

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 16922/90

Josef Fischer

against

Austria

REPORT OF THE COMMISSION

(adopted on 9 September 1993)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1 - 16)	1 - 2
A. The application (paras. 2 - 4)	1
B. The proceedings (paras. 5 - 11).	1 - 2
C. The present Report (paras. 12 - 16)	2
II. ESTABLISHMENT OF THE FACTS (paras. 17 - 31).	3 - 6
A. The particular circumstances of the case (paras. 17 - 26)	3 - 4
B. Relevant domestic law and practice (paras. 27 - 31)	4 - 6
III. OPINION OF THE COMMISSION (paras. 32 - 70).	7 - 14
A. Complaint declared admissible (para. 32)	7
B. Points at issue (para. 33)	7
C. As to the applicability of Article 6 para. 1 of the Convention (paras. 34 - 40)	7 - 8
D. As to compliance with Article 6 para. 1 of the Convention (paras. 41 - 67)	8 - 14
a. The scope of review by the Administrative Court (paras. 41 - 48).	8 - 10
Conclusion (para. 48).	10
b. The absence of a hearing before the Administrative Court (paras. 49 - 63).	10 - 13

Conclusion (para. 63).13
c. The absence of a hearing before the Constitutional Court (paras. 64 - 67). . . .	13 - 14
Conclusion (para. 67).14
Recapitulation (paras. 68 - 70)14
CONCURRING OPINION OF Mr. F. ERMACORA.	15
PARTLY DISSENTING, PARTLY CONCURRING OPINION OF Mrs. J. LIDDY	16 - 18
APPENDIX I : HISTORY OF THE PROCEEDINGS19
APPENDIX II : PARTIAL DECISION ON THE ADMISSIBILITY. . .	20 - 24
APPENDIX III : FINAL DECISION ON THE ADMISSIBILITY . . .	25 - 30

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is an Austrian citizen born in 1932. He lives in Vienna and is represented before the Commission by Mr. M. Gnesda, a lawyer practising in Vienna.

3. The application is directed against the Republic of Austria whose Government were represented initially by their agent, Ambassador H. Tuerk, head of the International Law Department of the Federal Ministry for Foreign Affairs, and latterly by his successor, Ambassador F. Cede.

4. The application concerns court proceedings by which the applicant attempted to challenge the revocation of a tipping licence under the Water Rights Act 1959 (Wasserrechtsgesetz). The applicant invokes Article 6 para. 1 of the Convention.

B. The proceedings

5. The application was introduced on 11 May 1990 and registered on 24 July 1990.

6. On 7 January 1991 the Commission declared inadmissible the applicant's complaint under Article 1 of Protocol No. 1 to the Convention, and decided to request the parties to submit written observations on the admissibility and merits of the complaint under Article 6 para. 1 of the Convention.

7. The respondent Government submitted their observations on 15 April 1991 and the applicant submitted his on 13 June 1991 and 21 August 1991. On 4 September 1991 the Government submitted further observations, to which the applicant replied on 10 October 1991.

8. At the hearing, which was held on 8 September 1992, the parties were represented as follows: the Government by Mr. Wolf Okresek, Federal Chancellery, agent, Mr. Franz Oberleitner, Federal Ministry for Agriculture and Forestry, adviser, and Ms. Susanne Boigner, Federal Ministry for Foreign Affairs, adviser; the applicant by

Mr. Michael Gnesda, lawyer.

9. At the close of the hearing the Commission declared the application admissible.

10. On 11 January 1993 the applicant made further submissions in writing.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
J. C. SOYER
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ

13. The text of this Report was adopted on 9 September 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decisions on the admissibility of the application are attached as Appendixes II and III.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant holds both the western and eastern part of a tip at Theresienfeld in Lower Austria. He owns the western part outright, having bought it in 1977. He holds the eastern part on a 25 year, assignable tipping lease dated 13 October 1975.

18. On 21 September 1972 a tipping licence under the Water Rights Act 1959 (Wasserrechtsgesetz 1959) was granted to a company, Waxina, by the Provincial Governor (Landeshauptmann) of Lower Austria. It related to the tipping of distillation residue on the site. The parties disagree as to whether the licence relates to the whole of the site or only to the eastern part. On 30 July 1973 the licence was extended to cover domestic, commercial and industrial waste. Further conditions were added; the licence was expressed to be revocable pursuant to Section 21 of the 1959 Act. The new licence was granted to both Waxina and the then owners of the site.

19. On 13 October 1975 the applicant took a 25 year tipping lease from the owners of the site.

20. In 1977 the applicant purchased from the owners the western part of the site. Title was registered on 10 January 1979 and the relevant authorities were informed of the change of ownership, the rights under the licence of 30 July 1973 thereby passing to the applicant by operation of law.

21. The licence of 30 July 1973 was revoked on 5 December 1986 by the Provincial Governor of Lower Austria. The Government submit that the revocation affected only the eastern part of the site, pointing out that separate proceedings were subsequently instituted relating to the western part. Further, the Government point out that the Administrative Court (Verwaltungsgerichtshof) and the Vienna Regional Court (Landesgericht), in subsequent proceedings, agreed that the licence related to the eastern part of the site only. The applicant underlines that, until 1980, the administrative authorities themselves accepted that the licence covered the whole of the tip, and adds that in criminal proceedings the courts accepted that the licence related to the entire site.

22. The reasons given for the revocation included that dangerously high levels of toxic substances had been found in the groundwater at the site (which forms part of an area constituting the groundwater reservoir for drinking water for over half a million people); barrels had been found both in the western and eastern (practically full) part of the site; certain of the barrels found contained non-authorised substances which could escape and mix with other substances; and the site was in any event unsuitable for tipping - even ordinary domestic waste should not be dumped.

23. The applicant's appeal to the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft) was rejected on 20 July 1987. The facts were accepted as established by the Provincial Governor. The Ministry found, after a further expert's report, that it was absolutely necessary to close the tip to safeguard water supplies and the site could not technically be rendered safe. In connection with the applicant's complaint of a violation of his right to be heard (Parteiengehör) the Ministry found that the applicant had had ample opportunity to make his views known in the proceedings before it, and that an oral hearing was not prescribed in cases involving revocations of licences.

24. On 6 August 1987 the applicant made a complaint to the Administrative Court in which he alleged that the decision of 20 July 1987 was unlawful. He also complained that the administrative authorities had not held a hearing. He requested that the decision be quashed, that the proceedings should have suspensive effect, and that the Administrative Court should hold an oral hearing. On 2 September 1987 the applicant made a constitutional complaint to the Constitutional Court (Verfassungsgerichtshof), alleging violation of, inter alia, Article 1 of Protocol No. 1 to the Convention and

Article 6 para. 1 of the Convention. He complained that the administrative authorities did not grant his request for a hearing before them, and requested a hearing before the Constitutional Court.

25. On 14 March 1989 the Constitutional Court refused to consider the applicant's complaint pursuant to Article 144 para. 2 of the Federal Constitutional Law (Bundesverfassungsgesetz). The Constitutional Court noted that the matter was not excluded from the jurisdiction of the Administrative Court, and found that the bulk of the complaints related to allegations of incorrect application of ordinary law. To the extent that the complaint did touch upon questions of constitutional law, the complaint had no adequate prospect of success. No hearing was held.

26. The Administrative Court, whose decision runs to some 20 pages, rejected the applicant's complaint on 21 September 1989 on the ground that it was ill-founded. The Court found that, regardless of the scope of the original licence, the revocation related to the whole of the original licence. It considered that the revocation clause in the original licence could only be invoked if there were adequate factual grounds for a revocation, and went on to find that a number of the applicant's allegations and complaints were directed to matters which were not relevant to the revocation of the licence at all. With regard to the balance to be struck between the public interest and other interests (such as those of the communes which could no longer use the tip, and of the applicant, whose business was seriously affected), the Administrative Court noted that the Ministry had found inter alia that "the public interest in ensuring the supply of drinking water [outweighs] the economic interests in favour of continued use of the tip". The Court concluded that there had been no procedural errors, that the revocation had taken place after due consideration of relevant factors and was in accordance with the law. The complaint was dismissed as ill-founded pursuant to Section 42 (1) of the Administrative Court Act. The Court found that an oral hearing had not been necessary, either before the Ministry or before itself, and rejected the applicant's request for a hearing before the Administrative Court under Section 39 (2) 6 of the Administrative Court Act.

B. Relevant domestic law and practice

27. Section 39 (1) of the Administrative Court Act provides that the Administrative Court is to hold a hearing after its preliminary investigation of the case where a complainant has requested a hearing within the time-limit. Section 39 (2) provides as follows:

[German]

"Der Verwaltungsgerichtshof kann ungeachtet eines Parteiantrages nach Abs. 1 Z. 1 von einer Verhandlung absehen, wenn

1. das Verfahren einzustellen (§ 33) oder die Beschwerde zurückzuweisen ist (§ 34);
2. der angefochtene Bescheid wegen Rechtswidrigkeit infolge Unzuständigkeit der belangten Behörde aufzuheben ist (§ 42 Abs. 2 Z. 2);
3. der angefochtene Bescheid wegen Rechtswidrigkeit infolge Verletzung von Verfahrensvorschriften aufzuheben ist (§ 42 Abs. 2 Z. 3);
4. der angefochtene Bescheid nach der ständigen Rechtsprechung des Verwaltungsgerichtshofes wegen Rechtswidrigkeit seines Inhaltes aufzuheben ist;
5. weder die belangte Behörde noch etwaige Mitbeteiligte eine Gegenschrift eingebracht haben und der angefochtene Bescheid aufzuheben ist;
6. die Schriftsätze der Parteien des verwaltungsgerichtlichen

Verfahrens und die dem Verwaltungsgerichtshof vorgelegten Akten des Verwaltungsverfahrens erkennen lassen, daß die mündliche Erörterung eine weitere Klärung der Rechtssache nicht erwarten läßt."

[Translation]

"Notwithstanding a party's application, the Administrative Court may decide not to hold a hearing when

1. The proceedings are to be discontinued (under Section 33) or the complaint is to be rejected (Section 34);
2. The contested decision is to be quashed for unlawfulness due to lack of jurisdiction on the part of the authority challenged (Article 42 (2) 2);
3. The contested decision is to be quashed for failure to comply with procedural provisions (Section 42 (2) 3);
4. The contested decision is to be quashed in accordance with the constant case-law of the Administrative Court for unlawfulness as to its contents;
5. Neither the authority challenged nor any third party has submitted a reply and the contested decision is to be quashed;
6. It is apparent to the Court from the written pleadings of the parties to the proceedings before the Administrative Court and from the files relating to the prior proceedings that an oral hearing is not likely to contribute to clarifying the case."

28. Section 39 (2) 1 to Section 39 (2) 3 were in force in 1958. Section 39 (2) 4 and 5 were added in 1964 and Section 39 (2) 6 was added in 1982.

29. Section 42 (1) of the Administrative Court Act states that, save as otherwise provided, decisions of the Administrative Court shall either dismiss a complaint as ill-founded or quash the contested decision. Apart from amendments to that part of Section 42 (1) which enumerates those proceedings to which it does not apply (not relevant in the present case) Section 42 (1) has been in force since at least 1946.

30. Article 90 para. 2 of the Federal Constitutional Law provides as follows:

[German]

"Die Verhandlungen in Zivil- und Strafrechtssachen vor dem erkennenden Gericht sind mündlich und öffentlich. Ausnahmen bestimmt das Gesetz."

[Translation]

"Hearings in civil and criminal cases by the trial court shall be oral and public. Exceptions may be prescribed by law."

31. Article 144 para. 2 of the Federal Constitutional Law provides as follows:

[German]

"Der Verfassungsgerichtshof kann die Behandlung einer Beschwerde bis zur Verhandlung durch Beschluß ablehnen, wenn sie keine hinreichende Aussicht auf Erfolg hat oder von der Entscheidung die Klärung einer verfassungsrechtlichen Frage nicht zu erwarten ist. Die Ablehnung der Behandlung ist unzulässig, wenn es sich um einen Fall handelt, der nach Art. 133 von der Zuständigkeit des Verwaltungsgerichtshofes ausgeschlossen ist."

[Translation]

"The Constitutional Court may refuse to consider a case up to a hearing by way of decision if it has no reasonable prospect of success or it cannot be expected that the decision will shed light on a problem of constitutional law. A refusal to consider is inadmissible if it concerns a case excluded from the jurisdiction of the Administrative Court by Article 133."

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

32. The Commission has declared admissible the applicant's complaint that he was not able to have a hearing on the issue of the revocation of his tipping licence before a court which complied with Article 6 para. 1 (Art. 6-1) of the Convention.

B. Points at issue

33. The issues to be determined are

- whether there has been a violation of the applicant's right to have his case determined by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention,
- whether the absence of an oral hearing before the Administrative Court violated Article 6 para. 1 (Art. 6-1) of the Convention, and
- whether the absence of an oral hearing before the Constitutional Court violated Article 6 para. 1 (Art. 6-1) of the Convention.

C. As to the applicability of Article 6 para. 1 (Art. 6-1) of the Convention

34. Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, provides:

"In the determination of his civil rights and obligations ... , everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

35. In the above court proceedings the applicant attempted to challenge the revocation of his tipping licence under the Water Rights Act 1959.

36. The applicant submits that Article 6 para. 1 (Art. 6-1) of the Convention applies to these proceedings.

37. The Government submit, first, that the land to which the tipping licence related had already been completely filled at the date of the revocation. Accordingly, the revocation did not affect the applicant with the result that the subsequent proceedings could not determine civil rights. The Government also submit that the revocation of the applicant's licence was a dispute which related only to the effects of civil rights and obligations, such that "the requirements resulting from the fact that a decision has been taken by an impartial tribunal must be less severe in a non-traditional field of civil rights, including the present case."

38. The Commission finds that the question of the extent of the licence at issue in the present case was one of the questions before the Constitutional and Administrative Courts. The question of the

actual existence of a right, and also its scope and the manner of its exercise was therefore at issue (c.f. Eur. Court H.R., Skärby judgment of 28 June 1990, Series A no. 180-B, p. 36 para. 27).

39. The Commission recalls that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State (cf. Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, pp. 29-30 paras. 88-89). It is sufficient for the applicability of Article 6 para. 1 (Art. 6-1) that the outcome is "decisive for private rights and obligations" (cf. Eur. Court H.R., H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 20 para. 47). In particular in the present case, the revocation of the applicant's licence might well have had adverse effects on the value of his business and of the good will and, indeed, the applicant made just such allegations in his initial application to the Commission. This confirms the existence of direct links between the revocation of the licence and the applicant's commercial activities (cf. Eur. Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, p. 16 para. 36).

40. The Commission therefore finds that Article 6 para. 1 (Art. 6-1) of the Convention was applicable to the proceedings by which the applicant challenged the revocation of his tipping licence under the Water Rights Act.

D. As to compliance with Article 6 para. 1 (Art. 6-1) of the Convention

a. The scope of review by the Administrative Court

41. The Commission must next examine the scope of the review offered by the Austrian judicial authorities in this determination of civil rights in order to establish whether the applicant had access to a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

42. The applicant emphasises that the Administrative Court has only a very limited possibility of reviewing facts. The Government consider that the control exercised by the Administrative Court in conjunction with that exercised by the Constitutional Court meets the requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

43. The Commission has had occasion recently to consider questions concerning the scope of review by the Administrative Court in the case of *Zumtobel v. Austria* (No. 12235/86, Comm. Report 30.6.92, pending before the Court of Human Rights). In that case, the Commission found as follows:

"68. There remains the Administrative Court which decided on the applicants' complaints about the expropriation. These complaints related inter alia to the adequacy of the envisaged stretch of road within the meaning of Section 44 of the Provincial Road Act and thus raised issues of both facts and law.

69. The Commission recalls that in the case of *Ettl and Others* it found, having regard in particular to Section 41 of the Administrative Court Act, that the abstract possibility of a limited review of the facts which the Administrative Court enjoyed was not sufficient to establish its full jurisdiction concerning the determination of the civil rights at issue (see Comm. Report, ... p. 24, para. 85). In the *Obermeier* case the Court found that, if the relevant legislation contained no precise provisions for the decision to be taken by the administrative authorities, and the Administrative Court could only examine whether the authorities had used their discretion

in a manner compatible with the law, such a limited review was not an effective judicial review under Article 6 para. 1 (Art. 6-1) of the Convention (see Eur. Court H.R., judgment of 28 June 1990, Series A no. 179, p. 23 para. 70).

70. The Commission recalls that Section 42 (2) 3 of the Administrative Court Act, relied on by the Government in the present case, played no part in the case of Ettl and Others v. Austria. In the present case this provision enabled the Administrative Court to quash the contested decision as being unlawful due to procedural defects, if the Court found that the administrative authority had determined the facts on an important point contrary to the case-file; or that the facts required to be supplemented on an important point; or that procedural provisions had been disregarded which, if taken into consideration, would have led to a different decision ...

71. Thus, the Administrative Court was able to review the facts of the case in that it could examine inter alia whether they had been incorrectly or incompletely established by the Provincial Government. While the purpose of this review was to determine any procedural defects leading to the unlawfulness of the decision, Section 42 (2) 3 of the Administrative Court Act did not restrict the Administrative Court in its power to review the facts. In particular, this provision sets no limits in respect of the assessment and supplementation of the facts.

72. It is true that the Administrative Court in its decision of 22 September 1989 referred to Section 41 of the Administrative Court Act ... Section 41 provides that the Court is bound by the facts as accepted by the authority; however, this provision expressly reserves Section 42 (2) 3 of the Administrative Court Act ... It follows that Section 41 does not restrict the Administrative Court's powers under Section 42.

73. Moreover, in its decision the Administrative Court explained its powers of review, in particular that it could 'take evidence for examining the question whether a procedural defect is essential or whether the incriminated authority might have arrived at a different decision by avoiding the alleged procedural defect; the Administrative Court may resort to these measures also in order to control the assessment of evidence...' The Commission sees no indication here that the Administrative Court regarded itself as being restricted in its review of the facts.

74. The Commission furthermore observes that the Administrative Court could have quashed the contested decision of the Provincial Government as being unlawful, if after its examination of the facts it had found that they were incorrect or incomplete. The Provincial Government would have been bound by the Administrative Court's decision ... Thus, the Administrative Court could have imposed its own views as to the assessment of the facts on the administrative authority concerned.

75. The Commission recalls that it suffices under Article 6 para. 1 (Art. 6-1) of the Convention if the decision of an administrative authority, which itself does not comply with the requirements of this provision, is subject to subsequent control by a judicial body that has full jurisdiction (see Eur. Court H.R., Albert and Le Compte judgment). In the present case, the decision of the Provincial Government concerning the expropriation of the applicants' real property was subject to such control by the Administrative Court which had full jurisdiction, as required by Article 6 para. 1 (Art. 6-1) of the

Convention.

76. The applicants' case was therefore heard by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention."

44. Applying those findings to the facts of the present case, the Commission notes that the Administrative Court, in its decision of 21 September 1989, dealt at some length with the complaints raised by the applicant. Although it is in the nature of the decisions of the Administrative Court that they be phrased as a review of the decisions of the administrative authorities, rather than as findings of fact on each and every issue, there is no indication in the decision that the Administrative Court regarded itself as being restricted in its review of the facts.

45. The Commission furthermore observes that the Administrative Court could have quashed the decision of the Ministry as being unlawful. The Ministry would then have been bound by the Administrative Court's decision. The Administrative Court could thus have imposed its own views as to the assessment of the facts on the administrative authority concerned.

46. The Commission recalls that it suffices under Article 6 para. 1 (Art. 6-1) of the Convention if the decision of an administrative authority, which itself does not comply with the requirements of this provision, is subject to subsequent control by a judicial body that has full jurisdiction (see Eur. Court H.R., *Albert and Le Compte* judgment loc. cit., p. 16 para. 29). In the present case, the decision of the Ministry of Agriculture and Forestry was subject to such control by the Administrative Court which had the jurisdiction required by Article 6 para. 1 (Art. 6-1) of the Convention.

47. The applicants' case was therefore heard by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Conclusion

48. The Commission concludes, by 12 votes to 1, that there has been no violation of the applicant's right to have his case determined by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

b. The absence of a hearing before the Administrative Court

49. The applicant alleges that the absence of a hearing before the Administrative Court violates Article 6 para. 1 (Art. 6-1) of the Convention. He considers that the Austrian reservation to Article 6 (Art. 6) of the Convention does not comply with the requirements of Article 64 (Art. 64), such that it cannot affect the requirement to hold a hearing in cases which determine civil rights.

aa. The Austrian reservation

50. The Austrian reservation to Article 6 (Art. 6) of the Convention provides as follows:

"The provisions of Article 6 (Art. 6) of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law."

51. Article 64 (Art. 64) of the Convention provides as follows:

"1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article (Art. 64).

2. Any reservation made under this Article (Art. 64) shall contain a brief statement of the law concerned."

52. The Government note that in the Ringeisen and Ettl cases (Eur. Court H.R., Ringeisen judgment of 16 July 1971, Series A no. 13, p. 40 para. 98, Eur. Court H.R., Ettl and Others judgment of 23 April 1987, Series A no. 117, p. 19 para. 42) the European Court of Human Rights accepted the Austrian reservation to Article 6 (Art. 6) as applying to administrative cases. They contend that, even if it is assumed that the reservation only applies to exceptions based on ordinary laws which were in force on the date of the reservation, then the reservation nevertheless complies with the requirements of Article 64 (Art. 64) of the Convention because the Administrative Court Act 1952, which was in force when the reservation was made, provided for certain grounds on which the Administrative Court could decide not to hold a hearing. They consider that the provision under which the applicant's request for a hearing was refused (introduced in 1982) is substantially the same as the provisions of Section 39 (1) 1 - 3 (gleichartig, systemimmanent), so that its scope is no broader than the provisions which were in force in 1958.

53. The Commission recalls that, in three recent cases, the European Court of Human Rights has considered the question of the compatibility of certain declarations with Article 64 (Art. 64) of the Convention (Eur. Court H.R., Belilos judgment of 29 April 1988, Series A no. 132; Eur. Court H.R., Weber judgment of 22 May 1990, Series A no. 177; Eur. Court H.R., Chorherr judgment of 25 August 1993, Series A no. 266-B). The Court found that Article 64 para. 1 (Art. 64-1) of the Convention requires "precision and clarity", and that Article 64 para. 2 (Art. 64-2) is not a "purely formal requirement but a condition of substance" which "constitutes an evidential factor and contributes to legal certainty" (aforementioned Belilos judgment, pp. 26-28, paras. 55 and 59).

54. Applying the principles laid down in the above case-law to the present case, the Commission notes that the applicant was refused a hearing before the Administrative Court on the ground that a hearing was not likely to clarify the case any further (Section 39 (2) 6 of the Administrative Court Act). That provision was not in force when Austria ratified the Convention, and the Commission finds that it goes considerably further in limiting the right to a hearing before the Administrative Court. In particular, apart from cases where a complaint to the Administrative Court was dealt with on formal grounds (under Sections 33 or 34 of the Administrative Court Act - see Section 39 (2) 1), all the grounds in force in 1958 concerned cases in which the contested decision was quashed. In such circumstances, a complainant to the Administrative Court had generally been successful, and so the question of a hearing became academic. Indeed, the grounds for refusal of a hearing which were added in 1964 (Section 39 (2) 4 and 5) also dealt with cases in which the contested decision was quashed. In 1958 the Administrative Court could not, in a case which was being dismissed under Section 42 (1) of the Administrative Court Act, have refused a hearing of the case if a complainant had applied for one.

55. It is true that the Commission has, in the past, held that legislation which entered into force after a reservation is made may nevertheless be compatible with Article 64 (Art. 64) of the Convention

if it does not have the effect of enlarging *ex posteriori* the subject matter which is excluded from the Commission's jurisdiction by the reservation (No. 2432/65 v. Austria, Dec. 7.4.67, Collection 22 p. 124 and p. 127). That case-law has since been questioned in a case before the Commission which was decided subsequent to the Court's judgments in the cases of Belilos and Weber (No. 13816/88, M. v. Austria, Dec. 16.10.91, Comm. Report 22.5.92). Moreover, the ground for refusal of a hearing in the present case cannot be viewed as a further precision of the grounds in force in 1958.

56. The Austrian reservation to Article 6 (Art. 6) of the Convention does not therefore prevent the Commission from examining the applicant's complaint that the refusal to hold a hearing before the Administrative Court violated Article 6 (Art. 6) of the Convention, because the provision by which the refusal was made was not "in force" at the time the reservation was made.

57. In these circumstances the Commission is not required to consider other objections to the reservation, for example that it is of a "general character", or that it only applies to civil and criminal cases and not administrative cases, or that it does not provide the "brief statement of the law concerned" called for by Article 64 para. 2 (Art. 64-2) of the Convention.

bb. Application of Article 6 para. 1 (Art. 6-1)

58. The Commission must next consider whether the absence of a hearing before the Administrative Court violated Article 6 para. 1 (Art. 6-1) of the Convention.

59. For the purposes of Article 6 (Art. 6) of the Convention, the Administrative Court was the only tribunal which dealt with the merits of the applicant's complaint. The applicant was accordingly entitled to a public hearing before that court, as none of the exceptions laid down in the second sentence of Article 6 para. 1 (Art. 6-1) applied (cf. Eur. Court H.R., *Håkansson and Sturesson* judgment of 21 February 1990, Series A no. 171, p. 20 para. 64, cf. also No. 18928/91, *Fredin v. Sweden*, Comm. Report 9.2.93, pending before the European Court of Human Rights).

60. In the present case, there is no question of a waiver by the applicant of his right to an oral hearing: he requested a hearing before the Ministry, complained about the refusal to the Administrative Court, and requested a hearing before the Administrative Court.

61. The Commission recalls that the European Court of Human Rights has recently considered that the absence of an oral hearing in a case dealing with social security matters did not violate Article 6 (Art. 6). However, there was a very real issue of whether the applicant in that case had waived her right to a hearing as she had not expressly requested one. The Court also referred to criteria of "efficiency and economy" (Eur. Court H.R., *Schuler-Zgraggen* judgment of 24 June 1993, Series A no. 263, paras. 56-58).

62. The present case must be distinguished from the *Schuler-Zgraggen* case. First, although the dispute at issue related to the revocation of a "public law" licence, the commercial considerations at the heart of the matter make it quite different from the social security questions dealt with in that case. Secondly, the issue of waiver does not arise in the present case. Whilst the Commission does not underestimate the necessity for procedures which run efficiently, it remains for the respondent State to comply with its obligations under the Convention by organising its legal system so as to ensure compliance with Article 6 para. 1 (Art. 6-1) of the Convention (cf. Eur. Court H.R., *Guincho* judgment of 10 July 1984, Series A no. 81,

p. 16, para. 38).

Conclusion

63. The Commission concludes, unanimously, that the absence of an oral hearing before the Administrative Court was in violation of Article 6 para. 1 (Art. 6-1) of the Convention.

c. The absence of a hearing before the Constitutional Court

64. The applicant alleges that the absence of a hearing before the Constitutional Court violates Article 6 para. 1 (Art. 6-1) of the Convention.

65. The Government refer to the Austrian reservation to Article 6 (Art. 6) of the Convention, and underline that the Constitutional Court was empowered to refuse to hold hearings in 1958, when the reservation was made. They accept that certain amendments to the Constitutional Court Act which were made in 1984 provided for a general exception to the principle of publicity for constitutional complaint proceedings, but consider that the exception is identical to the one before, and has the sole purpose of simplifying and expediting proceedings before the Constitutional Court.

66. In the circumstances of the present case, that is, where the Administrative Court has jurisdiction to deal with the case and the Constitutional Court declines to consider a matter pursuant to Article 144 para. 2 of the Federal Constitutional Law, the Commission finds that Article 6 para. 1 (Art. 6-1) of the Convention does not require a hearing to be held before the Constitutional Court.

Conclusion

67. The Commission concludes, by 12 votes to 1, that the absence of an oral hearing before the Constitutional Court was not in violation of Article 6 para. 1 (Art. 6-1) of the Convention

Recapitulation

68. The Commission concludes, by 12 votes to 1, that there has been no violation of the applicant's right to have his case determined by a tribunal within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (para. 48).

69. The Commission concludes, unanimously, that the absence of an oral hearing before the Administrative Court was in violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 63).

70. The Commission concludes, by 12 votes to 1, that the absence of an oral hearing before the Constitutional Court was not in violation of Article 6 para. 1 (Art. 6-1) of the Convention (para 67).

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

(Or. English)

CONCURRING OPINION OF Mr. F. ERMACORA

I agree with the opinion that the absence of an oral hearing before the Administrative Court was in violation of Article 6 para. 1 of the Convention. However, I have difficulties with the reasons of this decision. The Report refers in its paragraph 50 to the Austrian reservation which states, as to the application of Article 6 of the

Convention, that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the Federal Constitutional Law. However the Commission later on has not dealt with this reservation and its impact as to the application of Article 6 para. 1 of the Convention. This reservation - in my opinion - does not apply to proceedings before the Administrative and Constitutional Court. It applies only to proceedings in civil and penal matters (Zivil- und Strafrechtssachen) before the ordinary courts (there might be an exception in proceedings before the Constitutional Court in cases of Article 137 of the Constitution, but such a problem does not arise in the present case). The reservation must be interpreted in accordance with the understanding of the High Contracting Party at the time of ratification. In Austrian Constitutional law the "Zivil- und Strafrechtssachen" referred to in Article 90 of the Federal Constitutional Law relate to matters which are solely dealt with by ordinary courts (at the time of the ratification of the Convention Austria could not have considered the European jurisprudence referred to in para. 52 of the Report) and not by extraordinary courts. This is clear from the wording of Article 90 of the Federal Constitutional Law, from the systematic position of Article 90 within the Constitution (it figures in the section entitled "Gerichtbarkeit" which excludes the Constitutional Court and the Administrative Court), and from the absence of any interpretation supporting a contrary view at the time of the drafting of the Constitution. Therefore the Austrian reservation as to Article 6 of the Convention is not applicable in the present case. Accordingly, as the Administrative Court refused the applicant's request for a hearing, I consider that there was a violation of Article 6 in this respect.

(Or. English)

PARTLY CONCURRING, PARTLY DISSENTING OPINION
of Mrs. J. LIDDY

As to the applicability of Article 6 para. 1 to the Convention.

1. I agree that Article 6 para. 1 was applicable to the proceedings before the Administrative Court, for the reasons given in the Report.
2. I consider also that Article 6 was applicable to the proceedings before the Constitutional Court. My understanding is that if the applicant had been successful in his allegations before that Court that Article 1 of Protocol No. 1 to the Convention and Article 6 para. 1 of the Convention had been violated, the Constitutional Court would have had the power to quash the decision of the administrative authorities. There was therefore a direct link between the subject-matter of the proceedings before the Constitutional Court and the subject-matter of the proceedings before the Administrative Court.
3. In the case of Ruiz-Mateos v. Spain (judgment of 23 June 1993), where there was a close link between the subject-matter of proceedings before the Spanish Constitutional Court and the civil courts, the Court found that Article 6 para. 1 applied to the constitutional proceedings. Likewise, here, I consider that Article 6 para. 1 applied to the proceedings before the Austrian Constitutional Court.

As to whether there has been a violation of the applicant's right to have his case determined by a tribunal within the meaning of Article 6 para. 1.

4. The effect of Section 41 of the Administrative Court Act, providing that the Administrative Court must examine the contested decision on the basis of the facts as accepted by the authority against which the appeal is directed, is ameliorated but not nullified by Section 42 of the Act, which enables the Administrative Court to quash

the contested decision as being unlawful due to procedural defects. The Administrative Court does not have the full jurisdiction required by Article 6 para. 1. To find otherwise, notwithstanding the limitation in Section 41, might have the effect of limiting an individual's right to a judicial assessment of the facts of a case not only in civil proceedings, but also in the administrative criminal proceedings known to Austrian law which can carry deprivation of liberty as a sanction (cf. the Commission's decisions on admissibility dated 10 May 1993 in Applications Nos. 15523/89, 15527/89, 15963/90, 16713/90, 16718/90 and 16841/90). I consider that there has been a violation of the applicant's right to have his case determined by a tribunal within the meaning of Article 6 para. 1.

As to whether the absence of an oral hearing before the Administrative Court violated Article 6 para. 1.

5. The Court has held that the public character of court hearings constitutes a fundamental principle enshrined in Article 6 para. 1. A person may waive the entitlement to have his case heard in public.

"However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest" (Håkansson and Sturesson judgment of 21 February 1990, Series A no. 171, para. 66).

6. In the present case there was no unequivocal waiver. On the contrary the applicant's request for a hearing was refused by the Administrative Court. Accordingly, unless the Austrian reservation to Article 6 is valid and applicable, there has been a violation of Article 6 para. 1.

7. The Convention does not permit reservations of a general character (Article 64 para.1). The Court has held that by reservation of a general character is meant in particular "a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope" (Belilos Case, judgment of 29 April 1988, Series A no. 132, para. 55).

8. To seek to understand the scope of the Austrian reservation it is necessary to consult Article 90 of the Federal Constitutional Law, which is referred to in the reservation. Article 90 provides that "Exceptions [to the principle of oral and public hearings] may be prescribed by law". To determine the exact scope of the reservation other Contracting Parties and the organs of the Convention would need the advice of a person qualified in Austrian law, who could ascertain and advise as to all the exceptions prescribed by Austrian law at any given time. It is at the least highly questionable as to whether a reservation which can only be understood after obtaining such advice meets the requirement that it not be of a general character.

9. What is beyond doubt, however, is that the exceptions prescribed by Austrian law are not specified in the reservation. Article 64 para. 2 of the Convention provides that any reservation shall contain "a brief statement of the law concerned". The Court has held in the Belilos Case that this is not a purely formal requirement but a condition of substance. The reference to Article 90 of the Federal Constitutional Law is insufficient because it does not enable the other Contracting Parties and the Convention institutions to identify "the law concerned", that is, in the instant case, the laws which provide that in certain circumstances (at present unspecified), hearings in civil and criminal proceedings need not be oral and in public. This reservation is quite different from the reservation to Article 5 considered by the Court in the case of Chorgherr (judgment of 25 August 1993). There, the Court pointed out that a reference in that reservation to the Federal Official Gazette made it possible for everyone to identify the precise laws concerned and to obtain any

information about them, and provided a safeguard against any interpretation which would unduly extend the field of application of the reservation.

10. I conclude that the reservation does not satisfy the requirements of Article 64 para. 2 with the result that it is invalid.

11. It follows that the absence of an oral hearing before the Administrative Court violated Article 6 para. 1 of the Convention.

As to whether the absence of an oral hearing before the Constitutional Court violated Article 6 para. 1.

12. For the reasons given at paras. 2 and 3 I consider that Article 6 para. 1 was applicable to the proceedings before the Constitutional Court. Despite the applicant's request for a hearing before that Court, no hearing was held. There was no unequivocal waiver of the right to a hearing.

13. For the reasons given at paragraphs 7 to 10 above I consider that the Austrian reservation to Article 6 is invalid and cannot therefore be invoked in support of the contention that Austria was not bound to observe the obligation in Article 6 para. 1 to provide a hearing.

14. It follows that the absence of an oral hearing before the Constitutional Court violated Article 6 para. 1 of the Convention.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
11 May 1990	Introduction of the application
24 July 1990	Registration of the application
Examination of Admissibility	
9 January 1991	Commission's deliberations, decision to invite the Government to submit observations on the admissibility and merits of the application and decision to declare the application partially inadmissible
15 April 1991	Government's observations
13 June 1991, 21 August 1991	Applicant's observations in reply
4 September 1991	Government's further observations
10 October 1991	Applicant's further observations in reply
15 May 1992	Commission's decision to invite the parties to an oral hearing on the admissibility and merits of the application
8 September 1992	Commission's hearing of the parties and decision to declare the application admissible
Examination of the merits	
26 October 1992	Decision on admissibility communicated to the

parties

9 January 1993

Commission's consideration of the state of proceedings

8 May 1993

Commission's consideration of the state of the proceedings

31 August 1993

Commission's deliberations on the merits and final vote.

9 September 1993

Adoption of the Report