AS TO THE ADMISSIBILITY OF

Application No. 27647/95
by B. S.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 15 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 20 April 1995 by B. S. against Austria and registered on 19 June 1995 under file No. 27647/95;

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 applicant, born in 1966, is a Croat national. In the proceedings before the Commission he is represented by Mr. S. Gulner, a lawyer practising in Vienna.

A. Particular circumstances of the case

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

In November 1991 the applicant settled in Vienna, where his father has been living for more than twenty years and where also his brother is living.

On 10 December 1993 the Vienna Regional Criminal Court (Landesgericht für Strafsachen) convicted the applicant of five counts of completed and one count of attempted aggravated burglary committed regularly for gain (schwerer gewerbsmäßiger Einbruchsdiebstahl). It found that he had, in November and December 1990, together with a number of accomplices stolen goods of a value of more than AS 25,000 by breaking into various buildings and that he had acted with the intention to draw regular gains from the repeated commission of such offences. The court sentenced the applicant to twelve months' imprisonment suspended for a probationary period of three years.

On 21 February 1994 the Vienna Federal Police Authority (Bundespolizeidirektion), referring to S. 18 paras. 1 and 2 subpara. (1) of the Aliens Act (Fremdengesetz), issued a residence ban valid for ten years against the applicant.

On 27 June 1994 the Vienna Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal. It noted in particular that the conditions for issuing a residence ban, laid down in S. 18 paras. 1 and 2 subpara. (1) of the Aliens Act, were met as the applicant had been convicted and sentenced to twelve months' imprisonment suspended on probation. Referring to SS. 19 and 20 of the Aliens Act, it found that the residence ban constituted an interference with the applicant's private and family life. On 7 January 1992 he had married a compatriot, who had meanwhile acquired Austrian nationality. Moreover, his father and his brother had been resident in Austria for years. However, the residence ban was necessary to achieve aims set out in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely to prevent crime and to protect the rights of others. In this context the Public Security Authority pointed out in particular that the applicant had been found guilty of burglary committed regularly for gain, which implied that there was a certain danger of a repetition of the offences. That he had not committed any offences since December 1990 was of little importance, given that he had only been convicted in December 1993. With a view to the nature of the offences, the public interest in issuing the residence ban outweighed the applicant's interest in staying in Austria.

On 18 August 1994 the applicant lodged a complaint with the Administrative Court (Verwaltungsgerichtshof). He submitted in particular that the Public Security Authority had not properly established the relevant facts and had wrongly found that the interest in issuing a residence ban weighed more heavily than his family life. His father had been resident in Vienna for twenty years, where also his brother was living. He himself, the applicant, as well as his wife had been working regularly and had bought a flat, the loan for which could not be payed by his wife alone. Thus, the residence ban would seriously harm his and his wife's private and professional interests. Moreover, the residence ban was not necessary for the prevention of crime, as he had not been involved in crime since 1990.

On 8 September 1994 the Administrative Court dismissed the applicant's complaint. It considered in particular that the Public Security Authority, having regard to the criminal court's finding that the applicant committed burglary regularly for gain, correctly assumed that his residence was a danger for public order and security. The fact that he had not committed further offences did not weigh very heavily, as criminal proceedings against him were pending until December 1993. Further, the Public Security Authority had, as required by S. 20 of the Aliens Act duly considered the applicant's interest in his private and family life, in particular his marriage with an Austrian national and the long-term residence of his father and brother. Its finding that, having regard to the nature of the applicant's offences, the interest in issuing a residence ban weighed more heavily, was unobjectionable.

The decision was served on 21 October 1994.

On 22 December 1994, the applicant was expelled to Croatia.

B. Relevant domestic law

According to S. 18 para. 1 of the Aliens Act (Fremdengesetz) a residence ban has to be issued against an alien, if there are reasonable grounds to believe that his stay will disturb public order or security or that it will be contrary to public interest as provided for in Article 8 para. 2 of the European Convention for the Protection

of Human Rights and Fundamental Freedoms. S. 18 para. 2 illustrates cases in which "reasonable grounds" within the meaning of para. 1 exist, e.g. if an alien has been sentenced to more than three months' imprisonment or to more than six months' imprisonment suspended on probation by an Austrian court and the judgment has become final (subpara. 1).

S. 19 provides that a residence ban, which would interfere with the alien's private and family life, may only be issued if it is urgently necessary to achieve one of the aims set out in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to S. 20 a residence ban may not be issued if the impact on the situation of the alien and his family weighs more heavily than the negative consequences of refraining from issuing it. In making this assessment the following circumstances are to be taken into account: the duration of residence and the degree of integration of the alien or his family and the intensity of the aliens's family or other ties.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the residence ban against him and his subsequent expulsion violated his right to private and family life. He submits in particular that he is married to an Austrian national, and that his father and brother are living in Austria. Moreover, he points out that he had only once, in 1990, committed a number of burglaries. As afterwards he worked regularly, there was no danger of a repetition of the offences.

THE LAW

The applicant complains under Article 8 (Art. 8) of the Convention that the residence ban against him and his subsequent expulsion violated his right to private and family life.

Article 8 (Art. 8), 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 Commission has doubts whether the applicant has exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention, as it appears that he has failed to lodge a complaint with the Constitutional Court (Verfassungsgerichtshof). However, even assuming exhaustion of domestic remedies, the Commission finds that the application is inadmissible for the following reasons.

The Commission finds that the residence ban against the applicant and his expulsion constituted an interference with his right to respect for his private and family life, which is in breach of Article 8 (Art. 8) unless the conditions laid down in paragraph 2 of this Article are satisfied (Eur. Court HR., Nasri v. France judgment of 13 July 1995, Series A no. 320-B, p. 23, para. 35; Boughanemi v. France judgment of 24 April 1996, to be published in Reports of Judgments and Decisions 1996, para. 36).

The interference at issue was in accordance with the law, as it was based on S. 18 paras. 1 and 2, subpara. (1) of the Austrian Aliens Act, and served legitimate aims, namely the prevention of crime and the

protection of the rights of others.

The applicant mainly contests the necessity of the interference. He submits that he is married to an Austrian national, that his father and brother are living in Austria and that he committed only once, in 1990, a number of burglaries.

The Commission 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 and notably to order the expulsion of 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 (Art. 8-1), 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. In assessing the necessity of the interference Contracting States enjoy a margin of appreciation (Nasri v. France judgment, loc. cit., p. 25, para. 41; Boughanemi v. France judgment, loc. cit., para. 41).

In the present case the Public Security Authority and the Administrative Court, referring to S. 20 of the Aliens Act examined whether the impact of the residence ban on the applicant's situation weighed more heavily than the negative consequences of refraining from issuing it. They had regard to the applicant's family ties, in particular to his marriage concluded in 1992 and to the long-term residence of his father and brother, and to the nature of the offences he had been convicted of. Attaching particular weight to the fact that he had committed several offences of burglary for regular gain, which implied a certain danger of the repetition of such offences, they found that the public interest in issuing the residence ban outweighed the applicant's interest in staying in Austria.

The Commission notes in the first place that the applicant, at the time of his expulsion, had only been in Austria for little more than three years. It is true that he was only convicted once for offences committed in 1990. However, these offences were not of a minor nature. Moreover, he settled in Austria and concluded his marriage after the commission of the offences and could therefore not expect to be able to establish his permanent residence there. According to the decision of the Public Security Authority, the applicant's wife was originally a compatriot, who later acquired Austrian nationality. The Commission notes in this context that the applicant has neither in the domestic proceedings nor in the present application forwarded any argument to show that his wife could not be expected to follow him to Croatia. In these circumstances, the Commission finds that the issuing of a residence ban against the applicant and his expulsion do not appear to be disproportionate to the legitimate aims pursued.

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.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber