AS TO THE ADMISSIBILITY OF

Application No. 12650/87
by Alois and Hertha WIENINGER
against Austria

The European Commission of Human Rights (Second Chamber) sitting in private on 31 May 1991, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
F. ERMACORA
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
Mrs. G. H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ

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 12 December 1986 by Alois and Hertha Wieninger against Austria and registered on 22 January 1987 under file No. 12650/87;

Having regard to:

- the Commission's decision of 11 July 1989 to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 20 November 1989 and the observations in reply submitted by the applicant on 3 January 1990 and supplemented on 11 February 1991;

- the Commission's decision of 8 December 1990 to refer the case to the Second Chamber;

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 facts agreed by the parties may be summarised as follows:

The applicants, Austrian citizens who own a farm at Weitersfeld, Lower Austria, are represented by Rechtsanwalt Dr. Erich Proksch of Vienna. They complain of the impossibility of obtaining compensation in respect of temporary disadvantages which they allegedly suffered in connection with agricultural land consolidation proceedings (Zusammenlegungsverfahren) under the Lower Austrian Agricultural Land Planning Act (Flurverfassungsgesetz).

The proceedings in question were instituted ex officio in January 1969. In October 1971 the Agricultural District Authority (Agrarbezirksbehörde) ordered the provisional transfer (vorläufige Übergabe) of the compensation parcels. At the relevant time there was no possibility of appealing against the provisional transfer. The applicants, who immediately claimed that their compensation parcels were insufficient, thus could only assert their claims in the main proceedings.

The consolidation plan (Zusammenlegungsplan) was issued in April 1972 in conformity with the situation created by the provisional transfer. The applicants' appeals against this plan were eventually successful. On 6 September 1978 the Supreme Land Reform Board (Oberster Agrarsenat) quashed this plan insofar as it concerned the applicants' compensation parcels finding that they were insufficient. The Agricultural District Authority adopted a new plan on 22 May 1980 which was amended by decisions of the Provincial Land Reform Board (Landesagrarsenat) of 24 November and 23 December 1981. The applicants thereby received, with effect from autumn 1982, compensation parcels which they considered as satisfactory.

In December 1979 the applicants applied for financial compensation in respect of the damages allegedly caused to them by the fact that they had received insufficient compensation parcels by the provisional transfer which at that time was still in force. They submitted an expert opinion according to which they suffered an annual loss of crops in the amount of approximately 50,000 AS. In its above decision of 22 May 1980 the Agricultural District Authority reserved this issue for a separate decision. On 24 March 1982 the applicants requested an adjournment of the proceedings in this respect. On 10 June 1985 they applied for the resumption of the proceedings, indicating that they now claimed compensation in the total amount of 597,927 AS.

On 12 June 1985 the Agricultural District Authority rejected the applicants' claim as being inadmissible. It observed that the Agricultural Land Planning Act did not provide for any compensation in respect of damage caused by the fact that there was a long period between the provisional transfer and the assignment of lawful compensation parcels by the final consolidation plan. A compensation claim could only arise if the authority had been at fault (schuldhaft) and assigned unlawful compensation parcels at the provisional transfer. However, such a claim did not fall within the jurisdiction of the agricultural authorities but had to be asserted in proceedings under the Official Liability Act (Amtshaftungsgesetz).

This decision was confirmed on appeal by a decision of the Provincial Land Reform Board of 10 December 1985. It referred to a decision of the Supreme Land Reform Board of 6 March 1985, according to which there was no legal basis for a claim such as the one of the applicants.

The applicants challenged this decision before the Constitutional Court (Verfassungsgerichtshof) invoking their constitutional rights to the inviolability of property and to a decision by the lawful judge. However, on 7 June 1986 the Constitutional Court, in summary proceedings under Article 144 para. 2 of the Federal Constitution, refused to deal with these complaints, holding that in the light of its constant case-law they did not show any prospects of success.

The applicants also complained to the Administrative Court (Verwaltungsgerichtshof) alleging the unlawfulness of the Provincial Board's above decision and suggesting that the lack of legal provisions on compensation should be brought before the Constitutional Court in proceedings for the review of the constitutionality of legislation. The Administrative Court rejected the complaint on 30 September 1986. It considered that the applicants' claim did not come under the provisions of the Provincial Land Planning Act concerning financial compensation for certain temporary damages and

that the agricultural authorities were not competent to deal with other compensation claims, including claims based on Section 365 of the Civil Code which the applicants had invoked in this respect. The Administrative Court had no doubts concerning the constitutionality of the applicable legal provisions and therefore saw no necessity to refer this question to the Constitutional Court.

The applicants also tried to assert their claim in official liability proceedings. Their claim was, however, rejected by the Provincial Governor on 29 August 1985. The applicants thereupon lodged an action with the Regional Civil Court (Landesgericht für Zivilrechtssachen) of Vienna on 1 October 1985. In his reply of 29 October 1985 the Provincial Governor submitted that the official liability proceedings were subsidiary to the above administrative proceedings which, at that time, were still pending. The liability proceedings were then stayed by a mutual agreement of the parties. They were resumed after the Administrative Court had handed down its above decision of 30 September 1986. A hearing took place on 4 December 1986. The Court decided to obtain expert evidence and ordered the parties to advance the costs for the expertise. They did not comply and therefore the proceedings remained suspended.

COMPLAINTS

1. The applicants complain that Article 1 of Protocol No. 1 to the Convention has been violated in that they are unable to obtain compensation for the damage caused to them by the assignment of insufficient compensation parcels at the provisional transfer in 1971. They had immediatly complained of the situation created by this measure which, however, remained in force until the conclusion of the consolidation proceedings in 1982, causing them important losses of crops during eleven years. They deny any responsibility for the delay of the relevant proceedings and invoke the cases of Erkner-Hofauer and Poiss where the Convention organs found a breach of Article 1 of Protocol No. 1 in a similar situation (cf. Eur. Court H.R., judgments of 23 April 1987, Series A no. 117).

2. The applicants further complain that Article 6 of the Convention has been violated in that the proceedings before the agricultural authorities and the Courts of public law were not conducted in conformity with the requirements of this provision; in their view the organisation and composition of the agricultural authorities, in particular the Land Reform Boards, did not meet the requirements of a tribunal within the meaning of Article 6.

PROCEEDINGS

The application was introduced on 12 December 1986 and registered on 22 January 1987.

On 11 July 1989 the Commission decided to give notice of the application to the respondent Government and to invite them to submit observations in writing on the admissibility and merits of the application before 10 November 1989. At the Government's request, this time-limit was extended to 27 November 1989.

The Government submitted their observations on 20 November 1989 and the applicants replied thereto on 3 January 1990. Subsequently, they announced the submission of further observations having regard to plans existing at the time to introduce amending legislation as proposed at an inquiry organised by the Federal Ministry of Forestry and Agriculture in 1989. On 11 February 1991 the applicants informed the Commission that the plans to introduce such legislation had apparently been abandoned.

In the meantime, the Commission, after consulting the parties,

decided on 8 December 1990 to refer the case to the Second Chamber.

THE LAW

1. The applicants complain that by a provisional transfer of lands ordered in connection with agricultural land consolidation proceedings in 1971 they received insufficient compensation parcels and that this situation was maintained for 11 years until 1982 when as a result of the final decision in the consolidation proceedings they got lawful compensation parcels. They claim that the situation created by the provisional transfer, which could neither be altered nor redressed by the adjudication of financial compensation, amounted to an unjustified interference with their property rights as guaranteed by Article 1 of Protocol No. 1 (P1-1) to the Convention.

This provision 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."

In the Erkner/Hofauer and Poiss judgments of 23 April 1987 (Series A no. 117), the European Court of Human Rights held that a provisional transfer of lands is a measure interfering with the right of property which falls to be considered under the first sentence of the first paragraph of Article 1 (Art. 1). It will be compatible with this provision only if a proper balance is struck between the demands of the community's general interest and the requirement of protecting the property rights of the individual. The Court observed that the Austrian system of provisional transfers of land suffered from a degree of inflexibility in that, before the entry into force of a consolidation plan, it provided no means of altering the position of landowners or of compensating them for damage they may have sustained in the time up to the final award of the statutory compensation in land. In the cases then before the Court, where the restrictions had lasted about sixteen and twenty-four years respectively, it was found that there had been no proper balance between the conflicting interests involved and that the applicants in those cases had been made to bear a disproportionate burden incompatible with Article 1 of the Protocol (P1-1) (cf. Erkner and Hofauer judgment, loc. cit., p.64 et seq., paras. 71-80; Poiss judgment, loc. cit., p. 107 et seq., paras. 61-70).

In the present case, the restriction of the applicants' property right caused by the provisional transfer of lands was maintained for about 11 years. During this period the applicants were allotted insufficient compensation parcels. The situation created by the provisional transfer could not be altered pending the entry into force of the final consolidation plan, and the applicants could not get any compensation in administrative proceedings under the land reform legislation.

This was confirmed by decisions of the Constitutional Court and the Administrative Court. The applicants claim that by appealing to these courts they have exhausted the domestic remedies in conformity with the requirements of Article 26 (Art. 26) of the Convention.

The Government submit that the applicants could have obtained

compensation if they had pursued the official liability proceedings instituted by them. The applicants consider that they were not required under Article 26 (Art. 26) to take official liability proceedings since such proceedings can give rise to compensation only if it is established that the competent authorities have caused damage by unlawful and faulty behaviour. They claim that under the Convention they are entitled to compensation even if there is no unlawful and faulty behaviour on the part of the authorities.

Unlike in the Erkner/Hofauer and Poiss cases (cf. No. 9816/82, Poiss v. Austria, Dec. 9.3.84, D.R. 36 p. 170) an official liability action was available to the applicants in the present case at the time of the introduction of their application, the consolidation proceedings having been finally concluded. The applicants introduced this remedy but did not pursue it. The Commission is required to determine whether the action would have constituted an effective remedy by which the applicants could have obtained redress for the specific violation of the Convention alleged by them.

The applicants claim that Article 1 of Protocol No. 1 (P1-1) was violated in that a disproportionate burden was placed upon them by the provisional transfer of lands in respect of which they were not entitled to compensation except if they could show that the competent authorities had caused them damage by faulty and unlawful behaviour. The limited scope of the right to compensation is therefore part of the applicants' complaint under Article 1 of the Protocol (P1-1). Insofar as the applicants might have suffered damages not attributable to faulty and unlawful behaviour on the part of the authorities, the official liability action therefore could not constitute an effective remedy for the applicants. The Government do not claim that in each and every case in which a provisional transfer leads to a disproportionate burden on the individual landowner concerned the courts seized with an official liability action would assume unlawful and faulty behaviour on the part of the authorities. Nor has it been claimed that special circumstances in the applicants' case justified the assumption of such behaviour. On the contrary, the Government seem to hold the view that the applicants' complaint is in substance unjustified because they only complain of the normal and inevitable consequences of a provisional transfer of lands for which the authorities are not to blame. The Commission concludes that the official liability action did not constitute an effective remedy which the applicants were required to exhaust under Article 26 (Art. 26) of the Convention.

As regards the substance of the applicants' above complaint, the Commission considers that it cannot at this stage be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. The Government argue that the system of provisional land transfers is not as such contrary to Article 1 of Protocol No. 1 (P1-1), that the disadvantages which it may entail for individual landowners must be weighed against the beneficial effects of an early and effective reform of the agricultural structure and the long-term improvements for each enterprise, and that having regard to these considerations, the restriction on the applicants' property rights, which lasted a much shorter time than in the Erkner/Hofauer and Poiss cases, was not disproportionate. The Commission considers, however, that the case raises complex and difficult issues concerning the application of Article 1 of Protocol No. 1 (P1-1) which require to be determined as to the merits.

2. The applicants further complain of the organisation of the agricultural authorities which dealt with their case, claiming that it fell short of the requirements of Article 6 (Art. 6) of the Convention. In particular they allege that due to the participation of a majority of civil servants, the disproportionate influence of the specialised civil servants who also assume the functions of experts, and the lack of a true adversarial character of the proceedings, the

competent Land Reform Boards cannot be regarded as independent and impartial tribunals within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. According to the applicants this deficiency is not remedied by the subsequent review of the Constitutional and Administrative Courts because it is not sufficiently wide in scope.

The Government contest the applicants' arguments. They refer to the Ettl and Others judgment of 23 April 1987 (Eur. Court H.R., Series A no. 117), where the agricultural authorities were recognised as tribunals within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission notes that the applicants' above allegations are essentially the same as those submitted by the applicants in the Ettl case. The present applicants give particular weight to the

status and functions of the expert civil servant members of the Land Reform Boards; but they have failed to indicate any element which could be held to justify a distinction of the present case from the Ettl case. In view of the Court's finding in that case concerning the general organisation and procedure of the Land Reform Boards, these Boards must in the present case be considered to fulfil the requirements of independent and impartial tribunals within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application must accordingly be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons the Commission,

- by a majority DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicants' complaint of unjustified interference with their right to the peaceful enjoyment of their possessions;

- unanimously DECLARES the remainder of the application INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)