AS TO THE ADMISSIBILITY OF

Application No. 25918/94
by Aliriza ALTUNTAS
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 15 May 1996, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
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 1 December 1994 by Aliriza ALTUNTAS against Austria and registered on 13 December 1994 under file No. 25918/94;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen, born in 1977 in Lustenau/Austria and was living in Austria when he lodged the present application. He is represented by Mr. W.L. Weh, a lawyer practising in Bregenz.

A. Particular circumstances of the case

The facts, as submitted by the applicant may be summarised as follows:

In September 1992 the applicant travelled to Austria with his father.

On 24 February 1993 his request for a visa (Sichtvermerk) was rejected.

On the same day the competent authorities (Bezirkshauptmannschaft) at Dornbirn issued an expulsion order against the applicant in accordance with Section 17 para. 1 of the Aliens Act (Fremdengesetz) which provides for the expulsion of aliens unlawfully within the territory of the state. The applicant was informed about his right to lodge an appeal which would however not have suspensive

effect ex officio.

It is stated in the expulsion order that the applicant's mother and his five sisters/brothers were living in Turkey. Only his father was authorised to live in Austria where he had a job. When applying for a visa for the applicant his father however had not advanced any arguments justifying the granting of a residence permit in accordance with Section 19 of the Aliens Act. As he had only been living for about five months in Austria and as the rest of his family was living in Turkey it could not be considered that he was integrated into Austria and that his ties to Austria were stronger than those to Turkey.

The applicant's appeal (Berufung) against the decision of 24 February 1993 was rejected by the Directorate of the Security Service of Vorarlberg (Sicherheitsdirektion) on 29 September 1993 after having granted suspensive effect to the appeal. This decision was mainly based on the fact that the applicant had entered the territory of Austria without a visa and that the main part of his family lived in Turkey.

The applicant then brought a complaint with the Administrative Court (Verwaltungsgerichtshof) which rejected it on 14 April 1994.

Insofar as the applicant had argued that an expulsion order could only be given within a time-limit of one month after the illegal entry the court noted that such a time-limit was only provided for when the expulsion grounds stated in Section 17 para. 2 of the Aliens Act applied not however when an expulsion was based on para. 1 of that Section. The court furthermore considered that the illegal stay of a foreigner in Austria affected public order and therefore the applicant's expulsion was necessary in a democratic society there being no reason to make an exception on account of close family relations.

The applicant also lodged a constitutional complaint which was however rejected by the Constitutional Court (Verfassungsgerichtshof) on 2 July 1993 as offering no prospects of success.

B. Relevant Domestic law

The relevant provisions of the Aliens Act read as follows:

[Translation]

"s.17. Deportation. (1) Aliens who are not legally resident in the Federal territory shall be served with a deportation order; account must be taken of the provisions of s. 19 when applying such a measure."

(2) Aliens may be deported on notice in the interests of public policy where they:

1. have been convicted by a criminal court of a crime of intent committed within a month of entry, even where an appeal is still possible; or,

2. within a month of entry, are found in the act of committing a crime of intent or are credibly accused, immediately after a crime of intent has been committed, of being the perpetrator thereof, provided that the offence carries a substantial sentence and that the competent public prosecutor has made a declaration of intention to file a report with the Federal Minister of Justice pursuant to s. 74 of the Extradition and International Legal Assistance Act; or

3. breach within a month of entry the regulations

concerning prostitution; or

4. cannot within a month of entry show that they possess the means to maintain themselves; or

5. are within a month of entry found by an organ of the Labour Inspectorate or the regional or provincial offices of the Labour Market Service carrying on an activity which they are not entitled to pursue under the Aliens' Employment Act; or

6. entered in breach of the provisions of Part 2 hereof or by evading border controls and are discovered within a month.

[German]

"§ 17. Ausweisung. (1) Fremde sind mit Bescheid auszuweisen, wenn sie sich nicht rechtmässig im Bundesgebiet aufhalten; hiebei ist auf § 19 Bedacht zu nehmen."

(2) Fremde können im Interesse der öffentlichen Ordnung mit Bescheid ausgewiesen werden, wenn sie

1. von einem Strafgericht wegen einer innerhalb eines Monates nach der Einreise begangenen Vorsatztat, wenn auch nicht rechtskräftig, verurteilt wurden oder

2. innerhalb eines Monates nach der Einreise bei der Begehung einer Vorsatztat auf frischer Tat betreten oder unmittelbar nach Begehung der Vorsatztat glaubwürdig der Täterschaft beschuldigt wurden, wenn überdies die strafbare Handlung mit beträchtlicher Strafe bedroht ist und eine Erklärung des zuständigen Staatsanwaltes vorliegt, dem Bundesminister für Justiz gemäss §74 ARHG berichten zu wollen, oder

3. innerhalb eines Monates nach der Einreise gegen die Vorshriften, mit denen die Prostitution geregelt ist, verstossen oder

4. innerhalb eines Monates nach der Einreise den Besitz der Mittel zu ihrem Unterhalt nicht nachzuweisen vermögen oder

5. innerhalb, eines Monates nach der Einreise von einem Organ der Arbeitsinspektorate, der regionalen Geschäftsstellen oder der Landesgeschäftsstellen des Arbeitsmarktservice bei einer Beschäftigung betreten werden, die si nach dem Ausländerbeschäftigungsgesetz nicht ausüben hätten dürfen oder

6. unter Missachtung der Bestimmungen des 2. Teiles oder unter Umgehung der Grenzkontrolle eingereist sind und binnen einem Monat betreten werden.

[Translation]

"s. 19. Protection of private and family life. Where a deportation order under s. 17 para. 1 or a residence prohibition interferes with an alien's private or family life, such a withdrawal of permission to remain is valid only if it is strictly necessary in order to achieve the aims laid down in Article 8 para. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms"

[German]

"§. 19. Schutz des Privat- und Familienlebens. Würde durch eine Ausweisung gemäss § 17 Abs. 1 oder ein Aufenthaltsverbot in das Privat- oder Familienleben des Fremden eingegriffen, so ist ein solcher Entzug der Aufenthaltsberechtigung nur zulässig, wenn dies zur Erreichung der im Art 8 Abs. 2 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten genannten Ziele dringend geboten ist."

[Translation]

"s. 20. Invalidity of a residence prohibition. (1) A residence prohibition shall not be issued if its effects on the alien and his family's situation outweigh the adverse consequences of not taking such a measure. In weighing the above factors, the following circumstances shall be taken into account:

1. the period of residence and the extent to which the alien or members of his family are integrated into society;

2. the strength of family or other ties.

(2) In addition to the foregoing, a residence prohibition shall not be issued against an alien who could have acquired nationality under s. 10 (1) of the Nationality Act of 1985 BGB1. No. 311 before the relevant facts took place, unless a residence prohibition were to be based on s. 18 (2) 1 on the ground that the alien has been convicted of an offence punishable by more than five years' imprisonment."

[German]

"§20 Unzulässigkeit eines Aufenthaltsverbotes. (1) Ein Aufenthaltsverbot darf nicht erlassen werden, wenn seine Auswirkungen auf die Lebenssituation des Fremden und seiner Familie schwerer wiegen als die nachteiligen Folgen der Abstandnahme von seiner Erlassung. Bei dieser Abwägung is auf folgende Umstände Bedacht zu nehmen:

1 die Dauer des Aufenthaltes und das Ausmass der Integration des Fremden oder seiner Familienangehörigen;

2 die Intensität des familiären oder sonstigen Bindungen.

(2) Ein Aufenthaltsverbot darf ausserdem nicht erlassen werden, wenn dem Fremden vor Verwirklichung des massgeblichen Sachverhaltes gemäss § 10 Abs. 1 des Staatsbürgerschaftsgesetzes 1985, BGB1. Nr. 311, die Staatsbürgerschaft verliehen hätte werden können, es sei denn, das Aufenthaltsverbot wäre auf § 18 Abs. 2 Z 1 zu gründen, weil der Fremde wegen einer mit mehr als fünf Jahren Freiheitssrafe bedrohten strafbaren Handlung verurteilt worden ist."

[Translation]

"s. 21 Period of validity of a residence prohibition. (1) A residence prohibition can be for unlimited duration in the cases set forth in s. 18 (2) 1 and 5, otherwise it is only valid for a maximum period of ten years.

(2) In establishing the period of validity of a residence prohibition account shall be taken of the circumstances relevant to its issue. Time starts running from when the

residence prohibition becomes enforceable."

[German]

"§ 21. Gültigkeitsdauer des Aufenthaltsverbotes. (1) Das Augenthaltsverbot kann in den Fällen des § 18 Abs. 2 Z 1 und 5 auch unbefristet, sonst nur für die Dauer von höchstens zehn Jahren erlassen werden.

(2) Bei der Festetzung der Gültigkeitsdauer des Aufenthaltsverbotes ist auf die für seine Erlassung massgeblichen Umstände Bedacht zu nehmen. Die Frist beginnt mit Eintritt der Durchsetzbarkeit zu laufen."

COMPLAINTS

The applicant argues that the text of Section 17 of the Aliens Act is misleading for lay-men, giving the impression that in all cases expulsion can only be ordered within a time-limit of one month while, according to the official interpretation, the one month time-limit only applies to the cases listed in para. 2 of the Section. He therefore considers that the Section lacks the necessary precision and foreseeability as required in the case-law of the European Court of Human Rights. He further submits that there is a contradiction between the interpretation of Article 17 of the Aliens Act and the present case as according to that interpretation there is no time-limit at all for expulsion measures while Section 20 para. 2 provides that a resident's permit cannot be denied to a person having lived 10 years on Austrian territory.

Finally the applicant considers that his expulsion is not necessary as he is living in Austria without causing any trouble. He has never been prosecuted criminally and is disturbing nobody. The applicant invokes Article 8 of the Convention.

THE LAW

1. The applicant complains that his threatened removal from Austrian territory infringes his right to respect for his family and private life.

Article 8 (Art. 8) of the Convention provides 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls according to its established case-law that while Article 8 (Art. 8) of the Convention does not in itself guarantee a right to enter or remain in a particular country issues may arise where a person is excluded, or removed from a country where his close relatives reside (see eg. No. 7816/77, Dec. 19.5.77, D.R. 9, p. 219; No. 9088/80, Dec. 6.3.82, D.R. 28, p. 160, and No. 9285/81, Dec. 6.7.82, D.R. 29, p. 205).

However, the Commission notes that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 (Art. 8) does not impose a general obligation on States to respect the choice of residence of a married couple or to

accept the non-national spouse for settlement in that country (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 94, para. 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether removal or exclusion of a family member from a Contracting State is compatible with the requirements of Article 8 (Art. 8) will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (eg. history of breaches of immigration law) or considerations of public order (eg. serious or persistent offenses) weighing in favour of exclusion (see eg. Nos. 9285/81, Dec. 6.7.82, D.R. 29 p. 205 and 11970/86, Dec. 13.7.87 unpublished).

The Commission first notes that when travelling to Austria with his father the applicant was already 17 years old and has not indicated any particular reasons showing a necessity for his living with his father in Austria instead with the rest of his family staying behind in Turkey. It can in these particular circumstances appear questionable whether the threatened expulsion constitutes an interference with family life.

However, even assuming the existence of family life the Commission recalls, as regards the question whether the interference complained of was "necessary in a democratic society", 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 Austrian authorities based their decision on the fact that the applicant entered the country illegally, i.e. without a visa. They also had regard to his family situation, in particular the fact that his mother and brothers/sisters were living in Turkey and that there were no exceptional circumstances entitling him to stay.

In these circumstances, the Commission considers that there are relevant and sufficient reasons for the challenged decisions. Weighing the applicant's interests in pursuing his family life with his father in Austria, and the public interests at stake, the Commission finds that the Austrian authorities did not overstep the margin of appreciation left to them.

In this respect the Commission had particular regard to the fact that the applicant only came to Austria at the age of seventeen and that most members of his close family remained in Turkey.

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.... in the interest of the economic well-being of the country" and "for the prevention of disorder and crime".

It follows that the application must be rejected as being 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)