrarily when after a careful examination of the expert's conduct within and outside the proceedings it reached the conclusion that the expert could no longer be considered as impartial. In the Commission's view the District Court's decision of 5 December 1985 to dismiss the first expert in fact demonstrates the Court's effort to guarantee a fair trial by excluding all possibility of doubt with regard to the impartiality of the expert, who was the person responsible for establishing the factual elements on which the court had to rely in its decision.

Under these Circumstances the Commission concludes that the dismissal of the first expert did not render the proceedings unfair.

As regards the applicants' further complaint that the District Court refused to hear the dismissed expert as witness, the Commission notes that the first expert was repeatedly heard by the court during the proceedings before his dismissal and that both experts repeatedly reacted to each other's reports in the course of the proceeding. The Commission further notes that on the basis of the first expert's report the applicants put questions to the second expert. Under these circumstances the Commission cannot find that the applicants were unduly prevented from presenting the first expert's views and opinions in the course of the proceedings.

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 applicants furthermore complain under Article 1 of Protocol No. 1 (P&-1) that they did not obtain adequate compensation as the compensation granted did not include interests on the compensation or compensation for the costs to replace the expropriated real property.

Article 1 of Protocol No. 1 (P1-1) 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 Government submit that the applicants' real property was expropriated in the public interest and in accordance with domestic law. As regards the amount of compensation awarded, the Government points to the wide margin of appreciation Contracting States have under Article 1 para. 1 of Protocol No. 1 (P1-1-1). They conclude that the fact that the Austrian legal provisions do not provide for the indexation, valorisation or payment interests as required by the applicants cannot be regarded as a violation of this provision. They also submit that the applicants were not granted a compensation which was lower than that granted in similar cases.

The applicants submit that the principles according to which compensation for an expropriation are assessed in Austria are unfair as courts refuse to include adjustment for inflation or interests in the amount awarded as compensation. By refusing these elements of compensation the applicants' right to property was violated and the expropriating authority encouraged to unreasonably delay proceedings for compensation.

The Commission finds that the applicants' complaint under Article 1 para. 1 of Protocol No. 1 (P1-1-1) cannot be separated from the issue under Article 6 para. 1 (Art. 6-1) of the Convention which require a further examination of the merits. It therefore has to be declared admissible as well, no other ground for declaring it inadmissible having been established.

For these reasons, the Commission, unanimously

DECLARES ADMISSIBLE, without prejudice to the merits, the applicants' complaints regarding the length of the proceedings and the applicants' complaint that they did not obtain adequate compensation;

and, by a majority,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)