AS TO THE ADMISSIBILITY OF

Application No. 25736/94
by Serafettin BIRINCI
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 24 October 1994 by Serafettin BIRINCI against Austria and registered on 21 November 1994 under file No. 25736/94;

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 1956 and living in Weiler, Austria. He his represented by Mr. W. Weh a lawyer practising in Bregenz.

A. Particular circumstances of the case

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

The applicant has been living and working in Austria since 1972 in Austria and lives with a Mrs. M. B. an Austrian citizen.

On 7 April 1992 the District Authority (Bezirkshauptmanschaft) at Feldkirch withdrew the applicant's residence permit with effect until 2002. An appeal was to no avail.

On 10 March 1993 the applicant made a request to set aside the order withdrawing his residence permit, alleging that the denial of a residence permit was no longer compatible with newly amended provisions of the Aliens Act (Fremdengesetz) 1992.

On 10 May 1993 the Feldkirch District Authority rejected this

request. It is noted in this decision that although the applicant's residence permit had also been withdrawn between 3 February 1988 and 3 February 1991 the applicant had committed further offences in June 1991 and January 1992 and had been fined AS 11.000 and AS 15.000 respectively.

Insofar as the applicant had argued that, in the light of the new provision of Section 20 para. 2 of the Aliens Act the withdrawal of his residence permit was no longer valid, the authority referred to the transitional provision (Übergangsbestimmung) in Section 88 para. 3 of the Aliens Act. It provided that the temporary revocation of permission to reside remained valid even under the new provisions of the Aliens Act until the original time-limit expired.

Furthermore the District Authorities stated that in weighing the public interests against the private and family interests of the applicant they saw no reason to grant the applicant's request.

Subsequently on 24 May 1993 the District Authority ordered the applicant's detention with a view to his expulsion (Schubhaft).

On 25 May 1993 the applicant lodged an appeal with the Regional Security Directorate against the order of the District Authority of 10 March 1993. Furthermore he complained to the Independent Administrative Tribunal of the detention order.

On 7 June 1993 the applicant was arrested on the basis of the District Court's order of 24 May 1993.

On 28 June 1993 the Regional Security Directorate for Vorarlberg (Sicherheitsdirektion) granted the appeal. Referring to Section 26 and 20 para. 2 of the Aliens Act of 1992 the Directorate considered that as the applicant had been living in Austria between 1972 until 1984 and as his convictions only concerned minor regulatory offenses (Verwaltungsübertretungen) he had at the relevant time qualified under Section 10 para. 1 of the Citizens Act (Staatsbürgerschaftsgesetz 1985) to apply for Austrian citizenship. Consequently the denial of a residence permit was no longer compatible with Section 20 para. 2 of the Aliens Act 1992. Referring furthermore mutatis mutandis to the Administrative Court's jurisprudence the directory considered that the change of the legal situation had to be taken into consideration when deciding on the applicant's request for restitution of his residence permit.

Meanwhile on 15 June 1993 the Independent Administrative Tribunal (Unabhängiger Verwaltungssenat) of Vorarlberg had dismissed the applicant's complaint (Beschwerde) about his arrest and detention without an oral hearing. Contrary to the applicant's arguments, the tribunal considered his arrest to be lawful and serving the purpose of his expulsion. The tribunal noted that the order withdrawing the applicant's residence permit was final since 21 October 1992. According to that final decision the applicant had been obliged to leave Austria within a week. Also the applicant's requests to the Administrative Court to restore his residence permit had been unsuccessful while the applicant nevertheless continued to live in Austria and thereby violated domestic law (fremdenpolizeiliche Vorschriften). In these circumstances his arrest and detention with a view to his expulsion was necessary. The fact that the applicant had brought fresh proceedings under Section 26 of the Aliens Act was irrelevant as otherwise every execution measure in accordance with Section 41 para. 1 of the Aliens Act could be frustrated by making a request under Section 26 of that Act.

As the reasons for keeping the applicant in detention pending his expulsion continued to exist, it was justified, in accordance with Section 52 para. 1 first sentence of the Aliens Act, to order the continued detention of the applicant.

The applicant then lodged a constitutional complaint which was rejected by the Constitutional Court (Verfassungsgerichtshof) on 28 September 1993 as offering no prospects of success. On 20 December 1993 the Constitutional Court referred the matter to the Administrative Court (Verwaltungsgerichtshof).

On 4 March 1994 the Administrative Court likewise rejected the applicant's complaint that in view of the applicant's continued refusal to leave Austria, although he was obliged to do so, justified his arrest and detention with a view to expulsion. The court considered it irrelevant that meanwhile the applicant had been granted a new residence permit by decision of 28 June 1993. The court noted in this respect that in any event the decision in question had been given subsequent to the order of his arrest.

The decision was served on 27 April 1994.

B. Relevant Domestic law

The relevant provisions of the Aliens Act read as follows:
Domestic legal situation

[Translation]

s. 28 Absence of visa requirement and right of residence of EEA citizens. (1) EEA citizens are aliens who are nationals of a Contracting Party to the Agreement on the European Economic Area ("EEA Agreement").

(2) EEA citizens may enter and reside in Federal territory without a visa.

(3) EEA citizens have the right to reside in Federal territory. EEA citizens who do not have sufficient resources to maintain themselves or who are not covered by sickness insurance in respect of all risks have the right of residence only if they can:

1. provide the authorities with a declaration of appointment from their employer or a certificate of employment; or

2. prove to the authorities that they exercise a gainful self-employed activity; or

3. prove to the authorities that they have a genuine prospect of obtaining gainful employment within a period of six months from entering the territory; or

4. prove to the authorities that they will be maintained as a family member of an EEA citizen having the right of residence.

[German]

§ 28. Sichtvermerksfreiheit und Aufenthaltsberechtigung von EWR-Bürgern. (1) EWR-Bürger sind Fremde, die Statsangehörige einer Vertragspartei des Abkommens über den Europäischen Wirtschaftsraum (EWR-Abkommen) sind.

(2) EWR-Bürger brauchen zur Einreise und zum Aufenthalt keinen Sichtvermerk.

(3) EWR-Bürger sind zum Aufenthalt im Bundesgebiet berechtigt. EWR-Bürger; die nicht über ausreichende eigene Mittel zu ihrem Unterhalt oder über keine Krankenversicherung verfügen; die alle Risiken abdeckt, sind nur zum Aufenthalt berechtigt, wenn sie der

Behörde.

1. eine Einstellungserklärung ihres Arbeitgebers oder eine Arbeitsbescheinigung vorlegen können oder

2. nachweisen können, dass sie eine selbständige Erwerbstätigkeit ausüben oder

3. nachweisen können, dass sie innerhalb eines Zeitraumes von sechs Monaten nach der Einreise begründete Aussicht auf Aufnahme einer Erwerbstätigkeit haben oder

4. nachweisen können, dass ihnen als Familienangehöriger eines zum Aufenthalt berechtigten EWR-Bürgers Unterhalt gewährt wird.

[Translation]

s.88 Transitional provisions relating to orders for custody pending deportation, residence prohibitions and deportation orders.

(1) Proceedings for the issue of a residence prohibition or deportation order which are still pending when this Federal Act enters into force shall be pursued in accordance with its provisions.

(2) Decisions to hold a person in custody pending deportation made under the Aliens Police Act shall, from 1 January 1993, be deemed to have been made under this Federal Act. Where the custody pending deportation of any alien commenced before 1 January 1993 and has continued thereafter without interruption, such custody cannot be maintained for a longer total period than is allowed under this Federal Act.

(3) Residence prohibitions which have not expired when this Federal Act comes into force shall be deemed to be residence prohibitions of identical duration issued under this Federal Act.

[German]

§ 88 Übergangsbestimmungen für Schubhaftbescheide, Aufenthaltsverbote und Ausweisungen.

(1) Verfahren zur Erlassung eines Aufenthaltsverbotes oder einer Ausweisung, die bei Inkrafttreten dieses Bundesgesetzes anhängig sind, sind nach dessen Bestimmungen weiterzuführen.

(2) Schubhaftbescheide nach dem Fremdenpolizeigesetz gelten ab 1. Jänner 1993 als nach diesem Bundesgesetz erlassen. Die Schubhaft eines Fremden, die vor dem Jahreswechsel 1992/1993 begonnen hat und ohne Unterbrechung danach fortgesetz wird, darf insgesamt nicht länger aufrechterhalten werden, als nach diesem Bundesgesetz zulässig ist.

(3) Aufenthaltsverbote, deren Gültigkeitsdauer bei Inkrafttreten dieses Bundesgesetzes noch nicht abgelaufen sind, gelten als nach diesem Bundesgesetz erlassene Aufenthaltsverbote mit derselben Gültigkeitsdauer.

COMPLAINTS

The applicant considers that in view of the provisions of the new Aliens Act his arrest and detention was arbitrary and violated Article 5 of the Convention.

THE LAW

The applicant complains of his arrest on 7 June 1993 and subsequent detention until 28 June 1993, with a view to securing his expulsion, at which date the Regional Security Directorate granted his appeal finding that in accordance with new regulation in the Aliens Act of 1992 he had to be granted a residence permit. The applicant considers that consequently his arrest and detention was arbitrary and violated Article 5 para. 1 (Art. 5-1) of the Convention.

In accordance with the case-law of the European Court of Human Rights, "if detention is to be lawful ...it must essentially comply with national law and the substantive and procedural rules thereof (see, in the context of Article 5 para. 1 (e) (Art. 5-1-e), Eur. Court H.R. , Herczegfalvy judgment of 24 September 1992, Series A no. 244, p. 21, para. 63; similar criteria were applied to detention within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) in Eur. Court H.R., Weeks judgment of 2 March 1987, Series A no. 114, p. 22, para. 41). Moreover, "the Convention imposes requirements over and above the substantive and procedural rules of national law in ascertaining the compatibility of deprivation of liberty with Article 5 (Art. 5), namely that the individual should be protected from arbitrariness" (see, in the context of Article 5 para. 1(a) and (b)(Art. 5-1-a, 5-1-b), Benham v. United Kingdom, Comm. Report 29.11.94, para. 49, unpublished, with reference to Eur. Court H.R., Van der Leer judgment of 21 February 1990, Series A no. 170, p. 25 para. 22).

The Commission notes that on 7 April 1992 the competent Austrian authorities withdrew the applicant's residence permit and this decision became final on 21 October 1992. On 24 May 1993 the competent authorities consequently ordered the applicant's detention with a view to his expulsion. An appeal against this order was rejected on 15 June 1993 by the Independent Administrative Tribunal which found that despite the withdrawal of his residence permit the applicant continued to live in Austria and thereby violated domestic law. His arrest and detention were therefore found to be necessary to secure his expulsion.

The applicant's appeals to the Constitutional Court and the Administrative Court were to no avail. The latter court stated, inter alia, the fact that the applicant was on 28 June 1993 granted a residence permit did not affect the legality of the detention order which had been given previously, namely on 24 May 1993.

The Commission reaffirms that it is not competent to deal with applications alleging that errors of law have been committed by domestic courts, except where it considers that such errors involve a violation of a right or freedom set out in the Convention (/59, Dec. 29.3.60, Yearbook 3 p. 222; No. 5258/71, Dec. 8.2.73, Collection 43, p. 71; No. 79877/77, Dec. 13.12.79, D.R. 18 p.31).

The Commission finds that in the circumstances of the present case there is nothing to show that the Austrian authorities and courts dealt with the applicant's case in an arbitrary manner. The applicant's arrest and detention were consequently justified under Article 5 para. 1 (f)(Art. 5-1-f) of the Convention and there is no appearance of a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

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)