AS TO THE ADMISSIBILITY OF

Application No. 12771/87
by Yusuf KARLIDAG
against Austria

The European Commission of Human Rights sitting in private on 7 October 1987 the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
M.A. TRIANTAFYLLIDES
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 27 January 1987 by Yusuf Karlidag against Austria and registered on 9 March 1987 under file N° 12771/87;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

&_THE FACTS&S

The applicant is a Turkish citizen of Kurdish origin, born in 1947 and at present domiciled in Turkey. He is represented by Mr. Gottfried Waibel, a lawyer practising in Bregenz, Austria.

The applicant and his family had lived several years in Austria when, on 11 November 1982, the District Authority (Bezirks-hauptmannschaft) of Bregenz issued a permanent residence prohibition (unbefristetes Aufenthaltsverbot) against him under Section 3 para. 1 in conjunction with Section 4 of the Immigration Control Act (Fremdenpolizeigesetz BGBl. 75/1954). The reason stated was that he had organised the illegal crossing of the Austrian-German border by other persons ("im Bereich der deutsch-österreichischen Grenze als Schlepper betätigt") and that he had been convicted of an offence against the German Aliens' Act (Ausländergesetz) on that account by a German court and had been expelled (abgeschoben) by the German authorities to Turkey. The Austrian residence prohibition was confirmed by the Vorarlberg Regional Directorate of Police (Sicherheitsdirektion) on 13 December 1982. As the applicant apparently did not appeal further to the Administrative Court (Verwaltungsgerichtshof) or the Constitutional Court (Verfassungs-gerichtshof), this residence prohibition has become final.

However, the applicant's family (his wife and three children) continued to live in Bregenz. On 8 April 1986 the applicant therefore applied to revoke the residence prohibition under Section 8 of the Immigration Control Act (termination of the reasons which underlie the residence prohibition), or, in the alternative, under Section 68 of the Code of General Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz), which stipulates a general power of the authorities to revoke administrative decisions which have not created a right for anybody. He observed that his German sentence had, in the meantime, been waived (erlassen) under Section 56 g of the German Criminal Code (Strafgesetzbuch). He further observed that Section 3 of the Immigration Control Act had been quashed by the Constitutional Court as being unconstitutional for failure to deal with sufficient precision with the question of respect for family life (decision G 225/85 of 12 December 1985).

By letter of 22 April 1986 the District Authority of Bregenz informed the applicant that it refused the revocation of the residence prohibition as the grounds which had led to its imposition continued to exist. The waiver of the German sentence did not remove that sentence. The applicant's private and personal circumstances which he had invoked did not justify the revocation of the residence prohibition. The authority added that the applicant would be granted leave to enter the Austrian territory for a period of three weeks in 1987 in order to visit his family (Section 6 para. 1 of the Immigration Control Act).

The applicant challenged this decision by a complaint to the Administrative Court. The Court rejected the complaint by a decision of 11 June 1986 which was served on the applicant on 22 August 1986. It held that the District Authority's letter was to be considered as an administrative decision. However, this decision had been based on the correct legal opinion that the reasons justifying the residence prohibition continued to exist and that Section 8 of the Immigration Control Act was therefore not applicable. The waiver of the German sentence left the conviction and other consequences of the judgment unaffected and it did not amount to an erasion of the conviction in the criminal record (Tilgung). The fact that the Constitutional Court had quashed Section 3 of the Immigration Control Act with effect from 30 November 1986 was irrelevant in the context of the present case.

From further correspondence with the District Authority and the Federal Ministry of the Interior, it appears that the applicant had travelled to Austria to visit his family. He asked for an extension of his leave of entry beyond the three-week period granted for this purpose and referred to the possibility of political persecution in Turkey if he and his family returned there, because of their Kurdish origin. It further appears from this correspondence that the applicant had applied for political asylum in Austria for this reason.

&_COMPLAINT&S

The applicant complains that the refusal to revoke the permanent residence prohibition amounted to an unjustified interference with his right to respect for his family life (Article 8 of the Convention). He claims that his family life is firmly established in Austria as his family have lived there for more than ten years and his three children visit Austrian schools. He further observes that, in the circumstances, his family cannot be expected to return to Turkey.

The applicant refers to the Constitutional Court's decision of 12 December 1985 by which Section 3 of the Immigration Control Act was found to be unconstitutional for failure to take the respect of family life sufficiently into consideration. However, the quashing of this

provision took effect only on 30 November 1986, and therefore the provision in question, which was the basis of the measure taken against the applicant, continued to be applicable in his case despite the fact that it was in conflict with the requirements of Article 8 of the Convention. In these circumstances the applicant had no possibility, according to the case-law of the Constitutional Court (decisions Nos. 4718/64, 531/66, 8483/79), to challenge the constitutionality of Section 3 of the Immigration Control Act. The applicant therefore considers that he was not required to complain to the Constitutional Court. He further claims that Section 8 of the Act, directly applied in this case, also fails to take the family situation sufficiently into account and thus, too, violates Article 8 of the Convention.

&_THE LAW&S

The applicant complains that the Austrian authorities' refusal to revoke a residence prohibition issued against him interferes with his right to respect for his family life as guaranteed by Article 8 (Art. 8) of the Convention.

The Commission notes that the applicant's family, i.e. his wife and three children who are not yet of age, have been lawfully residing in Austria for more than ten years. Despite the residence prohibition issued against the applicant, it appears that he has been granted leave to enter Austrian territory for short periods for the purpose of visiting his family. In these circumstances it can be assumed that the applicant's family life is indeed established in Austria.

The Commission further notes that the specific measure complained of is the refusal to revoke a permanent residence prohibition which was ordered in 1982. Although the applicant can no longer complain of the original order, the Commission considers that he is entitled to complain that the refusal interfered with his rights under Article 8 para. 1 (Art. 8-1) of the Convention. A permanent residence prohibition may become disproportionate with the lapse of time and in the present case the applicant invokes a change of circumstances which, in his view, justified his request for a revocation under Article 8 (Art. 8) of the Convention.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant failed to bring his complaint before the Constitutional Court and has, therefore, not exhausted the remedies available to him under Austrian law. An examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It is true that the applicant claims that he could not challenge the constitutionality of Section 3 of the Immigration Control Act, as applied in his case, with regard to Article 8 (Art. 8) of the Convention. In its decision of 12 December 1985 the Constitutional Court had already examined this question and had, with effect from 30 November 1986, annulled Section 3 as lacking sufficient precision with regard to the authorities' obligation to observe the requirements of Article 8 (Art. 8) of the Convention, thus implying that until that date the provision in question must be regarded as being in conformity with constitutional law. However, it was not Section 3 but Section 8 of the Act which was applied in the present case. The above decision of 12 December 1985 did not in any way prevent the applicant from claiming before the

Constitutional Court that Section 8, too, might raise problems as to its conformity with Article 8 (Art. 8) of the Convention. He could even have invoked that decision in support of his argument.

Moreover, it is not primarily the constitutionality of the applicable provisions of the Immigration Control Act which is at issue here, but their application in the concrete case. In a complaint under Article 144 of the Federal Constitution the applicant could have challenged the particular refusal to revoke the residence prohibition and could have claimed that Section 8, or indirectly Section 3, of the Act had been applied in his case in such a way as to violate his rights under Article 8 (Art. 8) of the Convention. In this respect he could have invoked the Constitutional Court's earlier case-law which preceded the decision of 12 December 1985 and in which it had been held that the Immigration Control Act must be interpreted in conformity with Article 8 (Art. 8) of the Convention. The applicant could have claimed that such an interpretation, prompted by Austrian constitutional law, had not been adhered to in his case.

It follows that a complaint to the Constitutional Court cannot be regarded as an ineffective remedy in the circumstances of the applicant's case.

Accordingly the applicant has not complied with the condition as to the exhaustion of domestic remedies laid down in Article 26 (Art. 26) and his application must in this respect be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission

&_DECLARES THE APPLICATION INADMISSIBLE.&S

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)