AS TO THE ADMISSIBILITY OF

Application No. 30470/96
by Manfred and Margot ZIPPEL
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 23 October 1997, the following members being present:

Mrs J. LIDDY, President
MM M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the 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 6 January 1996 by Manfred and Margot ZIPPEL against Germany and registered on 15 March 1996 under file No. 30470/96;

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 applicants, born in 1928 and 1935, are German nationals and resident at Syburg. They are a married couple.

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

In November 1977 the applicants bought a moated castle at Syberg.

In August 1978 the applicants filed an action against the Bergen Municipality, claiming compensation for damages as well as the clearing from mud and refilling of two ponds ('Gutzenweiher' and 'Schloßweiher') with a view to starting pisciculture. They submitted that various highly poisonous agents were flowing from the municipal sewage treatment plant into the watercourses feeding their ponds.

In February 1980 the Ansbach Regional Court (Landgericht) dismissed the action. The Court found that the 'Gutzenweiher' had silted up a long time ago and that the 'Schloßweiher', next to the castle, was needed as a water reserve in case of fire and was

inappropriate for pisciculture due to the lack of maintenance by the previous owners of the castle.

In February 1982 the Nürnberg Court of Appeal (Oberlandesgericht) dismissed the applicants' appeal (Berufung) to the extent that the compensation claims were concerned and, amending the first instance judgment, declared that the civil courts had no jurisdiction as far as their further claims were concerned. This part of the action was transferred to the Ansbach Administrative Court (Verwaltungsgericht).

On 17 September 1986 the Ansbach Administrative Court dismissed the applicants' action. The Court found that the applicants had no claims regarding the 'Gutzenweiher' which had silted up some fifty years ago. Moreover, as regards the 'Schloßweiher', the applicants themselves were responsible for maintenance under the relevant provisions of the Bavarian Water Act (Wassergesetz). The applicants' submissions concerning the proper functioning of the municipal sewage treatment plant were irrelevant to the issue of clearing the pond from mud, but could only oblige the authorities to take general security measures. The Court dismissed the applicants' request to submit their case to the European Court of Justice for a preliminary ruling.

On 18 May 1993 the Bavarian Administrative Court of Appeal (Verwaltungsgerichtshof) dismissed the applicants' appeal, which had been extended to various further claims. The extension was admitted as far as it concerned requests for protective measures at the sewage treatment plant, for removal of various agents having penetrated the walls of the castle via the 'Schloßweiher', as well as for demolition and reconstruction of their castle at another place. The Court of Appeal confirmed the findings of the Administrative Court that the applicants had no claims under the Bavarian Water Act. Moreover, the municipal sewage treatment plant had been licensed in August 1978, as amended in 1983. In December 1977, the project had been published in the local gazette, together with information as to the remedies under the Water Act. However, neither the applicants nor the previous owners of the castle had availed themselves of these remedies, and the licence was, therefore, a final (bestandskräftig) administrative decision. There was nothing to show that the licence was null and void. Moreover, and this had not been in dispute between the parties, the conditions fixed in the said licence, in particular on the limits of feeding permissible syphoning, had been respected. Any complaints that the sewage treatment plant was not at the latest state of engineering would have to be raised in proceedings with the competent authorities under the Water Act.

On 18 February 1994 the Federal Administrative Court (Bundesverwaltungsgericht) dismissed the applicants' request for leave to appeal on points of law (Beschwerde über die Nichtzulassung der Revision).

The applicants thereupon lodged constitutional complaints (Verfassungsbeschwerden) both with the Federal Constitutional Court (Bundesverfassungsgericht) and the Bavarian Constitutional Court. The applicants complained that the respective court decisions violated their rights to life and property and also disregarded legal provisions emanating from the European Communities, and that the proceedings concerned had been unfair.

On 25 April 1994 the Federal Constitutional Court refused to entertain their constitutional complaint.

On 20 July 1995 the Bavarian Constitutional Court, in a detailed decision, dismissed their constitutional complaint.

COMPLAINTS

1. The applicants complain about the German court decisions permitting the continued poisoning of the ponds and moats surrounding their castle. They submit that they cannot, therefore, use their property for the envisaged professional purposes and that they run health risks if they continue to live there. They invoke Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1.

2. The applicants further complain under Article 6 about the alleged unfairness of the proceedings concerned. They submit in particular that they were not duly heard and that the courts disregarded parts of their submissions.

3. The applicants also complain under Article 6 that the Bavarian Constitutional Court did not hold a public hearing.

4. The applicants finally complain about the length of the proceedings at issue.

THE LAW

1. The applicants complain about the German court decisions permitting the continued poisoning of the ponds and moats surrounding their castle. They submit that they cannot, therefore, use their property for the envisaged professional purposes and that they run health risks if they continue to live there. They invoke in particular Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1).

Article 8 (Art. 8) of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1 (P1-1) reads:

"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 Commission recalls that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (Art. 8-1) - or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation

to the positive obligations flowing from the first paragraph of Article 8 (Art. 8), in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (cf. Eur. Court HR, López Ostra v. Spain judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, para. 51). Similar considerations may apply with regard to the protection of property rights under Article 1 of Protocol No. 1 (P1-1).

a. However, according to Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

As regards the applicants' complaints about the operation of the communal sewage treatment plant, the Commission notes that this plant was licensed in 1978, pursuant to the relevant provisions of the Bavarian Water Act. The project had been previously published, together with information on the legal remedies. The applicants failed to avail themselves of these legal remedies. The Commission considers that the applicants, having bought the castle in November 1977, could not reasonably have been unaware of important local building projects, as published in the local gazette (cf., mutatis mutandis, Eur. Court HR, Allan Jacobsson v. Sweden judgment of 25 October 1985, Series A no. 163, p. 18, paras. 59-61). In this context, the proceedings for compensation and clearance of the ponds instituted by the applicants in 1978 cannot be regarded as an effective remedy, for the purposes of Article 26 (Art. 26). Rather, the competent courts found that the licence of 1978, as amended in 1983, was a final administrative decision, i.e. no longer challengeable before the administrative courts. Consequently, the applicants failed to exhaust the remedies available to them under German law with regard to the operation of the sewage treatment plant, as licensed in 1978.

To the extent that the applicants are to be understood as complaining that the sewage treatment plant was not at the latest state of engineering, they failed to institute proceedings with the competent authorities under the Water Act.

The Commission further observes that, as stated in the reasons of the decision of the Bavarian Administrative Court of Appeal, the applicants had not disputed that the sewage treatment plant operated in full compliance with the conditions fixed in the licence.

These aspects of the application are, therefore, inadmissible for non-compliance with the conditions under Article 26 (Art. 26), and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

b. The remainder of the applicants' complaints under this head relates to the refusal by the Bergen Municipality, as confirmed by the German administrative courts, to clear the 'Schloßweiher' and the 'Gunzenweiher' from mud and to refill them.

According to these decisions, one of the ponds had no longer existed when the applicants acquired the estate. Moreover, as far as the other pond was concerned, the applicants themselves were, under the relevant legislation, responsible for any maintenance work, whereas the operation of the sewage treatment plant did not constitute an unlawful interference with their rights. In this respect, the German courts referred to the binding licence granted for the operation of the plant in question. However, for the reasons stated above, the Commission is prevented from examining whether the granting of the licence as such amounted to a breach of the applicants' rights under the Convention or the Protocols thereto.

In these circumstances, the impugned decisions do not disclose any appearance of a breach of the applicants' rights to respect for

their private and family life and their home, and their right to the peaceful enjoyment of their possessions.

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 further complain under Article 6 (Art. 6) about the alleged unfairness of the proceedings concerned. They submit in particular that they were not duly heard and that the courts disregarded parts of their submissions.

Article 6 para. 1 (Art. 6-1) of the Convention provides inter alia that "[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal".

a. Insofar as the applicants' complaints relate to the proceedings concerning the grant of the licence in 1978, the Commission, referring to its above findings, considers that the applicants failed to comply with the conditions under Article 26 (Art. 26) of the Convention, and that this part of the application must likewise be rejected under Article 27 para. 3 (Art. 27-3).

b. As regards the civil court proceedings before the Ansbach Regional Court and the Nürnberg Court of Appeal as well the administrative court proceedings before the Ansbach Administrative Court and the Bavarian Court of Appeal, the Commission finds no indication that the applicants could not duly present their arguments or that their submissions were disregarded by the courts. The Commission notes in particular that the Bavarian Court of Appeal largely admitted an extension of the applicants' claims in the course of the appeal proceedings. The respective courts based their decisions on a comprehensive reasoning and there is nothing to show that they unduly disregarded any relevant procedural request. In this context, the Commission recalls that Article 6 para. 1 (Art. 6-1) cannot be understood to require a detailed answer to every argument that a litigant may bring before the courts (Eur. Court HR, Ruiz Torija and Hiro Balani v. Spain judgments of 9 December 1994, Series A nos. 303 A/B, p. 12, para. 29 and pp. 29-30, para. 27, respectively).

Considering all circumstances, there is no appearance of a breach of the applicants' right to a fair hearing.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 26 par. 2 (Art. 26-2) of the Convention.

3. The applicants also complain under Article 6 (Art. 6) that the Bavarian Constitutional Court did not hold a public hearing.

The Commission observes that the applicants do not claim that they requested the Constitutional Court to hold a public hearing in their case. However, assuming that the applicants did not waive their right to such a hearing, the Commission recalls that, provided a public hearing has been held at first instance, the absence of such hearing before a second or third instance may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (Art. 6), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court. Even where courts of appeal have jurisdiction to review cases both as to facts and as to the law, Article 6 (Art. 6) does not always require a right to a public hearing irrespective of the nature of the issue to be decided (cf., Eur. Court HR, Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C, pp. 68-69, para. 31).

The Commission notes that the Bavarian Constitutional Court had to decide upon a constitutional complaint, alleging the breach of the applicants' rights under the Bavarian Constitution. These proceedings did not involve any question which could not be adequately resolved on the basis of the case-file. Considering the entirety of the proceedings before the German courts and also the nature of issues relevant in the applicants' case, the Bavarian Constitutional Court could, as a matter of fair hearing, properly decide on their constitutional complaints without having held a public hearing.

In these circumstances, the absence of a public hearing before the Bavarian Constitutional Court does not disclose any indication of a violation of Article 6 para. 1 (Art. 6-1).

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

4. The applicants finally complain about the length of the proceedings at issue.

a. The applicants first lodged their action with the Ansbach Regional Court in August 1978. Part of their action was referred to the Ansbach Administrative Court in 1982. Their case was pending before administrative courts until February 1994.

It is true that the applicants subsequently lodged constitutional complaints both with the Bavarian Constitutional Court and the Federal Constitutional Court. However, they failed to raise, in their complaint submissions with both Constitutional Courts, the issue of the allegedly excessive length of the preceding proceedings (No. 10785/84, Dec. 18.7.86, D.R. 48, p. 102).

In this respect, the Commission recalls that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, Article 26 (Art. 26) must be applied with some degree of flexibility and without excessive formalism. However, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be made subsequently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (cf. Eur. Court HR, Sadik Ahmet v. Greece judgment of 15 November 1996, Reports 1996-V, No. 20, para. 30).

It follows that the applicants' complaint about the length of the proceedings before the German civil and administrative courts must be rejected under Article 27 para. 3, in conjunction with Article 26 (Art. 27-3+26), of the Convention.

b. The Commission notes that in the ensuing proceedings, the Federal Constitutional Court rejected their constitutional complaint within two months. In parallel proceedings, the Bavarian Constitutional Court took a decision within about seventeen months. The applicants do not particularly address the question of length at that stage of the proceedings.

The Commission finds that no delay can be imputed to the Federal Constitutional Court. Furthermore, considering the particular features of proceedings before a constitutional court and given the fact that it examined the applicants' complaints in detail, the length of the proceedings before the Bavarian Constitutional Court did not exceed a "reasonable time" within the meaning of Article 6 para. 1 (Art. 6-1).

Consequently, there is no appearance of a breach of Article 6 (Art. 6) in this respect.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber