COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF FISCHER v. AUSTRIA

(Application no. 16922/90)

JUDGMENT

STRASBOURG

26 April 1995

In the case of Fischer v. Austria[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. MATSCHER,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr D. GOTCHEV,
Mr P. JAMBREK,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 22 September 1994 and 24 March 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 10 December 1993 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 (art. 32-1) and Article 47 (art. 47) of the Convention. It originated in an application (no. 16922/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) on 11 May 1990 by an Austrian citizen, Mr Josef Fischer.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

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[1] The case is numbered 52/1993/447/526. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The President gave the lawyer in question leave to use the German language.

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr C. Russo, Mr S.K. Martens, Mr A.N. Loizou, Sir John Freeland, Mr D. Gotchev and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 21 June 1994 and the applicant's memorial on 24 June 1994. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr W. Okresek, Head of the International Affairs Division, Constitutional Service, Federal Chancellery, Agent,
Ms E. Bertagnoli, Human Rights Division, International Law Department, Federal Ministry of Foreign Affairs,
Mr F. Oberleitner, Federal Ministry of Agriculture and Forestry, Advisers;

- for the Commission

Mr M.P. Pellonpää, Delegate;

- for the applicant

Mr M. Gnesda, Rechtsanwalt, Counsel.

The Court heard addresses by Mr Pellonpää, Mr Gnesda and Mr Okresek.

6. On 3 October 1994 the Government filed a written statement in reply to the applicant's claim for just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr Josef Fischer was born in 1932 and lives in Vienna.

8. Since 1975 the applicant has owned a refuse tip at Theresienfeld in the Land of Lower Austria. He used to operate it under a revocable refuse-tipping licence granted to his predecessor in title on 30 July 1973 under the Water Rights Act 1959 (Wasserrechtsgesetz).

9. On 5 December 1986 the tipping licence was revoked by the Governor (Landeshauptmann) of the Land of Lower Austria on the grounds, inter alia, that dangerously high levels of toxic substances had been found in the groundwater (which forms part of a groundwater reservoir for drinking-water for over half a million people); several barrels found at the site contained unauthorised substances; and the site was in any event unsuitable for tipping - even ordinary domestic waste should not be dumped there.

10. Mr Fischer appealed to the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft), complaining also that he should have had the right to be heard. On 20 July 1987 the appeal was dismissed on the ground that it was absolutely essential to close the tip in order to safeguard water supplies, since it was not technically possible to render the site safe. As to the applicant's right to be heard, he had had ample opportunity to make his views known and an oral hearing was not required in proceedings involving revocation of licences.

11. On 2 September 1987 Mr Fischer filed a complaint with the Constitutional Court (Verfassungsgerichtshof) alleging a violation of, inter alia, Article 6 para. 1 (art. 6-1) of the Convention, in that the administrative authorities had not granted his request for an oral hearing. He requested that a hearing be held before the Constitutional Court. On 14 March 1988, pursuant to Article 144 para. 2 of the Federal Constitution (see paragraph 22 below) the Constitutional Court declined to accept the applicant's complaint. It found that the bulk of the complaint related to allegations that the ordinary law had been applied incorrectly. To the extent that the complaint did touch upon questions of constitutional law, it did not have sufficient prospects of success. No hearing was held.

12. On 6 August 1987, before his constitutional complaint, the applicant had lodged an appeal with the Administrative Court (Verwaltungsgerichtshof) in which he alleged that the decision of 20 July 1987 was unlawful and that the administrative authorities should have held a hearing. He requested that the decision be quashed and that a hearing be held before the Administrative Court.

On 21 September 1989 the Administrative Court dismissed the applicant's complaint as ill-founded pursuant to section 42 (1) of the

Administrative Court Act (see paragraph 18 below). The court found that an oral hearing before the Ministry had not been necessary and rejected the applicant's request for such a hearing before the court itself under section 39 (2) (6) of the Administrative Court Act (see paragraph 21 below).

13. The following reasons were given in the judgment:

"The appellant submitted in the first place that in the reasons given for the decision at first instance the scope of the 1973 licence was wrongly restricted in terms of area; the revocation of the licence, which was upheld on appeal, without this question - raised in the appeal - having been dealt with, therefore remained contradictory. The Court can discern no such contradiction. The revocation by the water-rights authority of first instance, which was upheld by the respondent authority, related - according to the terms of the formal order - to the 1973 licence without any restriction. Similarly, where in the reasons given for the Land Governor's decision of 5 December 1986 the words 'where the gravel pit has already been closed' are used when parcel 514-1 KG Theresienfeld is being particularised, they are merely taken from the decision of 30 July 1973 whereby the licence was granted. Moreover, the use of the expression 'part of the area' (Teilfläche) merely clarifies - in the context of setting out the earlier history - the meaning which the same authority attributed to the outline description in the decision whereby the revoked licence had been granted. This is not a legally binding determination, nor does it in any way restrict the revocation itself, which at all events applied to the 1973 licence in its entirety, regardless of how the indication 'where the gravel pit has already been closed' - which is not more closely defined - is to be understood. It is accordingly clear, without it being necessary to go into the appeal submissions in detail, that neither the aforementioned comment in the decision at first instance nor the absence of any reference to these issues in the impugned decision amounted to an interference with the rights of the appellant.

It is irrelevant whether the reservation of the right to revoke the licence under section 21 (1) of the Water Rights Act 1959 was properly included in the 1973 decision, as that decision became final and the aforesaid incidental provision became legally effective likewise. The Court agrees with the respondent authority and, on this point, the appellant that even where, as in the present case, a reservation of the right to revoke is not spelt out in more detail, revocation is justifiable only where there are sufficient objective reasons for it; these, however (and to this extent the Court's view does not coincide with the one reflected in the decision appealed against), could only derive from considerations of public interest, since the right to revoke was not reserved in the interests of third parties. Ultimately, the revocation of a decision under the Water Rights Act can only be regarded as objectively justified if it can be considered necessary within the meaning of the Act; and that applies only where it does not serve interests that can be asserted under provisions of the Water Rights Act without any specific need for a revocation.

The appellant criticises the respondent authority for having confirmed the revocation of the water-rights licence for no valid reason.

The appellant complains that in the decision at first instance and in the impugned decision it is stated, among other things, that waste tipping in accordance with the terms of the licence could contribute to an increased potential hazard. In the decision at first instance the remark relating to an increased risk of this kind plainly goes back to a finding - also cited in the reasons - by the officially appointed medical expert that, in view of its position in the central area of the Mitterndorf basin, the site of the refuse

tip was to be rejected on health grounds and represented a potential hazard to the groundwater. The same expert referred to a comment by the officially appointed technical expert, who had stated that by present-day criteria a renewal of the licence for a refuse tip on this site was to be ruled out. In the decision appealed against, the site of the tip as such was likewise described as problematical on the basis of the experts' reports - in the expert opinion that is reproduced in the impugned decision it is stated that it was out of the question that areas where there were sources of groundwater suitable in quantity and quality for use as a water supply should be used for refuse tips - and the tipping of waste that endangered the groundwater was attributed to among other things the 'imprecise wording of the licence' of 1973. This last observation concerns the past, and the appellant cannot rely on the distinction between licensed and unlicensed tipping as set out in this Court's decision of 19 May 1987, no. 86/07/0147, to rebut it. This distinction was indeed recognised partly in contradiction of the view that had been advanced by the appellant's predecessor in title. It accordingly cannot be ruled out that, prior to publication of the court decision just mentioned, the operator of the tip disregarded the differences that are pointed out in it and which are of importance as regards authorised tipping of waste. As to the technical comments on the choice of site, however, these appear to the Court sufficient to justify the view that even authorised tipping was at least 'problematical' on the particular site.

The appellant further submitted that dumping in accordance with the licence had not so far been proved to have had any effects in the area around the tip; he referred to the report of 29 April 1986 by an officially appointed technical expert, in which, however, the possibility of groundwater contamination by domestic waste is also described in detail. In the expert report reproduced in the decision appealed against, reference was also made to the fact that a considerable length of time passed between the moment of pollution and the first observable signs of harmful substances in the subsoil or in the groundwater, a fact that had previously been regarded as pointing to the subsoil's (only) seemingly unlimited cleansing and storing capacity and in many cases had led to an approach to the siting and licensing of refuse tips that would nowadays be regarded as untenable. The fear of adverse effects on the groundwater is thus not shown to be baseless - as the appellant's objection amounts to saying - by even a single finding.

The appellant further submitted that in the impugned decision an additional argument in favour of revocation was wrongly put forward to the effect that waste which was dumped contrary to the terms of the licence was so mixed up with that which was tipped in accordance with it that it was in practice impossible to separate the two kinds. The appellant contended that this argument overlooked the fact that, according to the officially appointed technical expert's opinion of 21 October 1986 on the issue of a general clearing up of the site, it was assumed that hazardous waste discovered on the site was separable from the other waste; in the decision at first instance, moreover, such a mixing up was a mere supposition. Apart from the fact that in describing the two types of waste as being 'in practice' inseparable (as was assumed), account was clearly taken of the practical difficulties which were mentioned in the same expert opinion, with express reference to the need to establish 'a highly qualified water-supervision unit that must have appropriate facilities available to it for carrying out analyses and for the safe disposal of any hazardous waste', this observation concerning the past is in any case of no vital importance for the revocation, which has its effects in the future, preventing future dumping.

The appellant pointed out that a mass of findings confirmed that there was no danger in the western part of the site, contrary to what was stated in the impugned decision; it followed that the cleaned-up western part of the site was ready for use for dumping in accordance with the terms of the licence. The passages from the administrative file which the appellant cites in evidence in this connection do not, however, support that assertion. In the opinion submitted on 23 April 1985 the domestic refuse deposited on the site is described by the expert as posing a threat to the groundwater, independently of the barrels to be disposed of. In a letter of 28 May 1985 from the district authority (Bezirkshauptmannschaft), which is also referred to by the appellant, it was admittedly announced that the cleaning-up operation had been completed, but at the same time the issue of what was to be done with the domestic waste whose existence had originally not been known about was also addressed. In an expert opinion of 15 May 1985, likewise cited by the appellant, it was confirmed that digging works were being carried out in the western part of the pit, but it was also noted that domestic waste had been found there and that it could not be ruled out that chemicals had been buried with it; furthermore, the possibility of sealing the site without removing the waste was rejected on technical grounds and because of the danger that barrels had been buried with it. In the district authority's letter of 18 June 1986 it was stated that the domestic waste still remaining in the cleaned-up western area would be removed once the decision had been taken on cleaning up the entire site. Thus, it has not been made out that the western part of the site is free of any dangerous waste nor has the argument been refuted that further tipping of permissible waste, on top of the waste already on the site, must be stopped precisely for the purpose of removing that existing waste.

For these reasons and because, as set out in greater detail above, no further dumping of waste on the aforesaid site should be allowed - because there should be no refuse tip there at all and clearing-up work is still pending - it was not necessary for a 'final cleaning-up programme' to be in existence, as the appellant maintained, before further tipping under the licence could be stopped (by revocation of the licence). Nor is a cleaning-up programme thereby pre-empted; such a programme may very well make special licences necessary; and even a partial continuation of the current tipping operations until a cleaning-up project is embarked on could not on that account be regarded as justifiable.

The appellant also considered the weighing of interests to have been inadequate and to have produced the wrong result; this applied, on the one hand, to those municipalities which would in future be deprived of their facilities for dumping refuse, and, on the other, to the appellant, who would be financially ruined. As regards the aforementioned municipalities, the appellant cannot legally represent their interests inasmuch as they are the interests of third parties, and it is moreover clear that the danger posed by the dumped waste affects a much larger number of people, as is apparent from the fact that it is widely known that, owing to its size, the Mitterndorf basin serves as a reservoir for drinking-water. The same considerations of public interest are valid with regard to the economic interests of an individual; the respondent authority did not, as the appellant maintained, disregard the relevant considerations, since in the decision appealed against it said, among other things, that in the case in issue 'the public interest in ensuring the supply of drinking-water outweighs the economic interest in continuing the operation of the tip'. It is equally untrue that the question of blame for the dumping of prohibited waste had a bearing on the revocation, as the revocation concerned the licence and thus the operation of the tip as permitted by that licence up to then.

The appellant also complains that he was not told the name of the hydraulic engineer who was officially appointed as an expert when his opinion was made known in the respondent authority's communication (Vorhalt) of 18 March 1987. The appellant, however, did not contradict the comment in the decision appealed against that his lawyer had been informed of the expert's name during an inspection of the entire file on 22 April 1987. As the appellant was familiar with the 'original' of the opinion concerned (it is referred to in the appeal), he must also have been aware of the exact date of the opinion, which was not given in the respondent authority's communication. The appellant further criticised the same expert on the ground that his opinion contained no 'findings of fact', a matter to which reference had already been made in the reply to the authority's communication. The way in which this point was dealt with in the impugned decision has been set out in the recital of facts. The technical opinion submitted in the appeal proceedings was an expert assessment of the same facts as those on which the first-instance authority had based its decision; the technical assessment in the appeal proceedings was intended - in view of the appellant's appeal - precisely to throw light on whether the factual situation (which was essentially identical both at first instance and on appeal) should lead to the legal characterisation given it by the Governor; it was not a question of assessing changed or substantially supplemented facts. For this reason it was unnecessary for the expert appointed by the respondent authority himself to set out afresh the facts to be taken as a basis. In a case such as the present one there can be no question of the facts on which the expert opinion was based not being known or of a further special reference being necessary to how they came about. By 'third-party documents' (Fremdakten) - a term used several times in the expert report - is usually understood, as can easily be inferred from the context, documents that have not been drawn up by the authority (in this instance the respondent authority) itself; since the questions being dealt with always related to the refuse tip concerned, it is clear that what was meant were the water-rights documents of other authorities than the respondent authority which related to the tipping site. As to the appellant's specific criticism to the effect that the expert did not make clear what he meant by 'the abuses found', it should be noted that immediately after that passage there follows a more detailed explanation, in particular through the reference to failures to comply with the decision of 21 September 1972 and condition 9 of the decision of 30 July 1973, by which is meant the occurrences which led to the revocation by the Governor on 16 May 1983 of the licence to dump distillation residues. The entire comment relating to this has little bearing on the revocation, however, because it was made by the expert only in connection with his general remarks on the need for precise definition of waste if there was to be any effective control of what was dumped. A separate reply to the question - posed in its observations in reply to the respondent authority's communication and repeated in the present appeal - whether account had been taken of the fact that in the eastern part of the tip there was a compressed mass of domestic refuse about 18 metres thick on the floor of the site does not seem to the Court to be of decisive importance with regard to the revocation stopping future tipping in view of the fact that - as set out in greater detail in the present appeal - it can 'now indisputably' be assumed that 'under a 15 to 18-metre-thick layer of highly compressed domestic refuse thousands of barrels of, in all probability, unauthorised dangerous solvents have been dumped there' and that the area must be cleaned up - which precludes all further tipping.

The appellant complained that further details about the significance of the Mitterndorf basin for the water supply were lacking in the expert report and considered the reference it contained to the 'expert opinions in the third-party documents' and the 'specialist literature' to be insufficient. Attention need only be drawn in the first place to the regulations issued by the respondent authority as early

as 1969 (Federal Gazette - Bundesgesetzblatt - no. 126), which define the groundwater conservation area on whose periphery the refuse tip is situated. Furthermore - in response to the appellant's criticism - reference is rightly made in the impugned decision to the fact that the importance of the area was well known. The Environment Protection Agency's (Umweltschutzanstalt) survey report of 17 February 1987, according to which a groundwater sample taken on 22 October 1986 had shown, among other things, that the chlorinated hydrocarbon content had further fallen, had no influence on the expert opinion in this context - this is confirmed in a note by the expert. In this connection, it must be borne in mind that the measurement was based on only a single sample and was merely 'better' than one from an earlier sample. Even the appellant does not infer from it that the dangerous eastern part of the site is thereby shown to be free of danger; if the licence continued in force, further tipping could not, in the expert's view, be regarded as conducive to further improvement in the quality of the groundwater. The appellant's objection that there was no water seepage through an open 'compressed, 18-metre-thick' layer of domestic refuse is impossible to understand. Since this waste was alleged to exist in the eastern part of the tip, it was on that account alone not unreasonable to prevent further tipping in accordance with the licence by revoking that licence, given the need - mentioned even by the appellant - for a cleaning up of the site. It may therefore be concluded that in this respect the alleged material defects in the expert opinion are non-existent.

The appellant is also wrong to maintain that the licence should only have been revoked after special appeal proceedings in which the appeal authority would have had to make its own investigation of the facts. The facts which the Governor took as a basis were set out in detail in the decision at first instance. The alleged defects were gone into in the appeal proceedings or have now been asserted in the present appeal. In both instances, however, the appellant partly relied on facts that were irrelevant to the issue of the revocation.

Nor does the Court agree with the appellant's submission that the technical expert's opinion in the initial appeal proceedings was defective because it contained legal arguments. In the section 'Definition of waste, control of tipping' there is firstly merely a discussion of stipulations in the revoked decision [to grant a licence] and then a mention of the applicability of the Poisons Act in connection with technical observations concerning water contaminants, with a reservation ('... would have to be checked by the water-rights authority ...'); the question whether revocation was absolutely essential or whether defects under section 33 (2) of the Water Rights Act 1959 could be remedied is dealt with from an exclusively technical point of view; the closing remark on the subject is at all events inaccurately reproduced in the appeal inasmuch as the expert endorsed the revocation in the light not of legal but of economic requirements. Contrary to what the appellant maintained, there was no pre-emption of the legal assessment to be made by the respondent authority.

The appellant further complained that the respondent authority did not, as requested, seek further expert opinions. Reference is made in the appeal to possible alternatives to revocation and to an opinion of 29 April 1986 by the hydraulic engineer officially appointed as an expert by the Governor. The appellant inferred from this expert opinion that approval of measures he had planned would have meant that the revocation could have been avoided; in that opinion, however, it was suggested - on the assumption of 'dangers which, if the principle that prevention is better than cure is applied', ruled out 'further tipping' (and it was stated that even tipping of domestic refuse 'undoubtedly' increased the danger 'significantly in quantitative terms') and on the basis of the facts - that 'the question of revoking the licence granted by decision of

the Governor, ON 14' (i.e. the decision of 1973), should be looked into, 'as important assumptions, on which the issuing of the licence [had] been based' had proved to be false. The expert opinion cited, which points in exactly the direction that was subsequently - in the last instance by the respondent authority - taken, was therefore an unsuitable basis for obtaining, as requested, further expert reports. Even if in the same context reference is made in the appeal to the expert report submitted in the water-rights proceedings of 18 November 1986 in support of the view that the 're-storage variant' (final disposal of the 'eastern refuse' in the western part of the tip), which the appellant had suggested as an alternative to revoking the licence, was 'technically feasible', little is gained - particularly in view of the many discussions that, according to the administrative documents, had already taken place - in the way of showing that the additional investigations that were held to be unnecessary in the impugned decision are in fact needed.

Lastly, the Court cannot accept the appellant's submission that an oral hearing should have been held for the specific purpose of considering the question of a revocation; on the one hand, no provision is made for a hearing for this purpose in the law, as the appellant himself concedes, and, on the other, issues relating to a cleaning up of the tip were discussed from a large variety of angles, most recently in the proceedings of 18 November 1986 which preceded the revocation by the first-instance authority, and for this reason it has not been shown that 'the facts before the appellant authority [were] so inadequate that the holding or reholding of an oral hearing' should have been regarded as 'unavoidable' (section 66 (2) and (3) of the General Administrative Procedure Act 1950).

The appellant has consequently not succeeded in showing that the licence was revoked on grounds that were not objective and thus unlawfully.

As the appeal is consequently unfounded, it must be dismissed pursuant to section 42 (1) of the Administrative Court Act.

The requested hearing was dispensed with under section 39 (2) (6) of the Administrative Court Act.

..."

II. RELEVANT DOMESTIC LAW

A. Article 90 para. 1 of the Federal Constitution

14. Article 90 para. 1 of the Federal Constitution provides:

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

B. Applications to the Administrative Court

15. By virtue of Article 130 of the Federal Constitution, the Administrative Court has jurisdiction to hear, inter alia, applications alleging that an administrative decision is unlawful.

16. Pursuant to section 36 of the Administrative Court Act, proceedings consist essentially in an exchange of written pleadings. If one of the parties so requests the Administrative Court may hold a hearing which is in principle held in public (sections 39 (1) (1) and 40 (4)).

17. Section 41 (1) of the same Act reads as follows:

> "In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42 (2), paragraphs 2 and 3) ..., it must examine the contested decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward ... If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

18. Section 42 (1) states that, save as otherwise provided, decisions of the Administrative Court shall either dismiss a complaint as ill-founded or quash the contested decision.

19. By virtue of section 42 (2),

> "The Administrative Court shall quash the impugned decision if it is unlawful
>
> 1. by reason of its content, [or]
>
> 2. because the respondent authority lacked jurisdiction, [or]
>
> 3. on account of a breach of procedural rules, in that
>
> (a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or
>
> (b) the facts require further investigation on an important point, or
>
> (c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

20. Under section 63 (1) of the Administrative Court Act, if the court quashes the challenged decision, "the administrative authorities are under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law (Rechtsanschauung)".

C. Hearings before the Administrative Court

21. Section 39 (2) of the Administrative Court Act provides:

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

...

6. it is apparent to the Court from the pleadings of the parties to the proceedings before it and from the files relating to the earlier administrative proceedings that an oral hearing is not likely to clarify the case further."

D. Hearings before the Constitutional Court

22. Under Article 144 para. 2 of the Federal Constitution:

"The Constitutional Court may ... decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The Court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

PROCEEDINGS BEFORE THE COMMISSION

23. Mr Fischer applied to the Commission on 11 May 1990. He relied on Article 6 para. 1 (art. 6-1) of the Convention in so far as he was not able to bring his case before a "tribunal" which complied with this provision or to have a public hearing on the issue of the revocation of his tipping licence.

24. The Commission declared the application (no. 16922/90) admissible on 8 September 1992. In its report of 9 September 1993 (Article 31) (art. 31), the Commission expressed the opinion that

(a) there had 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) (twelve votes to one);

(b) the lack of an oral hearing in the Administrative Court had violated Article 6 para. 1 (art. 6-1) (unanimously); and

(c) the lack of an oral hearing in the Constitutional Court had not violated Article 6 para. 1 (art. 6-1) (twelve votes to one).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[3].

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 312 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

25. The Government asked the Court to "hold that Article 6 (art. 6) of the Convention has not been violated in the case at issue".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

26. The applicant alleged a breach of Article 6 para. 1 (art. 6-1) of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

His complaints concerned his right of access to a court invested with full jurisdiction as well as the complete lack, throughout the proceedings, of any oral hearing.

A. Right of access to a court

27. Mr Fischer claimed that none of the bodies before which his case came in the impugned proceedings could be regarded as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1). This applied not only to the Constitutional Court, whose review was limited to aspects of constitutional law, but, most importantly, to the Administrative Court.

28. The Court reiterates that under Article 6 para. 1 (art. 6-1) of the Convention it is necessary that, in the determination of "civil rights and obligations", decisions taken by administrative authorities which do not themselves satisfy the requirements of that Article (art. 6-1) be subject to subsequent control by a "judicial body that has full jurisdiction" (see the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 16, para. 29, and, as the most recent authority, the Ortenberg v. Austria judgment of 25 November 1994, Series A no. 295-B, pp. 49-50, para. 31).

29. The Court agrees with the applicant and the Commission that the Austrian Constitutional Court does not have the requisite jurisdiction (see the Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 13, para. 30, and the Ortenberg judgment previously cited, p. 50, para. 32). Its review is confined to ascertaining whether the administrative

decision is in conformity with the Constitution. It may even refuse to consider the merits of a complaint where "it cannot be expected that the judgment will clarify an issue of constitutional law" (see paragraph 22 above).

30. As for the scope of the Administrative Court's review, the applicant submitted that such a review was insufficient for the purposes of Article 6 para. 1 (art. 6-1) since only legal issues could be examined, not factual ones. The Administrative Court was a kind of Court of Cassation, having no jurisdiction in matters of fact. Only in very limited cases was it allowed to supplement the facts established by the administrative authority, even where those authorities had failed to take important evidence.

31. In the Commission's view, although the decisions of the Administrative Court were generally expressed as embodying a review of the administrative decision rather than a finding of fact on each and every issue, this did not mean that in the instant case it regarded itself as being restricted in its review of the facts.

Furthermore, the Administrative Court could have quashed the administrative authority's decision as being unlawful and imposed on the authority its own view as to the assessment of the facts (see paragraph 20 above). In the case under consideration, therefore, the Ministry of Agriculture and Forestry's decision of 20 July 1987, which confirmed the revocation of 5 December 1986, was subject to control by a court which had the jurisdiction required by Article 6 para. 1 (art. 6-1).

32. The Government endorsed the Commission's opinion and added that there was no indication in the case that any discretion had been exercised by the administrative authorities. Moreover, the Administrative Court had dealt in detail with all the complaints raised by the applicant. That being so and as the case bore greater similarity to the Zumtobel case (previously cited) than to the Obermeier v. Austria case (judgment of 28 June 1990, Series A no. 179), the requirements of Article 6 para. 1 (art. 6-1) had been complied with.

33. The European Court should confine itself as far as possible to examining the question raised by the case before it. Accordingly, it should only decide whether, in the circumstances of the case, the scope of the competence of the Administrative Court satisfied the requirements of Article 6 para. 1 (art. 6-1).

34. The Court notes at the outset that, as was pointed out by the Government and not contested by the applicant, the decision to revoke the tipping licence which gave rise to the present case was, as in the Zumtobel case (previously cited, p. 13, para. 31), not one which lay "exclusively within the discretion of the administrative authorities". It is not the task of the Court to assess the quality of the experts' reports on which the revocation was based. The Court is satisfied that the impugned administrative decision was based on objective criteria that left relatively

little room for discretion. In this respect the instant case is distinguishable from the Obermeier case (previously cited, p. 23, para. 70).

As to the applicant's arguments concerning the Administrative Court's limited powers to examine questions of fact and to take new evidence, there is nothing before the Court to suggest that any such limitations were in issue in his case. As is evident from the extensive reasoning in its judgment (see paragraph 13 above), the Administrative Court considered all the applicant's submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining facts.

Regard being had to the nature of Mr Fischer's concrete complaints as well as to the scope of review necessitated by such complaints, the Administrative Court's review of the decision being challenged fulfilled the requirements of Article 6 para. 1 (art. 6-1).

B. Lack of a hearing

35. The applicant further complained that the Administrative Court and the Constitutional Court had refused to hold an oral hearing. In his submission, Austria's reservation in respect of Article 6 (art. 6) of the Convention did not apply to the case or, if it did, was invalid for failure to comply with the requirements of Article 64 (art. 64) of the Convention.

1. Austria's reservation

36. Austria's reservation in respect of Article 6 (art. 6) of the Convention reads 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." (see paragraph 14 above)

37. Article 64 (art. 64) of the Convention provides:

> "1. Any State may, when signing [the] 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."

38. In the applicant's submission, the reservation did not apply to hearings in the Administrative Court and the Constitutional Court. Both were special courts, which concentrated on issues of legality or constitutionality and did not conduct a full review of the cases before them. Such courts did not come within the concept of the traditional criminal and civil courts contemplated in the reservation. If they did, it would mean that

the reservation was open to different interpretations and was not drafted with the "precision and clarity" required by Article 64 para. 1 (art. 64-1). This conclusion was, in the applicant's view, consistent with the ruling given by the European Court in the case of Belilos v. Switzerland (judgment of 29 April 1988, Series A no. 132, p. 26, para. 55).

In any event the reservation was invalid under Article 64 para. 2 (art. 64-2), since it did not contain any statement whatsoever of the content of the law concerned.

39. The Government drew a parallel between the instant case and the cases of Ringeisen v. Austria (judgment of 16 July 1971, Series A no. 13) and Ettl and Others v. Austria (judgment of 23 April 1987, Series A no. 117), in which the Court had held that the reservation applied in proceedings before a court dealing with questions of administrative law. In their view, even if Article 90 of the Federal Constitution referred only to "civil and criminal cases", the reservation was also applicable to cases before administrative courts when those courts determined questions of "civil rights", within the meaning of Convention case-law. The same conclusion could be reached by looking at the intention of the Federal Government at the time of making the reservation.

The Government further argued that even though section 39 (2) (6) of the Administrative Court Act was added in 1982, its scope was no broader - from a teleological point of view - than that of the corresponding provisions in force in 1958. In all cases, albeit for different reasons, the Administrative Court could refuse to hold a hearing which, in the particular circumstances of a given case, would be of purely "academic" interest.

40. It thus has to be determined whether the Austrian reservation covers the power of the Administrative Court under section 39 (2) (6) of the Administrative Court Act to refuse a hearing, having regard to the terms of the reservation and to the conditions laid down in Article 64 (art. 64) of the Convention.

41. The Court would note firstly that that section came into force in 1982, whereas Austria ratified the Convention and made the reservation in question in 1958. Under Article 64 para. 1 (art. 64-1) only laws "then in force" in the State's territory can be the subject of a reservation.

The Court cannot discern how section 39 (2) (6) and the provisions in force when the reservation was made can be seen, as the Government submitted, as essentially identical provisions. As the Commission rightly pointed out, the introduction of subsection (2) (6) in effect considerably extended the Administrative Court's power to refuse to hold a public hearing. The grounds for such a refusal that were in force in 1958 related to cases in which formal or procedural matters were in issue as well as those where a ruling favourable to the appellant to quash an administrative decision was to be made. The ground added in 1982 made it possible for the first time for the Administrative Court, after considering the written

pleadings and other documents in the file, to refuse an oral hearing on grounds pertaining to the merits of the case, in instances where the appeal fell to be dismissed.

The Court therefore concludes that the applicant's complaint that the Administrative Court had not held a hearing is not excluded from review by the above reservation, since the provision on which the refusal to hold such a hearing was based was not in force at the time the reservation was made.

42. In view of this conclusion, the Court does not consider it necessary to examine the validity of the reservation in the light of the other conditions laid down in paragraphs 1 and 2 of Article 64 (art. 64-1, art. 64-2) of the Convention, or to determine whether the reservation could be read as encompassing administrative-court proceedings such as those at issue in the present case.

2. Compliance with Article 6 para. 1 (art. 6-1) of the Convention

43. It remains to be examined whether in the present case Article 6 para. 1 (art. 6-1) conferred on the applicant the right to an oral hearing. As stated earlier (see paragraph 29 above), only the proceedings before the Administrative Court are in issue; the other authorities which dealt with the applicant's complaint, notably the Austrian Constitutional Court, cannot be considered tribunals invested with full jurisdiction for the purposes of Article 6 (art. 6).

44. The practice of the Austrian Administrative Court is not to hear the parties unless one of them asks it to do so (see paragraph 16 above). Contrary to what happened in the Zumtobel case, Mr Fischer expressly requested an oral hearing in the Administrative Court. This was refused on the ground that it was not likely to contribute to clarifying the case (see paragraph 21 above). There is accordingly no question of the applicant's having waived that right.

Furthermore, there do not appear to have been any exceptional circumstances that might have justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which Mr Fischer's case was brought; it was able to examine the merits of his complaints; the review addressed not only issues of law but also important factual questions. This being so, and having due regard to the importance of the proceedings in question for the very existence of Mr Fischer's tipping business, the Court considers that his right to a "public hearing" included an entitlement to an "oral hearing" (see the Fredin v. Sweden (no. 2) judgment of 23 February 1994, Series A no. 283-A, p. 10, para. 21).

The refusal by the Administrative Court to hold such a hearing amounted therefore to a violation of Article 6 para. 1 (art. 6-1) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

45. Article 50 (art. 50) of the Convention reads:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

46. According to the applicant, the pecuniary loss resulting from the unlawful revocation of his tipping licence amounted to a total of 7,737,000 French francs. He referred to the supporting evidence produced before the Commission.

In the Government's submission, compensation could not be awarded on the basis of speculating as to what the outcome of the proceedings would have been had an oral hearing taken place.

At the hearing, the Delegate of the Commission questioned whether there was a sufficient causal link between the alleged violation and the resulting loss.

47. The Court agrees; it cannot speculate as to the outcome of the proceedings had an oral hearing taken place before the Administrative Court. The claim must therefore be rejected.

B. Costs and expenses

48. Mr Fischer further claimed 874,272.37 Austrian schillings (ATS) in respect of costs and expenses incurred in the domestic proceedings and in those before the Strasbourg institutions.

The Government argued that only the proceedings in the Administrative Court - where the violation was said to have been committed - and before the Convention institutions could be taken into consideration. They further contested the basis on which legal fees had been calculated. In their contention, a global sum of ATS 140,000 would represent a reasonable compensation for all relevant costs and expenses.

The Delegate of the Commission submitted that if the Court, like the Commission, were to uphold only one of the two complaints before it, the amount of the reimbursement granted should reflect this finding.

49. The Court notes that, as to the costs incurred in the domestic proceedings, only those related to the request for an oral hearing come into consideration.

Having regard to the fact that only one of the two complaints declared admissible by the Commission has led to the finding of a violation and to the criteria laid down in its case-law, the Court, making an assessment on an equitable basis, as required by Article 50 (art. 50) of the Convention, awards the applicant ATS 200,000 in respect of costs and expenses.

FOR THESE REASONS, THE COURT

1. Holds, by eight votes to one, that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention as regards the applicant's complaint that he was not able to bring his case before a "tribunal";

2. Holds, unanimously, that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention as regards the lack of an oral public hearing before the Administrative Court;

3. Holds, unanimously, that Austria is to pay the applicant, within three months, the sum of 200,000 (two hundred thousand) Austrian schillings in respect of costs and expenses;

4. Rejects, unanimously, the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 April 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- concurring opinion of Mr Matscher;

- separate opinion of Mr Martens;

- concurring opinion of Mr Jambrek.

R. R.
H. P.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

1. I voted with the majority of the Chamber to the effect that there had been a breach of Article 6 para. 1 (art. 6-1) because the Administrative Court had dispensed with a public oral hearing. Nevertheless, I should like to draw attention to the following.

I value proceedings being oral and public in so far as this amounts to a procedural safeguard; I attach no value to it where such a procedure becomes a mere ritual (or a ceremony) or where it is sought for purposes that have nothing to do with a procedural safeguard.

As an example of the first aspect of proceedings being oral unnecessarily, I should like to mention the reading out of the judgments of our Court (Rule 55 para. 2 of Rules A) at the crack of dawn to a room that is usually empty except for a single official from the Commission and a representative of the Government, who are bound to attend out of consideration for the Court.

The second aspect to which I referred may arise for various reasons:

- exploiting the fact of proceedings being oral and public to proclaim to the general public political or other ideas which have very little to do with the case being tried, in other words turning the hearing before the court into a forum for an ideological debate. There are a good many examples of this, both in national proceedings and among hearings before our Court;

- relying - legitimately, in formal terms - on the absence of a public oral hearing within the meaning of Article 6 para. 1 (art. 6-1) to secure a finding of a breach in a case which discloses no other failure to comply with the requirements of the Convention; here too there are numerous examples in our case-law;

- requesting a hearing before a national court - where it is in principle not mandatory under the applicable procedure - mainly in order to be able to seek lawyers' fees for the hearing which, in a case in which the sum in dispute is a large one, may be considerable, even if the hearings amount to a pure formality, lasting a few minutes, without even a semblance of any real oral argument; there are likewise numerous examples of this in national courts of appeal and supreme courts.

In neither of these respects is the fact of proceedings being oral and public in the nature of a true procedural safeguard worthy of protection.

2. The Chamber reached the finding of a breach by interpreting the scope of Austria's reservation in respect of Article 6 (art. 6) extremely narrowly. This is in keeping with the Court's tendency, first shown in the Belilos v. Switzerland judgment of 29 April 1988 (Series A no. 132), to restrict the scope of reservations and interpretative declarations, and even to eliminate them as far as possible. From the point of view of international

law, this practice strikes me as highly questionable, given that Article 64 (art. 64) expressly authorises States to make reservations, even if the Convention makes them subject to certain conditions. The Contracting States which made such reservations in respect of a Convention Article or one of its Protocols did so in good faith, trusting to the interpretation of certain provisions of the Convention that were current at the time of ratification, and they could not foresee the steady development that the case-law would undergo in the future. In this way, many reservations and interpretative declarations have become obsolete or, to put it another way, the mutual trust has been betrayed.

To return to the instant case: in the ordinary types of case that come before the courts, Austrian law provides for a reasonable balance between oral/public proceedings and written proceedings; in order to preserve that position, Austria made a reservation in respect of Article 6 (art. 6) that was naturally confined to the ordinary types of court case. It could not foresee that as a result of the Convention institutions' evolutive interpretation of the Convention, many administrative and disciplinary matters which, according to the prevailing judicial opinion at the time, were not caught by Article 6 (art. 6), would subsequently be covered by it.

Having regard to the mutual trust to which I referred above, the Court took the view for some while that Austria's reservation covered administrative proceedings which now are caught by Article 6 (art. 6) (see, for example, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, pp. 40-41, para. 98, and the Ettl and Others v. Austria judgment of 23 April 1987, Series A no. 117, p. 19, para. 42). This course, however, which I would describe as a wise one, is apparently no longer taken. In saying that, I do not overlook that in the instant case the reasoning in the judgment may be considered correct since the scope for the proceedings in question to be oral and public was formally restricted when section 39 (1) of the Act on proceedings before the Administrative Court was reworded in 1982, that is to say after the reservation had been made.

3. The result will be that the Austrian legislature will have to amend section 39 (2) so as to make a public oral hearing compulsory every time a party requests one. All this will make proceedings in the Administrative Court longer and more expensive, without affording any additional procedural safeguard to the parties.

4. Nevertheless, out of a spirit of solidarity with my colleagues but not without hesitation, I voted in favour of finding a breach of Article 6 para. 1 (art. 6-1) in that the proceedings in the Administrative Court were neither oral nor public.

SEPARATE OPINION OF JUDGE MARTENS

1. The applicant's case originates in the revocation (in 1986) by the Governor of Lower Austria of the tipping licence under which the applicant exploited a refuse tip. The applicant, whose means of subsistence were at stake, challenged that revocation under the administrative proceedings open to him. It is common ground that Article 6 (art. 6) of the Convention applies to these proceedings. What is at issue before the Court is whether and, if so, to what extent it was violated.

I. IS THE VERWALTUNGSGERICHTSHOF A TRIBUNAL WITHIN THE MEANING OF ARTICLE 6 (art. 6) OF THE CONVENTION?

A. INTRODUCTION

2. Undoubtedly by far the most important issue in this case - from a general viewpoint as well as for the applicant - is whether the Verwaltungsgerichtshof (Administrative Court) is to be deemed a tribunal within the meaning of Article 6 (art. 6) of the Convention. In answering this question in the affirmative (paragraph 34 of its judgment), the Court has evidently followed its Zumtobel v. Austria judgment of 21 September 1993 (Series A no. 268-A) and its Ortenberg v. Austria judgment of 25 November 1994 (Series A no. 295-B) (see paragraph 32 of the judgment).

I was not a member of the Chambers which delivered those judgments and to my regret I feel unable to subscribe to the doctrine laid down therein (hereinafter "the Zumtobel doctrine").

3. The applicant's case falls within the ever growing but also problematic category of proceedings which under national law are purely administrative, whereas under the Convention they are considered as determining civil rights or criminal charges. Since its judgment of 23 June 1981 in the case of Le Compte, Van Leuven and De Meyere v. Belgium (Series A no. 43) the Court has consistently held that it is not incompatible with the Convention for the first and second stages (should there be a second stage) in such proceedings to be conducted before administrative bodies which do not satisfy the requirements of Article 6 (art. 6), provided that the individual can bring the ultimate decision of those bodies for subsequent control before a court that does afford the safeguards of that provision[1].

[1] For cases concerning civil rights and obligations, see inter alia: the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58; the O. v. the United Kingdom judgment of 8 July 1987, Series A no. 120-A, pp. 27-28, para. 63; the Belilos v.

It is common ground that neither the Governor (Landeshauptmann) of Lower Austria - who took the original decision to revoke the applicant's tipping licence - nor the Federal Minister of Agriculture and Forestry (Bundesminister für Land- und Forstwirtschaft) - who dismissed the applicant's administrative appeal against the original decision - satisfied the requirements of Article 6 (art. 6) and that, consequently, what is decisive is whether the Verwaltungsgerichtshof - to which the applicant appealed from the Minister's decision - does.

The divergence between the Court and myself concerns both the method of ascertaining whether the Verwaltungsgerichtshof fulfils the essential requirements of a "tribunal" within the meaning of Article 6 (art. 6) (see paragraphs 15 to 18 below) and the outcome of that query (see paragraphs 19 to 21).

4. Before going into that divergence of opinion and before explaining why I cannot subscribe to the Zumtobel doctrine, I note that the applicant has alleged no other ground for doubting whether the Verwaltungsgerichtshof fulfils the essential requirements of a "tribunal" within the meaning of Article 6 (art. 6) than the scope of its control.

B. GENERAL CONSIDERATIONS

5. Both judgments referred to in paragraph 2 above were unanimous. However, it is not simply out of deference to the Court that I feel that the Zumtobel doctrine calls for a thorough discussion. It is also because I fear that it not only concerns the Austrian administrative courts but may generally affect the category of proceedings mentioned in paragraph 3 above. It is especially in view of the latter aspect that I feel bound to speak against it.

I propose, firstly, to make some general remarks on the consequences of applicability of Article 6 para. 1 (art. 6-1) in the field of administrative law and, secondly, to analyse the Court's case-law on the notion of a "tribunal" within the meaning of that provision.

Switzerland judgment of 29 April 1988, Series A no. 132, p. 31, para. 70; the Langborger v. Sweden judgment of 22 June 1989, Series A no. 155, p. 15, para. 30; the Obermeier v. Austria judgment of 28 June 1990, Series A no. 179; the Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, pp. 21-22, paras. 53-56; the Beaumartin v. France judgment of 24 November 1994, Series A no. 296-B, pp. 62-63, para. 38; for cases concerning criminal charges, see inter alia: the Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, and the Bendenoun v. France judgment of 24 February 1994, Series A no. 284.

1. Consequences of applicability of Article 6 para. 1 (art. 6-1) in the field of administrative law

6. The Court's gradual widening of the ambit of Article 6 (art. 6) into the field of administrative procedures undoubtedly creates problems as well as tensions, since administrative procedure has traditions and demands which are often at variance with the requirements of the Convention. The Court, when setting and maintaining that course, was without doubt well aware of those problems, but was equally clearly prompted by the conviction that one of the demands of the rule of law is that the type of dispute between the individual and the executive referred to in paragraph 3 above must, in the last resort, be decided by the judiciary. I would recall the Court's fundamental statement in its Klass judgment[2]:

> "The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in last resort, judicial control offering the best guarantee of independence, impartiality and proper procedure."

Consequently, the problems can never be resolved nor the tensions mitigated at the price of impairing the very essence of the protection to which the individual is thus entitled under Article 6 para. 1 (art. 6-1). The Court confirmed this when, right at the outset of the case-law referred to in paragraph 3, it made it clear that the aforementioned traditions and demands should be heeded, but only as far as is compatible with effective protection of the individual's rights under the Convention[3].

7. It follows that also in the context of administrative proceedings coming within the ambit of Article 6 (art. 6) a fair balance has to be struck between conflicting interests - that is to say, between protecting the individual on the one hand and leaving sufficient freedom of action to the executive authorities on the other.

It is in so doing that we meet the problems and tensions referred to in paragraph 6 above. When endeavouring to strike the requisite balance, it should not be overlooked that some of these tensions and problems result from views already long overtaken by developments in legal thinking and practice, such as for instance the doctrine that there should be a strict partition between administration and judiciary[4]. It seems justified to

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[2] Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, pp. 25-26, para. 55.

[3] See the Le Compte, Van Leuven and De Meyere judgment (cited at paragraph 3 above), p. 23, para. 51 under (a).

[4] This doctrine is, however, consecrated by Article 94 of the Austrian Constitution as construed by the Verfassungsgerichtshof; in its judgment of 14 October 1987, EuGRZ 1988, pp. 166 et seq., this court held that a strict separation between judiciary and executive is essential for the Austrian Constitution. It concluded therefrom that the Constitution made it impossible to introduce a system of administrative proceedings at two instances. On this important judgment, see inter alia: W.L. Weh, EuGRZ 1988, pp. 438 et seq.; Merli,

presume that legal thinking and practice in the member States generally go in the direction of acceptance of an "effective control" of the executive by the judiciary (see the Klass judgment, paragraph 6 above), a judicial control which is not always restricted to the legality of administrative acts but may sometimes to a certain extent include matters of expediency. In this context it is not without importance that all member States have now accepted a final control through the supervisory mechanism of the Convention, which is essentially judicial in nature. This control by an international court should help to dispose of remnants of the old doctrine to the effect that the administration cannot be accountable to the judiciary[5].

On the other hand, even a superficial glance at comparative literature[6] makes it clear that there are certain areas where it is imperative that administrative courts should be in a position to leave sufficient freedom of manoeuvre to the executive authorities. I am thinking of areas where highly technical questions or important diplomatic issues are decisive or where the authorities may legitimately maintain secrecy even towards the courts. If ever judicial restraint is obligatory, it is in such areas.

8. This brings me to another aspect of the above-mentioned balancing exercise: one should, probably, take into account the particular subject-matter of the proceedings in question. In another context the Court has already indicated that the particular subject-matter is of importance, notably as regards the degree of precision with which a law conferring discretion upon administrative authorities should indicate the scope of that discretion[7]. Likewise, it would seem acceptable that in administrative proceedings the scope of the control exercised by the administrative judge should - to a certain extent - vary according to the particular subject-matter of the case at hand. In this context I would recall that the Court itself leaves the States a wider margin of appreciation in some fields than in others.

ZaöRV 1988, pp. 251 et seq.; Holoubek, Grund- und Menschenrechte in Österreich, pp. 73 et seq.

[5] In this context the influence of the Court of Justice of the European Communities should also be mentioned; as to the influence of its case-law on national legal thinking and practice, see Schwartze, op. cit. (note 6), pp. 93 et seq.

[6] See inter alia: Ule, Verwaltungsprozeßrecht (Beck, München, 1987), pp. 408 et seq.; The protection of the individual in relation to acts of administrative authorities (Council of Europe, 1975); Frowein, Festschrift für Felix Ermacora (1988), pp. 141 et seq.; Banda, Administratief procesrecht in vergelijkend perspectief (Tjeenk Willink, Zwolle, 1989); Bok, Rechtsbescherming in Frankrijk en Duitsland (Kluwer, Deventer, 1992); Schwartze, European Administrative Law (Sweet and Maxwell, London, 1992), pp. 97 et seq.; Banda, Het onderzoek door de rechter, in: Ten Berge et al., Nieuw Bestuursrecht (Kluwer, Deventer, 1992), pp. 99 et seq.; Klap, Vage normen in het bestuursrecht (Tjeenk Willink, Zwolle, 1994).

[7] See inter alia: the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 27, para. 89; the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-37, para. 25, and the Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, pp. 15-16, para. 31.

A persuasive indication for this view is to be found in the Court's judgments of 8 July 1987 in the cases of O., H., W., B. and R. v. the United Kingdom[8]. In these judgments the Court held that the powers of the English courts were insufficient to satisfy fully the requirement of Article 6 para. 1 (art. 6-1) that the tribunal should have jurisdiction to examine the merits of the matter[9].

The subject-matter of the proceedings was a parent's right of access to his child taken into care. The parents had the possibility of asking for judicial review. However, on an application for judicial review, the courts would not review the merits of the decision but would confine themselves to ensuring, in brief, that the authorities had not acted illegally, unreasonably or unfairly[10]. "In a case of the present kind", said the Court, Article 6 para. 1 (art. 6-1) required that the parents should be able to have "the local authority's decision reviewed by a tribunal having jurisdiction to examine the merits of the matter".

The significance of this judgment can only be appreciated if it is compared with that in the AGOSI case[11]. In that case, which concerned confiscation, the Court found the scope of the powers of the English courts on an application for judicial relief to be sufficient to satisfy the requirements of Article 1 of Protocol No. 1 (P1-1). To reconcile these judgments, one has to assume either that the requirements of Article 1 of Protocol No. 1 (P1-1) are less exacting than those of Article 6 para. 1 (art. 6-1) - which is rather unlikely - or that the difference of subject-matter was decisive for the difference of outcome. If - as it would seem - the latter premise is correct, one may perhaps presume that the Court would require power of full control in all those cases where the proceedings, although administrative in nature under national law, directly concern rights coming within the ambit of Article 8 (art. 8) of the Convention, or in which - more generally - the general interest is clearly much less involved than that of the individual. An example of the latter category may possibly be seen in the Obermeier case (see note 1), where the subject-matter was the right of a disabled person not to be dismissed unless dismissal was socially justified.

The examples given suggest that particular kinds of subject-matter may result in stricter requirements as to the scope of the tribunal's powers than are normally acceptable in the field of administrative law under discussion: in such cases, it would appear, the tribunal should have the power to overrule the administrative decision and to give the final decision in the dispute. I am inclined to think that there is no room for the opposite effect, that is: the particular subject-matter entailing less strict requirements than are normally acceptable. However that may be, I repeat that whatever allowances may be made as regards the special characteristics of the

[8] Series A nos. 120 and 121.
[9] See for example: Series A no. 120, p. 28, para. 64.
[10] ibid., p. 27, para. 63.
[11] AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108.

administrative proceedings at hand, these allowances should never be taken to the point where the very essence of the guarantees for the protection of the individual implied in Article 6 (art. 6) is impaired[12].

9. Finally, the Committee of Ministers has repeatedly stressed the importance of uniform protection of the individual in the field of administrative law in all member States[13]. The Court has expressed a similar view in terms of the principle of equality of treatment. It has recently done so in its Salesi v. Italy and Schuler-Zgraggen v. Switzerland judgments[14]. This means, on the one hand, that in the aforementioned balancing exercise one should be careful not to attach undue weight to local particularities and traditions as regards the organisation of administrative justice and, on the other, that States should be treated equally. In this respect it may be recalled, for instance, that the Benthem v. the Netherlands[15] judgment obliged the Netherlands to reorganise completely their system of administrative justice[16], just as a series of judgments made it necessary for Sweden to do the same. Other States cannot claim that they should not be obliged to bear similar consequences of the Court's gradual widening of the ambit of Article 6 (art. 6) into the field of administrative procedure, however unexpected this evolution of the case-law may have been[17]. They should not be allowed to seek shelter behind their Constitution: if need be,

[12] Since, in my opinion, it is part of the essence of Article 6 (art. 6) that the "tribunal" should be able to determine all aspects of the matter on the basis of its own investigation of the facts (see notably paragraph 13 below), I am not persuaded by the plea made by the Austrian Verfassungsgerichtshof in its decision referred to in note 4. According to this almost emotional plea, in the category of cases under discussion (see paragraph 3 above) the requirements of Article 6 (art. 6) should be deemed to be fulfilled even if the "tribunal" in question were only competent to exercise a limited control, provided such control would enable it to satisfy itself that, in outcome, the administration's decision was right both as regards questions of law and as regards questions of fact.

[13] See Recommendations Nos. R (77) 31 (28 September 1977), R (80) 2 (11 March 1980) and R (89) 8 (13 September 1989).

[14] Judgment of 26 February 1993, Series A no. 257-E, p. 59, para. 19, and judgment of 24 June 1993, Series A no. 263, p. 17, para. 46.

[15] Judgment of 23 October 1985, Series A no. 97.

[16] I cannot refrain from noting that this reorganisation has lead to the introduction of a completely new and uniform system of administrative procedure based on the notion that the primary function of rules of administrative procedure is to protect the individual: see Daalder, De Groot and Van Breugel, De Parlementaire geschiedenis van de Algemene wet bestuursrecht, Tweede Tranche (Samsom H.D. Tjeenk Willink, Alphen aan den Rijn, 1994), pp. 174 et seq. (para. 2.3) and pp. 460 et seq. (Afd. 8.2.6).

[17] The Contracting States are under the obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 para. 1 (art. 6-1): see the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 20, para. 35.

they may be required to amend their Constitution in order to comply with their obligations under the Convention[18].

2. Analysis of the Court's "full jurisdiction" doctrine

10. Coming now to the analysis announced in paragraph 5 above, I would firstly recall that the requirement of "determination" by a "tribunal" is one of the constitutive elements of the guarantee afforded to the individual by Article 6 para. 1 (art. 6-1)[19].

In its case-law referred to in paragraph 3 above the Court has made it clear that the requirement of the individual's being enabled to have the ultimate decision of the administrative authorities controlled by a "tribunal" within the meaning of Article 6 (art. 6) means that the jurisdiction[20] of the relevant court should be such that it may determine[21] all matters in issue, whether they concern questions of law or of fact[22]. Summarising this requirement in its judgment of 23 September 1982 in the case of Sporrong and Lönnroth v. Sweden[23], the Court said that the individual was entitled to have his case heard by

> "a tribunal competent to determine all the aspects of the matter".

11. One of the requirements of a "tribunal" within the meaning of Article 6 (art. 6) being that it is "established by law", there is little doubt to my mind that, when referring to the jurisdiction or competence of the "tribunal" in question, the Court was adverting to the very same notion and, consequently, to competence pursuant to the law under which the "tribunal" was established. Accordingly, that law - of course, as construed by the national courts - should be the basis for determining whether or not the powers of the court in question are sufficient.

12. What are questions of law may, at first sight, appear clear[24], but may become less so if one takes into account the so called "vague norms" to

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[18] If the Austrian Verfassungsgerichtshof in its decision referred to in note 4 above was intending to suggest that under the reservation to be discussed in paragraphs 23 et seq. below this cannot be required of Austria, it is mistaken: the reservation is invalid.

[19] See the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, p. 41, para. 78.

[20] See the Le Compte, Van Leuven and De Meyere judgment (paragraph 3 above), p. 23, para. 51.

[21] See the Le Compte, Van Leuven and De Meyere judgment, loc. cit., and the Albert and Le Compte judgment (note 1 above), p. 16, para. 29. As the latest authorities for the power to give a binding decision being one of the essential elements of the notion of a tribunal within the meaning of Article 6 (art. 6), see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 16, para. 45; and the Beaumartin v. France judgment of 24 November 1994, Series A no. 296-B, pp. 62-63, para. 38.

[22] See note 19.

[23] Series A no. 52, p. 31, para. 87.

[24] Since it is probably immaterial in the present case, I leave aside the intriguing - and, as far as I know, hitherto unexplored - question whether the basic idea of protection of the

which, especially in the field of administrative law, our legislatures frequently resort. Controlling the application of such norms poses, as every lawyer familiar with "cassation" proceedings knows, delicate problems of demarcation, since such application undoubtedly has a factual component. However, in the present context these niceties may be left aside since the Court specified that the "tribunal" should be competent to determine both questions of law and of fact. Which evidently means that, in principle, that "tribunal" should be able to control fully the application of vague norms. "In principle", since that application may be bound up with questions of factual assessment which fall within the "discretion" of the administrative authorities (see paragraph 7 above and paragraph 13 below)[25].

13. For the sake of discussion[26], questions of fact may be divided into at least two categories:

(1) questions about facts: the "tribunal" should be free to take into account all facts which it deems relevant[27], it should be free to determine whether such facts are established or not[28] and, if not, be competent to take evidence;

(2) questions of factual assessment.

In this connection - especially as regards "questions of factual assessment" - we touch a sensitive issue, for we enter the province of the "discretion" of the administrative authorities. Does the requirement that the "tribunal" should be "competent to determine all the aspects of the matter"

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individual implies that the "tribunal" should be invested with the power of applying the maxim ius curia novit, and thus of going ex officio into questions of law not raised by the parties.

[25] It is interesting to note that according to Bok (see note 6), pp. 150 and 193 et seq., both the French and the German administrative courts take the view that they have power to control fully the application of vague norms by the authorities without - except in rather special cases - leaving room for discretion. However, see also Klap (note 6), pp. 125 et seq., and 250.

[26] "For the sake of discussion": obviously the two categories intertwine, since a tribunal lacking the power to take into account other facts than those on which the executive authorities have based themselves can less well control questions of factual assessment even if in principle it is empowered to carry out such control.

[27] Once again I pass over the question whether and to what extent the "tribunal" - in order to compensate the imbalance between the parties and better to protect the individual - should be free or even obliged actively to try to ascertain the relevant facts. I note, for the rest, that here lies another, rather difficult problem, viz. whether the tribunal should review ex tunc or ex nunc: should it be allowed to take into account new facts or not? I only note the problem, adding that for the moment I am inclined to think that the requirements of Article 6 para. 1 (art. 6-1) imply the power to review ex nunc. On the ex tunc/ex nunc problem, see Teunissen in: Ten Berge et al., Nieuw Bestuursrecht (Kluwer, Deventer, 1992), pp. 111 et seq. (who treats the Article 6 (art. 6) aspect on pp. 126 et seq.); Schueler, Vernietigen en opnieuw voorzien (Tjeenk Willink, Zwolle, 1994), pp. 215 et seq.

[28] It should be competent to "rectify factual errors": see the Le Compte, Van Leuven and De Meyere judgment (paragraph 3 above).

imply that it should have competence to control fully all factual assessments made by those authorities?

I am convinced that this fundamental question should be answered in the affirmative.

Of course, as stated already (see paragraph 7 above), it is imperative to ensure that the executive authorities should have proper freedom of manoeuvre, but that does not warrant accepting a restriction on the "tribunal's" competence as to "questions of fact". It suffices to accept that the "tribunal" be empowered to exercise judicial restraint when and where that is called for. As explained in paragraph 8 above, there may be exceptional cases in this sphere where, in view of the subject-matter of the proceedings in question, the "tribunal" should fully control even all factual assessments made by the executive authorities, but as a rule the "tribunal" should exercise judicial restraint with respect to issues of expediency[29]. Judicial restraint, however, presupposes competence. Only a "tribunal" which has full competence can decide, on the merits of each case, whether and to what extent it must exercise restraint.

If the legislature generally curtails the "tribunal's" competence as to questions of fact, the latter's position is like that of a man having to fight with one arm bound behind his back. It will sometimes find that it simply cannot properly exercise its control over whether the impugned administrative decision is lawful without to some extent going into certain questions of fact. To illustrate the point I am trying to make, I would recall that the Court, as a rule, does not control findings of fact made by the national courts, but reserves itself the right to do so where such control is indispensable for a proper exercise of its task[30]. What is at stake here is the above-mentioned balancing operation between protecting the individual - which requires full control - and leaving proper freedom of action to the executive authorities. This balancing operation is far too subtle and too dependent on the specific type of subject-matter of each case to be left to the legislature; the rule of law implies that it should be left to the judiciary, which should have the last word.

This view is in conformity with the spirit of the Court's case-law, which, taken as a whole, warrants the conclusion: (1) that one of the basic notions

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[29] To that extent - but only to that extent - I agree with the Zumtobel doctrine: see paragraph 32 in fine of the Zumtobel judgment (paragraph 2 above).

[30] According to the consistent case-law of the German Constitutional Court, where the right of freedom of expression is at stake, unacceptable curtailment of that right can only be prevented if factual assessments made by the normal courts are fully reviewable by the Constitutional Court (see Bverfge 43,130 = EUGRZ 1977, pp. 109 et seq.). The European Court has taken the same approach. As the latest authority, see the (Grand Chamber) judgment of 23 September 1994 in the case of Jersild v. Denmark (Series A no. 298), pp. 23-24, para. 31. See also my concurring opinion in the case of Schwabe v. Austria (Series A no. 242-B, pp. 40 et seq.) and paragraph 4 of my dissenting opinion in the case of Prager and Oberschlick v. Austria (Series A no. 313).

underlying the Convention is that the individual should be effectively protected against arbitrariness, and (2) that this implies that even assessments which fall within the administration's discretion should, to a certain extent, be controlled by the judiciary.
For the first proposition it suffices to refer to such judgments as Silver and Others[31], Malone[32], Leander[33], Olsson (no. 1)[34], Chappell[35], Eriksson[36], Kruslin[37] and Herczegfalvy[38].

As to the second, it should be noted firstly that already in the judgment inaugurating its case-law under discussion the Court required that the "tribunal" should be competent to examine such a typically "discretionary" question as whether "the sanction is proportionate to the fault"[39]. Furthermore, in its Obermeier judgment the Court found that judicial control of discretionary assessment by the administrative authorities which was restricted to testing whether these authorities had acted ultra vires - to be precise: had used their discretion in a manner incompatible with the object and purpose of the relevant law - did not constitute effective review. The Court did not indicate what measure of control it would have held sufficient. It may be that the case fell, in its opinion, in the above-mentioned category where, in view of the subject-matter of the proceedings, only a full review as to the merits is sufficient[40]. This hypothesis is, however, not necessary to understand the Court's finding: in view of such judgments as Pudas[41], Allan Jacobsson[42], Mats Jacobsson[43] and Skärby[44], one can very well surmise that the control in the Obermeier case would have been found

[31] Silver and Others v. the United Kingdom, judgment of 25 March 1983, Series A no. 61, pp. 33-34, paras. 88-89.
[32] Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 32, para. 67.
[33] Leander v. Sweden, judgment of 26 March 1987, Series A no. 116, p. 23, para. 51.
[34] Olsson v. Sweden (no. 1), judgment of 24 March 1988, Series A no. 130, p. 30, para. 61 under (c).
[35] Chappell v. the United Kingdom, judgment of 30 March 1989, Series A no. 152-A, p. 24, para. 57.
[36] Eriksson v. Sweden, judgment of 22 June 1989, Series A no. 156, pp. 24-25, paras. 59-62.
[37] Kruslin v. France, judgment of 24 April 1990, Series A no. 176-A, pp. 22-25, paras. 30-36.
[38] Herczegfalvy v. Austria, judgment of 24 September 1992, Series A no. 244, p. 27, para. 89.
[39] See the Le Compte, Van Leuven and De Meyere judgment (paragraph 3 above), p. 23, para. 51 in fine.
[40] See paragraph 8 above.
[41] Pudas v. Sweden, judgment of 27 October 1987, Series A no. 125-A, p. 15, para. 34.
[42] Allan Jacobsson v. Sweden, judgment of 25 October 1989, Series A no. 163, p. 20, para. 69.
[43] Mats Jacobsson v. Sweden, judgment of 28 June 1990, Series A no. 180-A, p. 13, para. 32.
[44] Skärby v. Sweden, judgment of 28 June 1990, Series A no. 180-B, p. 37, para. 28.

satisfactory if the "tribunal" could have scrutinised not only whether the authorities had acted ultra vires in making their assessment, but also whether they had duly observed "generally recognised legal and administrative principles"[45].

14. A final aspect which deserves attention is the kind of decision which the "tribunal" should take. It is clear from its case-law that in the Court's opinion the power to bring the proceedings to an end by means of a binding decision on all issues raised before it constitutes an essential requirement of a "tribunal" within the meaning of Article 6 (art. 6)[46].

As to the contents of such a decision in the domain under discussion, two further remarks seem appropriate.

Firstly: it follows from the foregoing considerations that the appeal to the "tribunal" should be an appeal de novo: the individual will have all the benefits of a fair trial[47] only if the tribunal is in principle competent to review completely the original decision, be it that it should be empowered to exercise restraint with regard to such decisions and assessments by the executive authorities which, in its opinion, should properly be left to their discretion. However, even in this respect it should have competence to control at least whether the authorities have duly observed "generally recognised legal and administrative principles".

Secondly: it is an open question whether the "tribunal" should have the power to settle the case itself or whether it suffices if it has the power to quash the administrative decision, leaving the final settlement to the administrative authorities. It goes without saying that the individual's protection is better served when the "tribunal" has the former power, but it must be acknowledged that conferring that power upon the judiciary goes against a long and deeply rooted tradition in many member States. However that may be, it follows - I would think - from the Court's AGOSI judgment[48] that the latter alternative is in line with the principles underlying the above case-law only when the administrative authorities, in finally settling the case, have to exercise their discretion within the boundaries

[45] I am thinking of such principles as, for instance, that of treating like cases alike, that of legal certainty and that of proportionality.

[46] As the latest authority, see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 16, para. 45. To avoid misunderstanding, I would add that in my opinion this requirement does not imply that the final decision of the "tribunal" should constitute res judicata in the sense that new proceedings on the same issue would be impossible or only possible under exceptional circumstances; it only implies that the final decision should be made by the "tribunal" itself and not by any other authority.

[47] See Robertson-Merills, Human Rights in Europe (Manchester University Press, Manchester and New York, 1993), p. 91.

[48] AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, p. 20, para. 58, in conjunction with p. 14, para. 38, last dash.

drawn by the tribunal's decision[49] and if the "tribunal" has power to quash if they overstep those boundaries.

C. METHODOLOGICAL OBJECTIONS

15. Having indicated in the foregoing paragraphs how the Court, on the basis of its case-law preceding the Zumtobel doctrine, should have decided these cases, I now come to the divergence between the Court and myself as to the method of ascertaining whether the Verwaltungsgerichtshof fulfils the essential requirements of a "tribunal" within the meaning of Article 6 (art. 6).

It is a basic characteristic of the Zumtobel doctrine that the Court simply refuses to decide this question once and for all, but proclaims that it will do so only on a case-by-case basis ("in the circumstances of the case")[50]. My first methodological objection is directed against both this refusal and the argument on which it is based.

16. This refusal to decide the question once and for all is (merely) based on the Court's doctrine that the Court "should confine itself as far as possible to examining the question raised by the case before it".

This doctrine is in my opinion no more than a regrettable petitio principii. No provision of the Convention compels the Court to decide in this way on a strict case-by-case basis. This self-imposed restriction may have been a wise policy when the Court began its career, but it is no longer appropriate[51]. A case-law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of each judgment and the precise contents of the Court's doctrine. Hence the need for comments. Hence speculation by annotators, which creates further uncertainty. The Court rightly is wont to stress that the protection of the rights and freedoms under the Convention falls primarily to national authorities. It should, however, not overlook that the reverse side of this coin is that national authorities are obliged to seek guidance in its case-law. It is thus duty bound to see to it that this case-law meets the very same standards of clarity, precision and foreseeability by which the Court usually measures laws of member States in the field of fundamental rights and freedoms.

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[49] In this respect the Verwaltungsgerichtshof meets the requirements of Article 6 para. 1 (art. 6-1), since under Article 63 of the Administrative Court Act, when the Verwaltungsgerichtshof has quashed a decision of the administrative authorities, these have to decide again according to the legal opinion of the Verwaltungsgerichtshof and if they fail to do so the Verwaltungsgerichtshof may itself decide (see the decision of the Verfassungsgerichtshof referred to in note 4).

[50] See the Zumtobel judgment (paragraph 2 above), p. 14, para. 32, and paragraph 33 of the present judgment.

[51] See also my concurring opinion in the case of Fey v. Austria, Series A no. 255-A, p. 16, para. 1.

17. Furthermore, I fail to see how the legal uncertainty thereby created by the Court's refusal to decide once and for all whether the Verwaltungsgerichtshof meets the requirements of a "tribunal" may be reconciled with its older case-law which, in my opinion, clearly conveys the idea that the competence of the "tribunal" is to be assessed on the basis of the provisions of the law, as construed by the national courts, under which it is established (see paragraph 11 above).

18. My second objection to the Zumtobel doctrine concerns its tests for assessing whether or not "in the circumstances of the case" the scope of the Verwaltungsgerichtshof's competence satisfies the requirements of Article 6 para. 1 (art. 6-1).

I say "tests", for there is a double test: the first test is whether the decisive issue in the particular proceedings concerns a matter which is "exclusively within the discretion of the administrative authorities"[52]; the second - which is to be applied only if the answer under the first is in the negative - is whether in the particular proceedings the Verwaltungsgerichtshof was able to consider all the applicant's submissions "on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts".

An initial point to be made is that the second test is to a certain extent irrational and perhaps even unfair, since it fails to take into account that when - as is the case here - there are certain legal restrictions as to the scope of a court's powers of review, prudent lawyers will, of course, avoid making submissions with respect to which that court will have to decline jurisdiction.

A second and, in my opinion, even more serious drawback is that the two tests oblige the Court to carry out a very minute and delicate examination both of the file and the relevant provisions of Austrian law[53]. It is by no means an easy task to ascertain whether the decisive issue in the proceedings concerns a matter which is "exclusively within the discretion of the administrative authorities". The task of ascertaining whether, in the case before the Court, the Verwaltungsgerichtshof was able to consider all the applicant's submissions "on their merits", point by point, "without ever having to decline jurisdiction in replying to them or in ascertaining various facts" is even more delicate. In any event it requires a scrutiny of the

[52] See the Zumtobel judgment (paragraph 2 above), p. 13, para. 31, and paragraph 34 of the present judgment. It would at least seem questionable whether this first test is adequately formulated, since under Article 130 para. 1 of the Federal Constitution (see paragraph 20 below) the Verwaltungsgerichtshof lacks competence in so far as the authorities have discretion.

[53] Or, since it is to be feared that the Zumtobel doctrine will be applied to administrative courts of other member States, of the law of such States.

complete file[54] that can reasonably only be made by an experienced lawyer, completely conversant with Austrian law and Austrian legal practice and style of litigation. In my opinion this aspect on its own is sufficient to condemn the Zumtobel doctrine.

D. MATERIAL OBJECTION

19. My material objection is that application of the Zumtobel doctrine has led the Court to the conclusion that the scope of the Verwaltungsgerichtshof's competence in the present case as well as in the cases mentioned in paragraph 2 above satisfied the requirements of Article 6 para. 1 (art. 6-1) of the Convention, whereas in my opinion that scope - when assessed properly, that is according to the principles set out in paragraphs 5 to 14 above on the basis of the relevant legal provisions - does not fulfil these requirements.

20. It is perhaps significant that neither the present judgment nor those mentioned in paragraph 2 above contain (a translation of) all legal provisions relevant for ascertaining the scope of jurisdiction of the Verwaltungsgerichtshof.

What is lacking is a reference to Articles 129a and 130 of the Federal Constitution. Article 129a makes it clear that the essential task of the Verwaltungsgerichtshof is to ensure the lawfulness (Gesetzmäßigkeit) of the executive. Accordingly, Article 130 para. 1 gives the Verwaltungsgerichtshof jurisdiction to hear, inter alia, complaints alleging unlawfulness (Rechtswidrigkeit) of an administrative decision[55]. Paragraph 2 of this provision specifies, however, that there is no question of unlawfulness in so far as the law refrains from imposing binding regulations with regard to the conduct of the authorities themselves, and the authorities have used their discretion in accordance with the object and purpose of the law[56]. Together, these provisions make it clear that even with respect to what are usually called questions of law the Verwaltungsgerichtshof has no full jurisdiction, since it can but very restrictively control discretion, which severely limits its powers as far as so-called vague norms are concerned (see paragraph 12 above).

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[54] That is because the test at least implies that the Court should compare "point by point" the applicant's submissions to the Verwaltungsgerichtshof and the latter's judgment in order to ascertain whether all submissions are really dealt with.

[55] See paragraph 15 of the Court's judgment.

[56] "Rechtswidrigkeit liegt nicht vor, soweit die Gesetzgebung von einer bindenden Regelung des Verhaltens der Verwaltungsbehörde absieht und die Bestimmung dieses Verhaltens der Behörde selbst überläßt, die Behörde aber von diesem freien Ermessen im Sinne des Gesetzes Gebrauch gemacht hat."

21. Sections 41 and 42 of the Administrative Court Act (Verwaltungsgerichtshofsgesetz)[57] set forth the restrictions on the Verwaltungsgerichtshof's competence with regard to questions of fact. I do not intend to analyse these intricate provisions, nor to comment upon them further than to say that at the least they do not easily disclose an exact notion of the scope of the Verwaltungsgerichtshof's control in this respect. It is no wonder, therefore, that their exact meaning and - what is more important in the present context - the question whether that scope is sufficient with regard to the requirements of Article 6 para. 1 (art. 6-1) are the subject of controversy in Austrian legal literature. In the proceedings before the Court both parties have quoted those learned authors who supported their view[58].

The Government relied on a very comprehensive and lucid essay by K. Ringhofer[59], which has, however, much helped me to come to the above conclusion. That is because Ringhofer has made it entirely clear that, whatever the exact scope of the Verwaltungsgerichtshof's jurisdiction, the appeal to that court cannot be considered an appeal de novo (see paragraph 14 above): the relevant legal provisions are the result of a compromise between the requirements of the protection of the individual and those of the protection of the Verwaltungsgerichtshof[60]. The legislature realised that since the Verwaltungsgerichtshof was to be the one and only administrative court in Austria, giving it competence to control de novo all administrative decisions was impossible, however desirable such a competence might be in terms of the protection of individual rights. The compromise consisted in setting up the appeal as one on questions of law only - the Verwaltungsgerichtshof being in principle bound by the findings of fact made by the administrative authorities - but allowing for certain exceptions to these principles. How far these exceptions exactly go is controversial, but

[57] See paragraphs 17 and 18 of this judgment.
[58] Neither party quoted L.K. Adamovich and B.-C. Funk, Allgemeines Verwaltungsrecht, (3., neubearb. Aufl. Springer, Wien, New York, 1987) pp. 93-94, 449 and 453. I mention this book because the first-named author is the President of the Austrian Constitutional Court. The latter fact makes it significant that the authors write that it is open to doubt (lassen es zweifelhaft erscheinen) whether the competence of the Verwaltungsgerichtshof meets the requirements of Article 6 para. 1 (art. 6-1). They mention notably the principle that the Verwaltungsgerichtshof may only quash a decision, that it has only a limited competence to review the facts (begrenzte Sachverhaltsprüfung) and also a limited possibility to review discretionary acts of the executive. They add that fundamental changes in the system may prove necessary.
[59] K. Ringhofer, Der Sachverhalt im verwaltungsgerichtlichen Bescheidprüfungsverfahren, in: Festschrift zum 100-jährigen Bestehen des österreichischen Verwaltungsgerichtshofes, pp. 351-75.
[60] Ringhofer, loc. cit., pp. 353, 358 and especially 361-62.

even Ringhofer concedes that the competence of the Verwaltungsgerichtshof as to questions of fact is restricted[61].
In my opinion that is decisive. One of the essential constitutive elements of the protection which Article 6 para. 1 (art. 6-1) affords the individual involved in a dispute concerning civil rights and obligations - or, for that matter, prosecuted under a criminal charge[62] - is that "all aspects" of his dispute with the authorities should be determined by a "tribunal". Article 130 para. 2 of the Constitution and section 41 (1) of the Administrative Court Act - which one should not consider separately, since (as follows from the above) they are clearly interrelated - bar such determination by the Verwaltungsgerichtshof. Such is the core of the above compromise. However, essentials do not allow of compromise.

E. CONCLUSION

22. To sum up, neither the reasoning nor the outcome of the Zumtobel doctrine is, in my opinion, acceptable. As compared with the Court's previous achievements in the area under discussion, the Zumtobel doctrine represents - clearly and deplorably - a step back. The Court has tried to conceal this by referring, at the outset, to its "full jurisdiction" doctrine[63]. I hope that the foregoing considerations have made it clear why that reference, in my opinion, is mere lip service.

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[61] Ringhofer, loc. cit., p. 363. In its decision referred to in note 4 the Austrian Verfassungsgerichtshof essentially confirmed Ringhofer's analysis. It held: "However, the Constitution does not permit the abandonment of the very system of limited control (das System der nachprüfenden Kontrolle) or the conferment on the Verwaltungsgerichtshof of the competence to give (at the request of one of the parties) in all administrative matters a binding decision on the dispute on the basis of a completely new investigation of the facts ... The Verwaltungsgerichtshof could not fulfil that task, if only in view of its magnitude."

[62] In a judgment of the same date as its decision referred to in note 4 the Austrian Verfassungsgerichtshof has held that with regard to criminal matters (im Bereich des Strafrechts) "the merely limited control (die bloß nachprüfende Kontrolle)" of the Verwaltungsgerichtshof did not meet the requirements of Article 6 para. 1 (art. 6-1). It is interesting to note (see Merli (note 4), p. 257) that the Verfassungsgerichtshof did so although the Government had relied in this case too on the analysis of Ringhofer (see note 59): apparently, this analysis of its Vice-President impressed the Verfassungsgerichtshof less than it did the European Court of Human Rights!
To my mind this judgment of the Verfassungsgerichtshof with regard to criminal matters is decisive since there is no ground to distinguish between the requirements of a "tribunal" as far as the determination of a criminal charge and that of civil rights and obligations are concerned. The latter point has been conceded by the Verfassungsgerichtshof: in its later case-law it has applied its doctrine of the insufficiency of the Verwaltungsgerichtshof's jurisdiction to administrative procedures which, in the European Court's doctrine, concern "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1), be it only if the rights at stake can be said to belong to a special, self-created category of "essentially civil rights" (see Holoubek, note 4).

[63] See paragraph 28 of the present judgment.

For these reasons I have, firstly, but in vain, urged that the present case be referred to a Grand Chamber and, secondly, voted for the finding of a violation of Article 6 para. 1 (art. 6-1) on the basis that the applicant's case was not heard by a tribunal within the meaning of that provision.

II. THE AUSTRIAN RESERVATION

23. There is a second issue on which I wish to express my opinion, although I have voted with the majority, namely the Austrian reservation on Article 6 (art. 6)[64].

24. There were - in my opinion - three different possible ways of dismissing the Government's plea based on this reservation:

(a) to hold that the reservation does not satisfy the requirements of Article 64 para. 2 (art. 64-2) as construed in the Court's Belilos v. Switzerland judgment[65] and, therefore, is invalid;

(b) to hold that it does not apply to proceedings before the Verwaltungsgerichtshof;

(c) to hold that it does not apply to the present refusal of oral argument by the Verwaltungsgerichtshof.

25. Like the Commission the Court opted for possibility (c)[66]. I would, however, have preferred option (a).

To my mind option (c) has a rather artificial ring. The choice of just that possibility may therefore suggest that the Court preferred to avoid the other two options and may, on a subsequent occasion, be lured into finding the reservation valid and applicable to proceedings before the Verwaltungsgerichtshof. After all, as the Government have stressed, the Court has already twice implicitly recognised the reservation as valid and construed it broadly as encompassing administrative proceedings also[67]. Since in my opinion the a fortiori construction of the Ringeisen judgment - which was followed in the Ettl and Others judgment - is no longer tenable following the Court's statement (in paragraph 59 of its Belilos judgment) that reservations are to be construed stricto sensu, I do not like creating the impression that the Court might be induced to maintain that old construction. The less so because I think that it follows from the Belilos judgment that the reservation is invalid[68]. In this respect I fully share the opinion of Mrs Liddy.

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[64] For the text of the reservation, see paragraph 36 of the present judgment.
[65] See note 1.
[66] See paragraph 41 of its judgment.
[67] See the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 40, para. 98, and the Ettl and Others v. Austria judgment of 23 April 1987, Series A no. 117, p. 19, para. 42.
[68] This is also the prevailing opinion in Austria: see C. Grabenwarter, Juristische Blätter, Jg. 116, p. 107, para. 5.

CONCURRING OPINION OF JUDGE JAMBREK

I voted with the majority on all four points of the Court's judgment. I am, however, of the opinion, that the principle, laid down in paragraph 33 of the judgment (the European Court should confine itself as far as possible to examining the question raised by the case before it) should neither be phrased nor be applied in too restrictive a way. Accordingly, the European Court should not hesitate also to couch its findings in more general terms. In this respect, I would recall the Court's recent description of the Convention "as a constitutional instrument of European public order (ordre public)" (Loizidou v. Turkey judgment of 23 March 1995, Series A no. 310, p. 24, para. 75). It seems to me that reasoning not solely restricted to the scope and the circumstances of the case would contribute better to the quality of the Court's case-law in the service of the Convention as a living constitutional instrument on European public order. In this respect, my own views come close to the methodological objection raised by Judge Martens in paragraph 16 of his separate opinion.