

AS TO THE ADMISSIBILITY OF

Application No. 18778/91

by S.

against Austria

The European Commission of Human Rights sitting in private on 1 December 1993, the following members being present:

MM. S. TRECHSEL, President

H. DANELIUS

G. JÖRUNDSSON

J.-C. SOYER

H.G. SCHERMERS

Mrs. G.H. THUNE

MM. F. MARTINEZ

L. LOUCAIDES

J.-C. GEUS

M.A. NOWICKI

I. CABRAL BARRETO

Mr. K. ROGGE, 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 22 August 1991 by S. against Austria and registered on 9 September 1991 under file No. 18778/91;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a banking institute established as co-operative (Genossenschaft) in the area of Salzburg. Before the Commission, the applicant is represented by Mr. H. Liebscher, a lawyer practising in Salzburg.

The facts of the case, as they have been submitted by the applicant, may be summarised as follows.

A. Background

In Application No. 12593/86, the applicant, together with another Salzburg banking institute, complained under Article 6 para. 1 of the Convention about the length of two sets of proceedings concerning one of their clients, namely criminal proceedings in which jewellery pledged to them was seized with a view to its forfeiture, and customs proceedings in which the seizure was maintained with a view to satisfying the State's customs claims against their client. Application No. 12593/86 was declared admissible on 10 October 1990, and is currently pending before the Committee of Ministers.

The applicant's complaints raised in the present application are related to the above-mentioned customs proceedings.

B. The particular circumstances of the case

On 10 April 1982 officers of the Salzburg Customs Office (Zollamt) seized (Beschlagnahme) jewellery which had been pledged to the applicant by Mr. K., one of its clients, as security for loans. The seizures were made for the purpose of securing evidence in connection with investigations against Mr. K. on the suspicion of having committed tax offences.

As from November 1982 the pledged jewellery continued to be seized on the basis of a court order issued in the course of the criminal proceedings against Mr. K. When the competent court lifted the seizure in July 1987 as regards part of the jewellery, and in March 1991 as regards the remainder, it conferred the power to dispose of the jewellery concerned to the Customs Office which had claimed it as security for unsatisfied customs claims against Mr. K.

On 13 August 1987 the Salzburg Customs Office, referring to S. 178 of the Customs and Excise Act (Zollgesetz), seized various pieces of jewellery (one sapphire, fifty-eight rubies, forty-one emeralds, two golden rings with emeralds and diamonds) and claimed its tax liability in rem (Sachhaftung) for Mr. K.'s customs duties relating to these pieces of jewellery.

On 9 March 1988 the Customs Office, in a preliminary decision (Berufungsvorentscheidung), dismissed the applicant's appeal against its decision of 13 August 1978. It corrected the sum of customs duties concerned, fixing it at AS 2,621,699. The Customs Office found in particular that S. 178 applied to import turnover tax. Moreover, the Office, having regard to its discretionary powers, considered that the public interests in claiming the tax liability in rem regarding the pledged jewellery outweighed the applicant's interests. In the public interest, it had to ensure a quick and secure recovery of the outstanding taxes. Furthermore, in the circumstances of the present case, it did not appear unfair to request the applicant, in the context of the tax liability in rem, to pay the taxes due.

The applicant maintained its appeal before the higher tax authority.

On 25 October 1989 the Salzburg Regional Directorate of Finance (Finanzlandesdirektion), fixing the amount of tax liability in rem at AS 2,621,699, dismissed the applicant's appeal.

In its decision, the Regional Directorate noted that on 13 September 1979 the applicant had accepted the sapphire and further pieces of jewellery (estimated value about AS 8.7 million) as security for a loan of AS 3.5 million granted to Mr. K. On 19 September 1979 the applicant had granted Mr. K. a further loan of AS 4 million and taken fifty-eight rubies, forty-one emeralds, two golden rings with emeralds and diamonds and further pieces of jewellery (estimated value about AS 8.7 million) as security.

The Directorate confirmed that the conditions for claiming the tax liability in rem of the jewellery were met. This liability extended to import turnover tax, the decision prescribing the import duties had become final and Mr. K. had meanwhile gone abroad. Other means to recover the taxes due had remained unsuccessful. The Directorate, referring to S. 20 of the Federal Taxation Act (Bundesabgabenordnung), further found that the Customs Office had correctly applied its discretionary powers in claiming the tax liability in rem. Weighing the interests of the party and the public interest in the payment of taxes, the Directorate found in particular that the applicant had failed to verify the origin of the jewellery. The applicant had meanwhile given back to Mr. K. pledges valued at almost AS 4 million without having explained the reasons for this reduction of its securities. In any

case, the fact that the value of the pledged objects exceeded by far the amount of the loans suggested that the applicant anticipated difficulties in the realisation of its right of pledge. There was no offer of proof as to the applicant's allegation that regarding most of the pieces of jewellery concerned the import duties had been paid, and, anyway, it was refuted by the final decision in the tax assessment proceedings against Mr. K.

On 28 March 1990 the Salzburg Customs Office ordered the seizure of some further pieces of jewellery (three emeralds and one diamond; estimated value more than AS 1.6 million), and claimed its tax liability in rem in respect of further import duties (AS 495,359) imposed upon Mr. K. in respect of these pieces of jewellery. The Office, referring to S. 178 of the Customs and Excise Act and S. 20 of the Federal Taxation Act, found that the public interest in recovering the taxes in a quick and secure manner outweighed the applicant's interests.

On 3 September 1990 the Salzburg Customs Office, in a preliminary decision, dismissed the applicant's appeal against its decision of 28 March 1990. It corrected the sum of customs duties concerned, fixing it at AS 381,598. Moreover, the Office exercising its discretionary powers considered that the applicant, when accepting the jewellery concerned as pledges, had not verified their origin and whether customs duties had been paid. Thus the applicant had no interest meriting protection.

On 25 September 1990 the Constitutional Court (Verfassungsgerichtshof) refused to deal with the applicant's constitutional complaint about the decision of the Regional Directorate of Finance dated 25 October 1989, and referred the matter to the Administrative Court (Verwaltungsgerichtshof).

The applicant maintained its appeal against the Customs Office's decision of 28 March 1990 before the higher tax authority. On 14 December 1990, the Regional Directorate of Finance dismissed the appeal.

The Regional Directorate noted that on 13 September 1979 the applicant had accepted three emeralds, a diamond and further pieces of jewellery (estimated value about AS 8.7 million) as security for a loan of AS 3.5 million granted to Mr. K. The Directorate found that the applicant had failed to inquire about the origin of the pieces of jewellery concerned as well as about the question of customs duties; as regards one piece of jewellery, it was obvious that it had been imported. The Directorate also rejected the applicant's argument that Mr. K. had been known as a respectable client. The Directorate considered that, taking into account this lack of diligence, the claim for tax liability in rem did not appear unfair.

On 14 February 1991 the Administrative Court dismissed the applicant's complaint about the decision of the Regional Directorate of Finance of 25 October 1989.

The Administrative Court, having regard to the relevant provisions of the Customs and Excise Act and the Federal Taxation Act, considered in particular that the Salzburg Customs Office had been competent to claim the tax liability in rem of the jewellery in question in respect of Mr. K.'s outstanding customs duties. Moreover, both customs duties in general as well as the import turnover tax were essentially linked to the object concerned which therefore continued to be a security for such duties irrespective of the rights of third persons. The tax liability in rem accorded the tax authorities a position in respect of a particular object which preceded any other rights in respect of this object, including property, in view of the

more important public interest in securing the payment of customs duties. According to the Turnover Tax Act (Umsatzsteuergesetz), the provisions of the Customs and Excise Act had to be applied mutatis mutandis; this included the tax liability in rem in respect of import turnover tax. As regards the applicant's objections to the amounts of customs duties due, the Administrative Court referred to the final tax assessments.

Furthermore, the Administrative Court considered that the Directorate of Finance had properly exercised its discretion when finding that the public interest in recovering Mr. K.'s outstanding taxes outweighed the applicant's interest in keeping the pledged jewellery. In this respect, the Administrative Court noted that the applicant had not objected to the findings of the Regional Directorate of Finance as to its negligence in verifying the origin of the pledges concerned as well as the question whether customs duties had been paid.

The decision was served on 3 April 1991.

On 26 February 1991 the Constitutional Court refused to deal with the applicant's constitutional complaint about the decision of the Regional Directorate of Finance dated 14 December 1990, and referred the matter to the Administrative Court.

On 24 May 1991 the Administrative Court also dismissed the applicant's complaint about the decision of the Regional Directorate of Finance dated 14 December 1990. The Administrative Court noted that the relevant issues were identical to those decided on 14 February 1991; moreover, the submissions of the applicant, who was again represented by the same counsel, were almost literally identical. The Administrative Court, therefore, mainly referred to its reasoning of 14 February 1991.

In September 1991 the Customs Office dismissed the applicant's requests for a reopening of the customs proceedings, which had been based on a new and lower estimation as to the value of the pledged jewellery. Appeal proceedings in this respect are apparently pending. The jewellery is still seized by the Customs Office.

C. Relevant domestic law

1. Tax liability in rem in respect of customs duties

S. 178 para. 1 of the Customs and Excise Act (Zollgesetz) reads as follows:

"Items in respect of which customs duty is or may be payable shall be liable for such duty regardless of the rights of third parties and may accordingly be seized by the customs authorities in pursuance of S. 20 of the Federal Taxation Act. The liability shall begin when the duty falls payable and shall end when the duty is extinguished."

S. 20 of the Federal Taxation Act (Bundesabgabenordnung) reads as follows:

"Decisions which the tax authorities have to take according to their discretion (discretionary decisions) must remain within the limits of discretion circumscribed by the law. Within these limits, the discretionary decisions have to be made on the basis of fairness and expediency taking into account all circumstances which might be relevant."

The reference in S. 178 para. 1 of the Customs and Excise Act to S. 20 of the Federal Taxation Act was inserted by an amendment in 1978

in order to make clear that, notwithstanding the fact that tax liability in rem arises directly under the law, the customs authorities have a discretionary power to claim or not to claim tax liability in rem in respect of particular items.

2. Jurisdiction of the Austrian Constitutional Court and Administrative Court

S. 144 of the Austrian Federal Constitution (Bundes-Verfassungsgesetz) provides in particular that a complaint can be filed with the Constitutional Court in which the applicant can allege a violation of his constitutional rights.

According to S. 130 para. 1 of the Federal Constitution the Administrative Court will review allegations of unlawfulness of an administrative decision. According to S. 130 para. 2, no unlawfulness exists where legislation refrains from establishing a binding rule on an administrative authority's conduct, leaving the determination of such conduct to the authority itself, and the authority has made use of this discretion in the spirit of the law.

S. 41 para. 1 of the Administrative Court Act provides, in so far as relevant:

"In so far as the Administrative Court does not find unlawfulness on account of a lack of jurisdiction of the authority against which the appeal is directed or on account of a violation of procedural provisions (S. 42 para. 2 [2] and [3]) ..., the Court must examine the contested decision on the basis of the facts as accepted by the authority against which the appeal is directed within the framework of the alleged complaint ... If it is of the opinion that reasons would be relevant for the decision on the unlawfulness of the contested decision ... which were so far not known to a party, it must hear the parties thereupon and, if necessary, adjourn the proceedings."

As regards the decisions of the Administrative Court, S. 42 para. 2 of the Administrative Court Act provides, in so far as relevant:

"The contested decision must be quashed

1. on account of the unlawfulness of its content,
2. on account of unlawfulness due to the lack of jurisdiction of the authority against which the appeal is directed,
3. on account of unlawfulness due to a violation of procedural provisions in particular because
 - a) the authority against which the appeal directed has determined the facts on an important point contrary to the case-file, or
 - b) the facts require to be supplemented on an important point, or
 - c) procedural provisions have been disregarded which, if taken into consideration by the authority against which the appeal is directed, could have led to a different decision of the authority."

The proceedings before the Administrative Court consist of an exchange of written observations between the parties (S. 36) and an oral hearing of their legal arguments (SS. 39 and 40). The parties have a right to request a hearing (S. 39 para. 1 [1]).

Where the Administrative Court has granted an appeal and has quashed the decision of the administrative authority, S. 63 para. 1 of the Administrative Court Act provides that the administrative authorities are obliged in the case concerned with the legal means at

their disposal promptly to restore the legal situation corresponding to the legal opinion expressed by the Administrative Court.

COMPLAINTS

1. The applicant complains that the decisions of the Austrian tax authorities to seize jewellery pledged to it and claim tax liability in rem under the relevant provisions of the Customs and Excise Act amount to a violation of their right to property within the meaning of Article 1 of Protocol No. 1 to the Convention. They submit in particular that the proceeds of a public sale by the tax authorities might not suffice to satisfy also its claims. Moreover, in exercising their right to claim tax liability in rem, the tax authorities had not duly taken the applicant's interests into account.

2. The applicant further complains that no "independent and impartial tribunal" within the meaning of Article 6 para. 1 of the Convention decided upon its dispute with the tax authorities regarding the seizure of the pledged jewellery and the claims of tax liability in rem.

THE LAW

1. The applicant complains under Article 1 of Protocol No. 1 (P1-1) to the Convention about the decisions of the Austrian tax authorities to seize jewellery pledged to it and claim tax liability in rem under the relevant provisions of the Customs and Excise Act.

Article 1 of Protocol No. 1 (P1-1) provides as follows:

"(1) 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.

(2) 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."

Article 1 of Protocol No. 1 (P1-1) in substance guarantees the right of property and comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst others, to control the use of property by such laws as they deem necessary in the general interest or to secure the payment of taxes. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (cf., *mutatis mutandis*, Eur. Court H.R., *Agosi* judgment of 24 October 1986, Series A no. 108, p. 17, para. 48; *Tre Traktörer AB* judgment of 7 July 1989, Series A no. 159, pp. 22-23, para. 54).

The Commission finds that the decisions of the Customs Office dated 13 August 1987 and 28 March 1990, respectively, namely seizure of various pieces of jewellery and claim of tax liability in rem regarding outstanding taxes, did not, as such, deprive the applicant

of its pledges. The interference at issue accordingly does not constitute a deprivation of property within the meaning of Article 1 para. 1, second sentence (Art. 1-1-2). The decisions rather aimed at securing the payment of taxes and therefore have to be considered in the light of Article 1 para. 2 of Protocol No. 1 (P1-1-2).

The Commission notes that the decisions complained of, as confirmed by the Salzburg Regional Directorate of Finance and the Austrian Administrative Court, were in particular based on S. 178 of the Customs and Excise Act and S. 20 of the Federal Taxation Act. As confirmed by the Austrian Administrative Court, these provisions of tax law aimed at securing the payment of customs duties in general as well as the import turnover tax. There is no indication that the measures complained of were unlawful or did not pursue the said general interest.

The Commission has next examined whether the measure of interference struck a "fair balance" between the demands of the public interest and the requirements of the protection of the individual's fundamental rights, i.e. whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (cf. Eur. Court H.R., Agosi judgment, loc. cit., p. 18, para. 52; Tre Traktörer AB judgment, loc. cit., p. 23, para. 59). In determining whether a fair balance exists, the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (cf. Agosi judgment, loc. cit.).

The Commission recalls that, in the area of the confiscation of smuggled goods, the striking of a fair balance depends inter alia on the behaviour of the owner of the property, including the degree of fault or care, which he has displayed. The applicable procedures must be such as to enable, amongst other things, reasonable account to be taken as to the degree of fault or care, or at least the relationship between the owner's conduct and the breach of the law, and also to determine whether the procedures in question afforded the owner a reasonable opportunity of putting his case to the responsible authorities (cf. Eur. Court H.R., Agosi judgment, loc. cit., p. 19, paras. 54-55).

Applying analogous considerations to the present case concerning property rights deriving from a pledge, the Commission notes that the Customs Office, when deciding to seize the imported jewellery pledged to the applicant and to claim tax liability in rem regarding in particular outstanding customs duties, had regard to the fact that the applicant was not itself liable for the taxes in question. In accordance with S. 178 of the Customs and Excise Act and S. 20 of the Federal Taxation Act, the Austrian tax authorities exercised their lawful discretion, and thereby balanced the public interests in securing the payment of taxes against the applicant's legitimate interests.

The questions of seizure and claiming tax liability in rem were dealt with at three instances: the Customs Office, the Regional Directorate of Finance and the Austrian Administrative Court. The Salzburg Customs Office found that the public interest in recovering the taxes in a quick and secure manner outweighed the applicant's interests. The Regional Directorate of Finance, weighing the applicant's interests and the public interest in the payment of taxes, noted a lack of diligence on the part of the applicant which had failed to verify the origin of the jewellery concerned, had itself previously reduced its securities and had apparently itself anticipated difficulties in the realisation of its right of pledge. The Administrative Court observed in particular that the tax liability in

rem accorded the tax authorities a position in respect of a particular object which preceded any other rights in view of the more important public interest in securing the payment of customs duties. The Administrative Court also confirmed the exercise of discretion by the lower instances; it noted in this respect that the applicant had not objected to the findings of the Regional Directorate of Finance as to its negligence.

In these circumstances, the Commission considers that the applicant's arguments in its position as the beneficiary of a pledge regarding the jewellery concerned were duly taken into account in the context of proceedings including a judicial review, which is sufficient to satisfy the requirements of Article 1 para. 2 of Protocol No. 1 (P1-1-2).

It follows that there is no appearance of a violation of Article 1 of Protocol No. 1 (P1-1). Consequently, this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention that the questions of seizure and claiming tax liability in rem as regards the jewellery pledged to it were not decided by an "independent and impartial tribunal".

Article 6 para. 1, first sentence (Art. 6-1-1), so far as relevant, provides:

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

The Commission recalls that tax proceedings are normally outside the scope of Article 6 (Art. 6) of the Convention (cf. e.g. No. 8903/80, X. v. Austria, Dec. 8.7.80, D.R. 21 p. 246; No. 9908/82, X. v. France, Dec. 4.5.83, D.R. 32 p. 266).

However, the present case does not concern tax obligations of the applicant, but the decisions taken by the Customs Office to seize and claim tax liability in rem in respect of objects which provided a security to the State's tax claims against a third party. As these objects had been pledged to the applicant, the decisions in question conflicted with the applicant's civil right of pledge. In accordance with S. 178 of the Customs and Excise Act and S. 20 of the Federal Taxation Act, the customs authorities exercised a discretionary power in claiming tax liability in rem, and, in this context, were required to consider civil rights of third parties who for this purpose were recognised as parties to the proceedings. In these circumstances, the customs proceedings in question involved a determination of the question whether and to what extent the applicant could actually make use of its civil right of pledge. Accordingly, Article 6 para. 1 (Art. 6-1) was applicable to these proceedings.

As to the applicant's complaint of lack of access to an independent and impartial tribunal, the Commission recalls that Article 6 para. 1 (Art. 6-1) does not require that the procedure which determines civil rights and obligations be conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the determination of civil rights by the tribunal envisaged in Article 6 para. 1 (Art. 6-1) of the Convention (see Ettl and Others v. Austria, Comm. Report, 3.7.85, Eur. Court H.R., Series A no. 117, p. 23, paras. 77 et seq.). The scope of review by this tribunal must cover questions of fact just as much as questions of law, it must have full jurisdiction and provide the guarantees of Article 6 para. 1 (Art. 6-1) (Eur. Court H.R. Le Compte,

Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 23, para. 51, sub-paragraph ; Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29; Zumtobel judgment of 21 September 1993, Series A no. 268-A, para. 29).

In the present case, the Salzburg Customs Office deciding to seize the jewellery pledged to the applicant and to claim its tax liability in rem, as well as the Salzburg Regional Directorate of Finance deciding upon the applicant's appeal, did not constitute tribunals within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Constitutional Court could inquire into the contested proceedings only from the constitutional point of view, and not examine all the relevant facts. It did not therefore have full jurisdiction (cf. Eur. Court H.R., Zumtobel judgment, loc. cit., para. 30).

Finally, the Administrative Court decided on the applicant's complaints about the seizures and claims of tax liability in rem regarding the pledged jewellery. The questions raised were mainly of a legal nature, namely in particular whether the requirements of S. 178 of the Customs and Excise Act had been complied with and whether, in exercising the discretionary powers under S. 20 of the Federal Taxation Act, the tax authorities had taken the applicant's interests as the beneficiary of a pledge into due account.

The Commission finds that the Administrative Court was not bound by the administrative decisions under S. 178 of the Customs and Excise Act. The Administrative Court, in its decisions of 14 February and 24 May 1991, carefully examined the arguments put forward by the applicant. Thus, it confirmed the competence of the Salzburg Customs Office, and also dealt with the question whether S. 178 of the Customs and Excise Act also applied to import turnover tax, and it examined the question whether the conditions of this provision were fulfilled. Furthermore, the Administrative Court, in reviewing the exercise of discretion by the Regional Directorate of Finance, considered in detail the applicant's position and confirmed that the public interest in recovering Mr. K.'s outstanding taxes outweighed the applicant's interest in keeping the pledged jewellery. In this context, the Administrative Court noted that the applicant had not objected to the findings of the Regional Directorate of Finance as to the applicant's negligence when accepting the jewellery as pledges.

In these circumstances, the Commission considers that the review of the Administrative Court fulfilled the requirements of Article 6 para. 1 (Art. 6-1) of the Convention (cf., mutatis mutandis, Eur. Court H.R., Zumtobel case, loc. cit., paras. 31-32).

Consequently, there is no appearance of a violation of the applicant's right of access to a tribunal within the meaning of Article 6 para. 1 (Art. 6-1). This part of the application is, therefore, also 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 THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber

President of the Second Chamber

(K. ROGGE)

(S. TRECHSEL)