CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF YILDIZ v. AUSTRIA

(Application no. 37295/97)

JUDGMENT

STRASBOURG

31 October 2002

FINAL

31/01/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yildiz v. Austria,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mrs E. STEINER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 22 May 2001 and 10 October 2002,

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

PROCEDURE

1. The case originated in an application (no. 37295/97) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Turkish nationals, Mr Mehmet Yildiz, Mrs Güler Yildiz and Ms Yesim Yildiz ("the applicants"), on 18 July 1997.

2. The applicants were represented by Mr W.L. Weh, a lawyer practising in Bregenz. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs. The Turkish Government, having been informed of their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 2 of the Rules of Court), submitted observations.

3. The applicants alleged, in particular, that the residence ban against the first applicant violates their right to respect for their family life.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 22 May 2001 the Court declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

8. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

9. The applicants were born in 1975, 1976 and 1995 respectively. When they introduced the application, they were all living in Austria.

10. The first applicant went to Austria in 1989 to live with his parents and siblings. As from 1994 he cohabited with the second applicant, who was born in Austria and has lived there all her life. They married under muslim law in April 1994 and under Austrian civil law in March 1997. Their daughter, the third applicant, was born on 14 August 1995.

11. On 5 January 1993 the first applicant was sentenced to three days' imprisonment on probation for shoplifting by a Swiss Court.

12. On 19 May 1993 the Dornbirn District Court (*Bezirksgericht*) convicted him of theft without pronouncing a sentence. The court established that in 1992 the first applicant had stolen moped-accessories, cutlery and other commodities, two gold rings and a gold bracelet, worth altogether less than 25,000 Austrian schillings (ATS), equivalent to 1,817 euros (EUR). A probation period of three years was fixed.

13. In 1992 and 1993 the first applicant was convicted of three minor breaches of traffic rules and sentenced to pay fines of ATS 300, 500 and 1,000 respectively. Between February and April 1994 he was convicted three times of driving a car without a driving licence and sentenced to pay fines of ATS 3,000, 4,000 and 5,000, respectively (equivalent to EUR 218, 290 and 363).

14. On 28 February 1994, still without a driving licence, he overran a red traffic light and exceeded the speed limit of 60 km/h, driving at 170 km/h. On 6 April 1994 the Dornbirn District Authority (*Bezirkshauptmannschaft*) convicted him of these offences and sentenced him to a fine of ATS 14,500.

15. On 21 September 1994 the Dornbirn District Authority imposed a five year residence ban on the first applicant.

16. On 24 January 1995 the Vorarlberg Public Security Authority (*Sicherheitsdirektion*) dismissed the first applicant's appeal.

17. The authority referred to section 18 §§ 1 and 2 of the 1992 Aliens Act, which paragraphs provide that a residence ban has to be issued against an alien, *inter alia*, if he has been convicted more than once for similar offences by a domestic or foreign court, or if a fine has been imposed on

him more than once for a grave administrative offence by an administrative authority. The Authority found that both conditions had been met in this case.

18. Further, the Vorarlberg Public Security Authority, referring to the first applicant's stay in Austria since 1989, the fact that his close family was living in Austria, his co-habitation with a Turkish national who was born in Austria, and his employment, found that the residence ban constituted an interference with the applicant's right to respect for his private and family life. However, it was necessary for the aims set out in Article 8 § 2 of the Convention, namely for the prevention of crime and the protection of the rights of others. Given the first applicant's continuous disregard of Austrian law, the authority assumed that it was probable that he would commit similar offences in the future. Thus, despite the first applicant's high degree of integration in Austria, the public interest in issuing a residence ban outweighed the first applicant's interest in staying. This decision was served on the first applicant on 8 February 1995.

19. On 11 May 1995 the applicant was taken into detention with a view to his expulsion.

20. On 13 June 1995 the Constitutional Court refused to deal with the first applicant's complaint as it lacked sufficient prospects of success.

21. Subsequently, the first applicant lodged a complaint with the Administrative Court. He requested that the decisions relating to the residence ban against him be quashed for errors of law. He submitted that the contested decisions violated his right to respect for his private and family life. In particular, he complained that the competent authorities had failed duly to weigh his interests in staying in Austria against the public interest of issuing a residence ban against him. Although he had been convicted of theft, no punishment had been imposed on him. The other convictions only concerned administrative offences. Neither his fiancée, the second applicant, who was born in Austria and worked there, nor their daughter, the third applicant, could be expected to follow him to Turkey.

22. Furthermore, the first applicant submitted that Austria had become a member of the European Union on 1 January 1995 and was therefore bound by the Association Agreement between the European Union and Turkey. According to this Agreement, and the decisions on its implementation, Turkish workers who had been legally employed in a member State for a certain period had a right of free access to the employment market and also to a residence permit. In this context the first applicant requested the Administrative Court to refer the case to the Court of Justice of the European Communities for a preliminary ruling under Article 177 § 3 of the EEC Treaty. Moreover, measures of public security against such workers were only possible if the public interest was massively and actually endangered. Therefore, it would contradict EU-law to issue a residence ban

against the child of a migrant worker's family who has never committed anything else than petty crimes.

23. On 10 August 1995 the Administrative Court granted the first applicant's complaint suspensive effect. Thereupon, on 11 August 1995, the applicant was released from detention with a view to his expulsion.

24. On 4 December 1996 the Administrative Court dismissed the first applicant's complaint. It found that the contested residence ban served aims set out in Article 8 § 2 of the Convention, namely the prevention of crime and the protection of the rights of others. Furthermore, the Public Security Authority had duly weighed the interests involved. Given the fact that the first applicant had committed several criminal and administrative offences during a protracted period, the public interest weighed more heavily than the private interest, even in cases where an alien was integrated as the first applicant.

25. As to the Association Agreement between the European Union and Turkey, and in particular decree no. 1/80 of the Association Council, the Administrative Court noted that the rights contained therein only applied after a certain number of years of lawful employment. The first applicant had failed to submit the relevant facts to the administrative authorities, in particular whether he had been working in Austria for the requisite period. Thus, the Vorarlberg Public Security Authority could not be reproached for not having taken into account that Agreement and the above decree. The decision was served on the first applicant on 20 January 1997.

26. On 16 June 1997 an order to leave Austrian territory was served on the first applicant, with which he complied on 1 July 1997.

27. The first applicant is currently living in Turkey. The validity of his residence ban expired in September 1999. However, according to his submissions, which were not contested by the Government, the possibilities of legally returning to Austria are very limited and involve long waiting periods.

28. It appears that the second and third applicants visited the first applicant on a number of occasions in Turkey and spent a longer period of time there at the end of the year 2000 and in the beginning of 2001. In March 2001 the first and second applicants divorced. According to the divorce decree issued by a Turkish court, the second applicant has sole custody over the third applicant while the first applicant has a right of access. In September 2001 the second applicant returned to Austria. She has a settlement permit and a work permit. She has left the third applicant temporarily in Turkey where the latter is being cared for by relatives but intends to bring her back to Austria.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicants complained that the residence ban issued against the first applicant violated their right to respect for their family life as guaranteed by Article 8 of the Convention which, so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

The applicants asserted, contrary to their prior submissions, that the relevant point in time for an assessment of their family life was the date when the residence ban against the first applicant was enforced, i.e. 1 July 1997. At that time, the first and second applicants had lived together for more than three years and the third applicant was one year and ten months old. They claimed that subsequent developments such as the first and second applicants' divorce were a result of the separation brought about by the execution of the residence ban, in particular, as the second applicant was unable to adapt to life in Turkey.

30. Furthermore, the applicants contended that the interference with their family life was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention, since the relevant domestic law was overruled by directly applicable EU law. They asserted that the Administrative Court decided arbitrarily in that it failed to apply the Association Agreement between the European Union and Turkey and in particular decree no. 1/80 of the Association Council. The applicants also claimed that the residence ban against the first applicant was disproportionate, in particular as he had all his family ties in Austria and had only been sentenced to modest penalties for offences of a petty nature.

31. For their part, the respondent Government contended that the relevant time for assessing whether the applicants had any private and family life in Austria is 27 September 1994, i.e. the date of the issue of the residence ban or, at the latest, 8 February 1995 when the decision of the Public Security Authority was served on the first applicant. At the first-mentioned date he had lived for about five years in Austria with his parents and siblings and was cohabiting with the second applicant since a couple of months. Thus, he had established family ties in Austria which were, however, not very intense. Subsequent developments such as the birth of the

third applicant were not to be taken into account. Moreover, the Government drew attention to the fact that the first and second applicants had meanwhile divorced, that the first applicant was living in Turkey and that the third applicant was currently living with relatives in Turkey.

32. The Government conceded that there was an interference with the applicants' right to respect for their family life. As to the applicants' allegation that the interference was contrary to the Association Agreement between the European Union and Turkey, the Government pointed out that the Administrative Court had dealt in detail with this submission but dismissed it on the ground that the applicant had failed to show that he fulfilled the conditions set out therein. Further, the Government asserted that the residence ban at issue served the prevention of crime and was proportionate, having regard to the first applicant's convictions for shoplifting, theft and various administrative offences, and the consideration that his family life as established at the relevant time could not weigh very heavily in the balance. In particular, he was not a second generation immigrant and was well acquainted with the language and society of his country of origin.

33. The Turkish Government submitted that there was an interference with all three applicants' private and family life. Even if one were to disregard the first and second applicants' marriage under muslim law, there was no doubt that they formed a natural family. Moreover, the first applicant came to Austria at a young age to live with his close family and the second and third applicants were both born there. The Turkish Government shared the applicants' view that the said interference was not in accordance with the law. Further, they contested the necessity of the residence ban against the first applicant. In particular, they asserted that he had committed the offences of shoplifting and theft when he was still a minor, while those committed later were only traffic offences. Moreover, he did not commit any offences after 1994. In sum, the offences at issue were by far not serious enough to justify disrupting a family with a small child.

34. The Court reiterates that the question whether the applicants had established a private and family life within the meaning of Article 8 must be determined in the light of the position when the residence ban became final (see for instance the Bouchelkia v. France judgment of 29 January 1997, *Reports of Judgments and Decisions* 1997-I, p. 63, § 41; El Boujaïdi v. France judgment of 26 September 1997, *Reports* 1997-VI, p. 1990, § 33 and also *Ezzouhdi v. France*, no. 47160/99, § 25, 13 February 2001).

35. In the present case the relevant date is, thus, 4 December 1996, when the Administrative Court gave its judgment confirming the residence ban. The applicants can, therefore, rely also on the third applicant's birth on 14 August 1995 and not only on the first and second applicants' co-habitation which had commenced in early 1994 before the residence ban proceedings were initiated.

36. Thus, the residence ban, which had the effect of separating the first applicant from his life-companion and their child, constituted an interference with their right to respect for their private and family life.

37. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether it was "in accordance with the law" motivated by one or more of the legitimate aims set out in that paragraph and "necessary in a democratic society".

38. The applicants, with whom the Turkish Government agreed, claimed that the interference at issue was not "in accordance with the law". The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see the Kruslin v. France judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29; *Amann v. Switzerland* [GC], no. 27798/95, § 52, ECHR 2000-II).

39. The Court observes that the residence ban against the first applicant had a basis in domestic law, namely section 18 §§ 1 and 2 of the 1992 Aliens Act. However, the applicants' argument is that these provisions were overruled by decree no. 1/80 of the Association Council established under the Association Agreement between the European Union and Turkey. The Court notes that the Administrative Court dealt with the issue in detail but found that the first applicant had failed to show that he fulfilled the conditions for the application of these provisions. Thus, the Court is satisfied that the interference complained of was "in accordance with the law."

40. Furthermore, the Court finds that the contested residence ban served a legitimate aim, namely the "prevention of disorder and crime".

41. As regards the necessity of the interference, the Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see among many others, the Dalia v. France judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; the Mehemi v. France judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX).

42. Accordingly, the Court's task consists in ascertaining whether the issue of a residence ban against the first applicant in the circumstances struck a fair balance between the relevant interests, namely the applicants' right to respect for their family life, on the one hand, and the prevention of

disorder or crime, on the other. The Court is thereby called upon to assess a number of criteria (see *Boultif v. Switzerland*, cited above, § 48).

43. The Court will first examine the applicants' family situation and the length of their stay in Austria. It observes that the first applicant is not a second generation immigrant, i.e. a person who was born or has lived the main part of his life in the country from which he is going to be removed. He only came to Austria in 1989 at the age of fourteen and must therefore have links with his country of origin and in particular be able to speak Turkish. On the other hand, he was still an adolescent when he came to Austria, where his close family was and is still living. In December 1996, when the Administrative Court confirmed the residence ban against him, he had been living in Austria for seven years, he had been working there and had been co-habiting for a little less than three years with the second applicant, who is also a Turkish national but was born in Austria and has lived there all her life. Their daughter, the third applicant, was one year and four months old at the material time. In fact, the Austrian authorities issuing the residence ban acknowledged that the first applicant had reached a high degree of integration in Austria. Nevertheless, the Court considers that, as regards the possible effects of the residence ban on his family life, the authorities failed to establish whether the second applicant could be expected to follow him to Turkey, in particular whether she spoke Turkish and maintained any links, other than her nationality, with that country.

44. It is true that, meanwhile, the applicants' family situation has changed. The first and second applicant divorced in March 2001 and, while the second applicant is residing in Austria, the first applicant lives in Turkey. The third applicant is currently staying with relatives in Turkey although the second applicant, who has sole custody over the child, asserts that she intends to bring her back to Austria. However, the Court has to make its assessment in the light of the position when the residence ban became final (see paragraph 34 above). Its task is to state whether or not the domestic authorities complied with their obligation to respect the applicants' family life at that particular moment and it cannot have regard to circumstances which only came into being after the authorities took their decision. Nor can it be the Court's role to speculate as to whether there is – as claimed by the applicants – a causal link between the contested measure and the subsequent developments, in particular the first and second applicants' divorce.

45. Next, the Court will turn to the offences committed by the first applicant, as their gravity is an essential element for assessing the proportionality of the interference with the applicants' family life. The Court notes that in 1993 the first applicant, who was then still a minor, was convicted twice by the criminal courts, once for shop-lifting with a sentence of three days' imprisonment suspended on probation, and once for theft without a sentence being pronounced. Between 1992 and April 1994 he was

convicted seven times of traffic offences, in particular driving without a licence and once ignoring a red light and high speeding. The fines imposed on him amounted to a total sum of ATS 28,000 (equivalent to EUR 2,035). In sum, the Court finds that these offences were not negligible. However, as is shown by the modest penalties imposed, the domestic authorities considered them to be of a minor nature. Moreover, the first applicant did not commit any further offences between April 1994 and December 1996, when the residence ban proceedings were terminated. Thus, in the Court's view the authorities' fear that he constituted a danger to public order and security in that would commit further offences is mitigated by the particular circumstances of the case (see *Boultif v. Switzerland*, cited above, § 51, with further references).

46. Having regard to all these elements, the Court considers that the authorities failed to strike a fair balance between the different interests involved and that the interference with the applicants' right to respect for their family life was not proportionate to the legitimate aim pursued.

Accordingly, there has been a breach of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

48. The applicants claimed compensation for damages of altogether ATS 689,188.80 (equivalent to EUR 50,085.20). This sum includes ATS 251,188.80, equivalent to EUR 18,254.50, for pecuniary damage, in particular costs of the first applicant's detention with a view to his expulsion in 1995, loss of earnings suffered by the first applicant after he left Austria in July 1997 and by the second applicant when she stayed in Turkey in 2001 and telephone costs incurred during their separation. Furthermore, it includes ATS 438,000, equivalent to EUR 31,830.70 in respect of non-pecuniary damage, in particular compensation for the first applicant's suffering on account of his detention with a view to his expuslion and for all three applicants' suffering due to being separated.

49. The Government contended that the applicants' claims were generally exaggerated and not supported by any evidence. They noted that the first applicant's detention with a view to his expulsion was not at issue in the present proceedings and could therefore not give rise to any claims.

As regards the remaining items of pecuniary damage, the Government submitted that there was no causal link between the first and second applicants' alleged loss of earnings and the breach of the Convention at issue. In any case the applicants' claims in this respect were not corroborated in any way. The same applied in respect of the telephone costs claimed.

50. As to pecuniary damage, the Court agrees with the Government that the first applicant's detention with a view to his expulsion is not the subject of the present application. Moreover, he has not substantiated the costs allegedly incurred in this respect. Further, there is no causal link between the loss of earnings claimed and the breach of the Convention at issue. Again, the applicants failed to substantiate the alleged damage. Equally, they failed to submit any proof of the telephone costs incurred. Consequently, the Court makes no award under this head.

51. Further, the Court considers that the present judgment in itself constitutes sufficient just satisfaction with regard to any non-pecuniary damage the applicants may have suffered (see the above-cited Mehemi v. France judgment, § 41).

B. Costs and expenses

52. The applicants claimed ATS 458,572.91, equivalent to EUR 33,325.70, in respect of costs and expenses incurred in the domestic proceedings and in the Convention proceedings.

53. The Government considered that these costs were excessive.

54. The Court, having regard to the sums awarded in comparable cases (see for instance, Mehemi v. France, cited above, § 46, and *Boultif v. Switzerland*, also cited above, § 62) and making an assessment on an equitable basis, grants the applicants EUR 8,000.

C. Default interest

55. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

3. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President