AS TO THE ADMISSIBILITY OF

Application No. 24375/94
by Bekir CIFTCI
against Austria

The European Commission of Human Rights sitting in private on 7 April 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

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 24 April 1994 by Bekir CIFTCI against Austria and registered on 10 June 1994 under file No. 24375/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 23 January 1995 and the observations in reply submitted by the applicant on 20 March 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen born in 1965. Before the Commission he is represented by Mr. L. Weh, a lawyer practising in Bregenz. The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant arrived in Austria in 1972 and he lived with his parents until 1984. In 1990 he married an Austrian citizen with whom he has three children. They were born in 1985, 1987, and in 1991 respectively and have Austrian citizenship. The applicant used to work in Austria.

On 14 January 1992 the Feldkirch Regional Court (Landesgericht) convicted the applicant for offences under the Narcotics Act (Suchtgiftgesetz) and sentenced him to two years' imprisonment. The court established that between January and July 1991 the applicant had sold a total of 700 grams of heroin, and that at different periods between July 1990 and August 1991 he had consumed cannabis, cocaine and heroin.

The Feldkirch Regional Court took into account, inter alia, that the applicant had admitted the acts imputed to him, that he had a clear criminal record and that he had started undergoing therapy which was progressing successfully. The execution of the sentence was stayed until 1 July 1993 and the applicant was ordered to undergo in-patient disintoxication therapy.

On 6 March 1992 the District Administrative Authority (Bezirkshauptmannschaft) in Bregenz imposed a residence prohibition on the applicant. The decision states, inter alia, that in 1989 the applicant had tried to transport illegally 33 Turkish nationals into Germany. The applicant admitted before the Austrian authorities that he had spent five weeks in detention in Kempten (Germany) and had paid a fine of DM 5,000. The Administrative Authority further established that in the course of the preceding five years the applicant had committed 13 administrative offences (Verwaltungsübertretungen) in Austria.

The District Administrative Authority held that both the applicant's attempt to smuggle foreigners out of Austria and his conviction for drug offences represented a relevant reason for imposing a residence prohibition on him.

The residence prohibition was based on Section 3 (1) of the Aliens Police Act 1954 (Fremdenpolizeigesetz). The Administrative Authority considered that in the light of the above findings the prohibition was necessary for the maintenance of public order and security. The public interest in preventing the applicant from committing further offences in Austria prevailed over the applicant's interest in staying united with his family.

On 20 October 1992 the Vorarlberg Police Headquarters (Sicherheitsdirektion) upheld the residence prohibition imposed on the applicant. The applicant then lodged a constitutional complaint. On 11 January 1993 the Constitutional Court (Verfassungsgerichtshof) granted his complaint suspensive effect, but on 22 March 1993 it decided not to deal with it. The case was transferred to the Administrative Court (Verwaltungsgerichtshof).

In his further and better particulars to the Administrative Court the applicant claimed, inter alia, that the interference with his right to respect for his private and family life was disproportionate to the aim pursued. In his view, the administrative authorities should have taken into account his behaviour and, in particular, his readiness to undergo a therapy. He further complained that the administrative authorities had not paid due attention to the progress he had made in

the course of that therapy, and to the decision to stay the execution of his prison sentence of 14 January 1992.

On 30 September 1993 the Administrative Court dismissed the applicant's complaint. It pointed out that the applicant had massively violated public order and security in that he had illegally transported foreigners out of Austria and had committed drug offences.

The Administrative Court found that, in view of the particularly dangerous character of drug offences, the public interest prevailed in such cases over the private interests of the person concerned. The Administrative Court further held:

[Translation]

> "In view of these facts, neither the applicant's readiness to undergo therapy, nor the stay of execution of the sentence granted by the court was capable of affecting the balance between the conflicting interests which was properly struck by the administrative authority to the disadvantage of the applicant."

[Original]

> "Von daher gesehen vermochte weder die Bereitschaft des Beschwerdeführers, sich einer Therapie zu unterziehen, noch der vom Gericht gewährte Aufschub des Strafvollzuges die richtigerweise zuungunsten des Beschwerdeführers ausgegangene behördliche Interessenabwägung zu beeinflussen."

On 5 October 1993 the Innsbruck Court of Appeal (Oberlandesgericht) suspended, after having examined the final report of the hospital in which the applicant had been treated, the applicant's prison sentence for a three years' probationary period.

According to the medical report, the applicant underwent in-patient treatment from 7 November 1991 until 23 February 1992. From the latter date until 24 July 1992 he spent only nights in the hospital while he worked during the day. Subsequently, the applicant received out-patient social therapeutic treatment. On 8 September 1993 the institution "Clean", an advisory body on drug questions, attested his motivation to abstain from the use of drugs in the future. The Court of Appeal concluded, therefore, that the applicant's treatment had been successful and decided to mitigate his sentence.

In view of this decision, the applicant requested that the residence prohibition imposed on him should be lifted. His request was dismissed by the Bregenz District Administrative Authority on 12 July 1994. On 3 November 1994 the Vorarlberg Police Headquarters upheld this decision. The District Administrative Authority noted that under Section 26 of the Aliens Act a residence prohibition shall be lifted either on request or ex officio when the grounds on which such a prohibition was based no longer exist. It considered, however, that the applicant was likely to re-offend in the future, and that the decision to mitigate his sentence did not warrant lifting the residence prohibition which had been imposed on him.

On 3 November 1994 the Constitutional Court refused to deal with the applicant's complaint about the refusal to lift the residence prohibition. It held that the complaint only raised issues under ordinary law, and that the case was not excluded from the jurisdiction of the Administrative Court.

COMPLAINT

The applicant complains that the residence prohibition imposed on him interfered with his right to respect for his private and family life. He alleges a violation of Article 8 of the Convention.

Originally, the applicant also complained that the Austrian authorities had not taken into account that his prison sentence was suspended after he had successfully undergone a disintoxication therapy.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 April 1994 and registered on 10 June 1994.

On 20 October 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 23 January 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 20 March 1995. On 10 September 1996 he submitted supplementary observations and informed the Commission about further developments in his case.

THE LAW

The applicant complains that the residence prohibition imposed on him interfered with his right to respect for his private and family life. He alleges a violation of Article 8 (Art. 8) of the Convention which reads, so far as relevant, 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 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 Government maintain that the applicant has failed to comply with the requirement as to the exhaustion of domestic remedies laid down in Article 26 (Art. 26) of the Convention as he did not seek redress, after the administrative authorities had refused to lift the residence prohibition, before the Constitutional Court or the Administrative Court.

The applicant contends that he unsuccessfully complained about the refusal to lift the residence prohibition to the Constitutional Court. He submits that he did not seek redress in this respect also before the Administrative Court as such an action lacked any prospect of success. The applicant further maintains that the object of his application is the decision to impose a residence prohibition on him, and that he does not complain separately about the subsequent refusal to lift this prohibition.

The Commission notes that the final decision as regards the imposition of a residence prohibition upon the applicant was taken by the Administrative Court on 30 September 1993. The judgment was served on the applicant on 25 October 1993. Subsequently, the applicant requested that the residence prohibition should be lifted on the ground that he had successfully undergone a disintoxication therapy and that his prison sentence had been, therefore, mitigated. The applicant was entitled to lodge such a request as under Section 26 of the Aliens Act a residence prohibition shall be lifted when the grounds on which it was based no longer exist.

Thus, as a result of further developments in the applicant's case

a new opportunity arose for the respondent Party to redress the alleged interference with the applicant's rights under the Convention. Since the basis of the rule of exhaustion of domestic remedies laid down in Article 26 (Art. 26) of the Convention is that the State made answerable must have had an opportunity of redressing the alleged damage by domestic means (cf., mutatis mutandis, No. 12945/87, Dec. 4.4.90, D.R. 65 p. 173), the Commission will take into consideration also the proceedings concerning this request.

The Commission notes that the applicant unsuccessfully complained about the refusal to lift the residence prohibition to the Constitutional Court but failed to seek redress in this respect also before the Administrative Court. However, on 30 September 1993, when dealing with the applicant's complaint about the imposition of a residence prohibition, the Administrative Court had already held that neither the applicant's readiness to undergo a therapy, nor the stay of execution of his prison sentence was capable of affecting the decision challenged by the applicant.

In view of this finding, the Commission considers that a possible complaint to the Administrative Court about the refusal to lift the residence prohibition after the applicant's sentence had been mitigated cannot be regarded as a remedy which the applicant should be required to try (cf., mutatis mutandis, No. 14838/89, Dec. 5.3.91, D.R. 69 pp. 286, 302). Accordingly, the applicant used the remedies which were effective and sufficient for the purposes of Article 26 (Art. 26) of the Convention and the Government's objection in this respect cannot be upheld.

The Government further point out that the applicant was convicted of drug offences and that he was involved in illegal transporting of foreigners from Austria to Germany. They submit that the interference with the applicant's rights under Article 8 (Art. 8) of the Convention pursued a legitimate aim, namely the prevention of disorder and the protection of public safety and health. The Government consider, with reference to the seriousness of the acts committed by the applicant and the risk that he could re-offend, that the interference with his rights was not disproportionate to the aim it pursued notwithstanding that the applicant was socially integrated in Austria.

The applicant contends that the interference with his rights was disproportionate as his family and social ties were in Austria. He submits that the imposition of a residence prohibition on him was arbitrary as there existed no pressing social need for separating him from his family.

After an examination of these issues in the light of the parties' submissions, the Commission considers that they raise questions of fact and law which can only be determined by an examination of the merits. It follows that the applicant's complaint cannot be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds of inadmissibility have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission