AS TO THE ADMISSIBILITY OF

Application No. 26720/95
by Komlanvi AFOPKA
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 12 April 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 11 January 1995 by Komlanvi AFOPKA against Austria and registered on 16 March 1995 under file No. 26720/95 ;

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

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, born in 1965, is a national of Togo. Before the Commission he is represented by Mr. J. Unterweger, a lawyer practising in Vienna.

In May 1989 the applicant arrived in Austria with a visa valid until July 1989. In September 1989 he requested a further visa on account of his occupation in Austria as journalist. He was thereupon granted a visa valid until 30 June 1990. In November 1991 the applicant again applied for a visa, which was refused on the ground that he had never worked as a journalist, contrary to his statements in his respective requests for visa. According to the applicant, he again requested a visa on 29 May 1992.

On 29 April 1993 he married an Austrian citizen.

On 3 January 1994 the Vienna Federal Police Department (Bundespolizeidirektion) issued a residence prohibition (Aufenthalts-verbot) against the applicant, and ordered him to leave the territory of Austria as soon as the residence prohibition was final. The

Department, referring to the relevant provision of the Aliens' Act (Fremdengesetz), found that, contrary to the statements in his respective requests for visa, the applicant had never worked as a journalist in Austria and therefore obtained his visa with false pretences. The Department noted that the applicant lived in Austria with his Austrian wife and his wife's two children. Nevertheless, taking into account the seriousness of his fraudulent behaviour, the public interest in preventing disorder outweighed his private interests in staying in Austria.

On 22 April 1994 the Vienna Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal. It confirmed the reasoning of the Vienna Federal Police Department. It further considered that the applicant's prolonged illegal stay in Austria contravened the proper enforcement of the laws on immigration of aliens. The applicant's defence that the statements in the requests had been drafted by a friend and that he had only signed these requests could not exculpate him on the ground that he had failed to verify the contents of his requests. His marriage with an Austrian national and his living situation in Austria did not outweigh the public interests in the prevention of crime and in the prevention of disorder.

On 23 June 1994 the Austrian Administrative Court (Verwaltungsgerichtshof) dismissed the applicant's complaint about the residence prohibition. It confirmed the reasoning of the lower instances. In particular, even assuming that the applicant did not have, at the relevant time, sufficient knowledge of German, he had been obliged to verify the contents of documents which he signed. He had thus at least acted with gross negligence. Moreover, he had stayed illegally in Austria for a prolonged period of time. Furthermore, the applicant's interests in staying in Austria had duly been weighed against the public interest in a residence prohibition against him. As regards his marriage, the Administrative Court observed that it had been concluded at a time when the applicant already knew that he had been illegally staying in Austria for almost three years and could not count on obtaining a residence permit. The decision was apparently served on 13 July 1994.

The applicant did not leave the Austrian territory. Thereupon, on 6 June 1994 he was taken into detention with a view to his expulsion to Togo. His appeal in this respect remained unsuccessful. He was deported to Togo on 27 June 1994.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the residence prohibition issued against him violated his right to respect for his private and family life. He submits in particular that he could not be held responsible for having obtained the respective visa with false pretences and had never been prosecuted on account of this conduct. He further considers that his prolonged stay in Austria and his marriage with an Austrian national outweighed any public interest in issuing a residence prohibition against him. He also states that his request for a visa of November 1992 was not decided upon by the competent authorities. However, he should be allowed to stay in Austria pending the proceedings regarding this request.

THE LAW

The applicant complains that the residence prohibition issued against him violated his right to respect for his private and family life. He relies on Article 8 (Art. 8) of the Convention which states, so far as relevant:

> "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, ... "

The Commission recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed in Article 8 para. 1 (Art. 8-1) (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 9203/80, Dec. 5.5.81, D.R. 24 p. 239).

The Commission finds that the residence prohibition issued against the applicant which was enforced in June 1994, interferes with his right to respect for his private and family life within the meaning of Article 8 para. 1 (Art. 8-1). Such interference is in breach of Article 8, unless it is justified under Article 8 para. 2 (Art. 8-2) of the Convention.

As regards the lawfulness of the interference, the Commission observes that the Austrian authorities, when issuing the impugned decision, relied on the relevant provisions of the Austrian Aliens' Act. The applicant failed to show any non-observance of the relevant legislation. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2).

Moreover, when issuing the residence prohibition, the Austrian authorities considered that the impugned measure was in the interest of the prevention of disorder and crime. This is a legitimate aim mentioned in Article 8 para. 2 (Art. 8-2).

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether such a need for an interference exists, but it goes hand in hand with European supervision (see, Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, p. 15, para. 128; Funke judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission notes that the administrative authorities had regard to the applicant's private and family situation. The authorities, as confirmed by the Austrian Administrative Court, found that the applicant had at least acted with gross negligence when lodging his incorrect requests for visa with a view to stay in Austria. Moreover, they considered his prolonged illegal stay in Austria as well as the fact that he had concluded his marriage at a time when the spouses knew that he had no prospect of staying legally in Austria (cf., mutatis mutandis, Applications No. 24377/94, Dec. 31.8.94; No. 24381/94, Dec. 31.8.94; No. 25168/94, Dec. 14.9.95 - not published).

As regards the applicant's argument that in 1992 he had renewed a request for a visa, the Commission notes that he failed to show that he had raised this issue in the course of the domestic proceedings. In any event, at that time, his previous request for a visa, which had been lodged almost one and a half year after the expiry of the previous visa, had been dismissed on the ground of false pretences, his further stay in Austria thus being illegal.

In these circumstances, the Commission considers that there are relevant and sufficient reasons for the challenged residence prohibition. Weighing the applicant's private and family interests, and the public interests at stake, the Commission finds that the Austrian authorities did not overstep the margin of appreciation left to them.

Consequently, the interference with the applicant's right to

respect for his private and family life was justified under Article 8 para. 2 (Art. 8-2) in that it can reasonably be considered "necessary in a democratic society ... for the prevention of disorder and crime." Thus there is no appearance of a violation of Article 8 (Art. 8) of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)