AS TO THE ADMISSIBILITY OF

Application No. 18643/91
by Josefa BENES
against Austria

The European Commission of Human Rights sitting in private on
6 January 1992, the following members being present:

MM.C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
SirBasil HALL
Mr.F. MARTINEZ
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

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 20 July 1991 by
Josefa BENES against Austria and registered on 7 August 1991 under file
No. 18643/91;

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 they have been submitted by the
applicant, may be summarised as follows:

The applicant, born in 1919, is a national of the Czech and
Slovak Federal Republic and resident in Graz, Austria. Before the
Commission she is represented by Ms. B. Sautter, resident in
Strasbourg.

On 11 October 1980 the applicant married an Austrian national in
Czechoslovakia. Subsequently, she acquired the Austrian nationality.
In March 1981 the applicant, having received an exit visa, came to
Austria.

On 11 July 1986 the Vienna Public Prosecutor's Office (Staats-
anwaltschaft) instituted proceedings before the Vienna Regional Court
(Landesgericht), competent in civil matters, requesting that the
applicant's marriage be nullified on the ground that it had only been
contracted in order to enable her to acquire Austrian nationality. It
appears that the applicant's husband, in the context of divorce
proceedings instituted by him in 1983, had stated that the marriage had

been concluded for that purpose. Thereupon, the divorce proceedings were not pursued.

The Vienna Regional Court held a hearing on 5 January 1987 with the parties and witnesses.

On 16 February 1987 the Vienna Regional Court nullified the applicant's marriage in accordance with S. 23 of the Austrian Marriage Act (Ehegesetz). The Court found in particular that in 1975 the applicant had met the witness Ms. E., who later had assisted her in arranging a marriage with an Austrian national securing her a right to enter Austria, and in order to keep the witness E. company. Following the wedding the applicant's husband had returned to Austria, where he had a life companion. When the applicant came to Austria, she took up residence with the witness E. Three months later, upon difficulties with E., the applicant returned to Czechoslovakia. When she returned to Austria, she again lived at the residence of the witness E. The applicant and her husband never had a common household. The applicant never attempted to lead a conjugal life with her husband who had refused such a community from the very beginning. The Court proceeded in particular from the testimony of the witness E. as well as from the statements of the applicant and her husband. It found that the applicant's statements were not credible insofar as she alleged to have tried to lead a conjugal life with her husband. In this respect, the Court referred to the fact that she had arranged with the witness E. to live at her place, and that her husband had already declared in Czechoslovakia that he did not intend to take up a matrimonial community.

According to S. 23 para. 1 of the Marriage Act, a marriage is null and void if it was contracted for the sole or main purpose of enabling the wife to acquire her husband's family name or the Austrian nationality without intention of founding a matrimonial community.

The applicant, represented by counsel, lodged an appeal (Berufung) with the Vienna Court of Appeal (Oberlandesgericht).

On 6 April 1987 the applicant's former husband died. The Vienna Court of Appeal, therefore, suspended the appeal proceedings on 30 July 1987.

On 19 August 1987 the applicant applied for a widow's pension. The competent Social Insurance Office (Sozialversicherungsanstalt der gewerblichen Wirtschaft) did not decide upon the request pending the nullity proceedings.

On 8 November 1990 the applicant requested the Vienna Court of Appeal to continue the proceedings. She submitted in particular that she faced problems as to the grant of social security benefits and the payment of a widow's pension.

On 16 April 1991 the Vienna Court of Appeal, following a hearing in camera where the applicant was represented by her counsel, dismissed the applicant's appeal. The Court of Appeal referred in particular to the facts as stated in the Regional Court's judgment of 16 February 1987, and confirmed the Regional Court's legal reasoning. The Court of Appeal found that the applicant's further submissions, especially several letters written by her former husband, did not show that, upon and after their wedding, he had ever intended to found a common matrimonial life with the applicant. The Regional Court's assessment and evaluation of evidence could not be objected to. Furthermore, there was no indication that the Regional Court had not duly advised the applicant, who had not been represented by counsel at that stage of the proceedings. The Court of Appeal also stated that an appeal on points of law was excluded under SS. 500 para. 2 (2), 502 paras. 1 and 3 (1) of the Code of Civil Procedure (Zivilprozeßordnung).

The judgment was served on 6 May 1991. On 13 May 1991 counsel informed the applicant about the judgment, one of its consequences being that she was not entitled to a widow's pension.

COMPLAINTS

The applicant complains about the Austrian court decisions to declare her marriage null and void. She submits that these decisions deprived her of her widow's pension. She also complains that the court proceedings concerned lasted unreasonably long. Furthermore, she submits that the proceedings concerned were unfair, in particular, that she was not summoned for the hearing before the Court of Appeal and that a witness was not heard. The applicant invokes Article 6 para. 1 and Article 8 of the Convention.

THE LAW

1.The applicant complains that the Austrian court decisions to declare her marriage null and void violated her right under Article 8 (Art. 8) of the Convention. Article 8 (Art. 8) provides as follows:

"1.Everyone has the right to respect for his private and family life, his home and his correspondence.

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 Austrian court decisions to nullify the applicant's marriage had implications on her legal status and in general on her private life. There was thus an interference with her right to respect for her private life under Article 8 (Art. 8) of the Convention.

Such an interference amounts to a violation of Article 8 (Art. 8), unless it is justified under paragraph 2 of Article 8 (Art. 8-2) as being in accordance with Austrian law and necessary in a democratic society for the protection of one of the aims set forth in this provision.

The Austrian courts nullified the applicant's marriage in accordance with S. 23 of the Austrian Marriage Act. They considered the marriage as fictitious, concluded for the sole purpose of providing the applicant with Austrian nationality. The interference was thus in accordance with Austrian law.

The proceedings to nullify a marriage of convenience served the prevention of disorder and the protection of the rights and interests of others.

As regards the question whether or not the Austrian court decisions to declare the applicant's marriage null and void were necessary in a democratic society for the above-mentioned aims, the Commission finds that it is for the national legislation to lay down the rules according to which a marriage is not valid and to draw the legal consequences, including proceedings to have the marriage concerned declared null and void. The Commission notes that, in the present case, the Austrian courts carefully considered that the spouses never had a common conjugal life, and that the applicant's former husband had admitted that the marriage had been concluded for the purpose of allowing the applicant to acquire the Austrian nationality

and he had never intended to take up a common life.

In these circumstances the Austrian court decisions to declare the applicant's marriage null and void do not appear disproportionate, and can be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights of others. Consequently there is no appearance of a violation of the applicant's right under Article 8 (Art. 8) of the Convention.

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

2. The applicant also complains under Article 6 para. 1 (Art. 6-1) of the Convention that the nullity proceedings lasted unreasonably long.

The proceedings lasted from 11 July 1986 until 6 May 1991, i.e. almost five years.

The Commission has assessed the reasonableness of the length of the proceedings in the light of the criteria established by the case-law of the Convention organs, namely the complexity of the case, the applicant's conduct and that of the national authorities.

The case concerned the question of nullity of a marriage under S. 23 para. 1 of the Marriage Act, and did not raise complex issues. The applicant did not cause any delays.

As regards the conduct of the Austrian judicial authorities, the Commission finds that the nullity proceedings, as a whole, did not last extraordinarily long. It is true that a delay occurred in the course of the appeal proceedings. On 30 July 1987 the Court of Appeal, following the death of the applicant's husband, suspended the proceedings. The Public Prosecutor's Office, as plaintiff, did not request the continuation of the proceedings which, upon the applicant's request, were not continued until in April 1991. In the particular circumstances, however, the continued suspension of the nullity proceedings does not appear as failure to expedite the proceedings in a reasonable manner.

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

3.Finally the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that, in the nullity proceedings concerned, she did not receive a fair hearing. She submits in particular that she was not summoned for a hearing before the Vienna Court of Appeal, and that a particular witness was not heard.

The Commission finds no indication that, in the nullity proceedings, the applicant, who was at the appeal stage represented by counsel, could not properly present her arguments or that the case was otherwise dealt with in an unfair manner. In particular, the applicant was represented by her counsel at the hearing before the Vienna Court of Appeal, and she failed to show that her personal presence was indispensable for a proper conduct of the proceedings. Furthermore, the taking and assessment of evidence do not disclose any unfairness. It does not follow from the applicant's submissions, in particular the domestic court decisions, that she had requested to hear a particular witness and that any request of this kind had been refused.

The applicant's complaint about the alleged unfairness of the nullity proceedings is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)