AS TO THE ADMISSIBILITY OF

Application No. 33052/96
by Hasan GÜNDOGDU
against Austria

The European Commission of Human Rights sitting in private on 6 March 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
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
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
Mr. R. NICOLINI

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;

- the application introduced on 19 September 1996 by Hasan GÜNDOGDU against Austria and registered on 20 September 1996 under file No. 33052/96;

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

- the observations submitted by the respondent Government on 4 October 1996 as well as on 15 November 1996 and the observations in reply submitted by the applicant on 16 October 1996 as well as on 29 November 1996;

- the further observations submitted by the Government on 17 January 1997, and the observations in reply submitted by the

applicant on 10 February 1997

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1972, is a Turkish national. At the time of lodging his application he was detained at the Salzburg Stadt Police Prison. In the proceedings before the Commission he is represented by Mr. W. Vacarescu, a lawyer practising in Graz.

A. Particular circumstances of the case

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

On 16 August 1994 the applicant crossed the border between Hungary and Austria. He carried a passport giving the name of Ahmed Koyuncu. He was immediately taken into detention with a view to his expulsion.

On 17 August 1994 he applied for asylum and was heard by the Eisenstadt branch of the Federal Office for Asylum (Bundesasylamt), which rejected his request on the same day. It noted the applicant's submissions that he was of Kurdish origin and had, since 1989, been active for the TKPML (Turkish Communist Party/Marxist Leninist), of which he formally had become a member in 1991. His task was to make propaganda for the party and to win supporters. Since 1991 the Turkish police had frequently arrested members of his party, had tortured them and thus obtained the names of further members. In May 1994 he had participated in an illegal demonstration, had been beaten on the head by the police and lost consciousness. In the first half of July 1994 about sixty members of TIKKO (Turkish Worker Peasant Liberation Army), the militant wing of TKPML, had been arrested and the names of more TKPML members had been disclosed. Also his cover name had become known and the police was searching for him.

The Federal Office for Asylum found that the reasons invoked by the applicant did not suffice to show that he suffered political persecution within the meaning of the Geneva Convention relating to the Status of Refugees (Refugee Convention). Rather he risked legitimate criminal prosecution for supporting a terrorist organisation, namely the TKPML. Moreover, referring to S. 2 para. 2 (3) of the Asylum Act (Asylgesetz), it found in any case that he had no right to be granted refugee status, as he had been in safe countries (sicheres Drittland) prior to his arrival in Austria. In particular, he had stayed in Bulgaria, Rumania, the Ukraine and Hungary.

On 18 August 1994 the Neusiedel District Administrative Authority (Bezirksverwaltungsbehörde) ordered the applicant's deportation (Ausweisung) on the ground of his illegal entry from Hungary.

On 2 September 1994 the Graz Federal Police Authority (Bundespolizeidirektion), upon the applicant's request under S. 54 of the Aliens Act (Fremdengesetz), heard him as regards the question whether his expulsion to Turkey would be permissible. These proceedings are still pending.

The applicant submitted in particular that he was of Kurdish origin and had supported anti-government groups since his youth. Since 1990 he had lived in the underground, mainly in Istanbul, as the police was searching for him. Since 1991 he had been an active member of an illegal leftist party, namely TKPML, which supported minority groups, like Kurds and Armenians. Being a journalist he had drafted propaganda material for his party, had made interviews in the war zones and the

like. It was there that pictures had been taken of him which were published in several newspapers and thus had come to the attention of the Turkish authorities. His party had organised documents for him carrying the name of Ahmed Koyuncu. His cover name within the party was "Cemal". He used it for example when he was publishing articles in the party newspaper. In May 1994 he had participated in a demonstration and had received a heavy blow on the head. In July 1994 about sixty persons belonging to minority groups had been arrested, including a member of his party. He had left Turkey on 20 July 1994.

On 20 September 1994 the Burgenland Public Security Authority (Sicherheitsdirektion) confirmed the deportation order against the applicant. Referring to S. 17 para. 2 (6) of the Aliens Act, it found that he had entered Austria illegally. As he had not come directly from the country where he was allegedly persecuted this entry was not justified under the Asylum Act. Finally, a deportation order obliged him to leave Austria, but did not oblige him to return to his country of origin. The question whether he could be returned to Turkey was reviewed in separate proceedings under S. 54 of the Aliens Act.

On 29 September 1994 the Federal Ministry for the Interior (Bundesministerium für Inneres) rejected the applicant's appeal against the refusal of his request for asylum. However, it granted the applicant special leave to stay until 20 March 1995.

The Ministry found that the applicant had failed to show that he had left his country of origin for a well-founded fear of persecution. His submissions that the Turkish police was searching for him on account of his membership in the TKPML were not credible, as he had not been able to specify them. Moreover, he had only claimed to have disseminated propaganda and tried to win supporters. In view of the low profile of these activities, it was not clear why the State would have any particular interest in persecuting him. As regards his submissions that he had been beaten during an illegal demonstration, the Ministry noted that the recourse to force which was necessary to maintain public security, did not constitute persecution. Finally, the applicant had obtained a Turkish identity card and a passport in April and May 1994, respectively, i.e. before the events which allegedly caused him to flee, which again cast doubt on his credibility.

Furthermore, the Ministry noted that the applicant in any case had no right to asylum because he had been in safe countries before coming to Austria. He had travelled via Bulgaria, Rumania, the Ukraine and Hungary. As Bulgaria, Rumania and Hungary were parties to the Refugee Convention, he could have requested asylum in one of these countries without running the risk of being expelled to Turkey before an examination of his request. The Ministry noted that the applicant had submitted a document of 25 March 1994 by the United Nations High Commissioner for Refugees (UNHCR) concerning the protection from expulsion in Rumania and Bulgaria. However, UNHCR had not shown any specific case where an expulsion had taken place contrary to the rules of international law. As regards Hungary, it was true that this State had only ratified the Refugee Convention with regard to European refugees. However, as the application had been resident in Istanbul, i.e. in the European part of Turkey, it would have been applicable to him. Moreover, the Ministry referred to observations of 4 July 1994 submitted by UNHCR to the German Federal Constitutional Court, according to which asylum seekers coming from outside Europe were allowed to stay in Hungary until UNHCR had examined their asylum requests. Hungary had also ratified the European Convention on Human Rights and was thus bound by its Article 3.

Finally, the Ministry noted that it could, in accordance with S. 8 of the Asylum Act, upon refusing a request for asylum, grant leave to stay for a maximum period of one year, if an expulsion was impossible for legal or factual reasons or if the person concerned could not be expected to return to his country of origin on account of

the situation pertaining in that country. The Ministry, without giving any specific reasons, noted that the conditions for granting such leave to stay were met in the applicant's case.

On 27 June 1995 the Administrative Court (Verwaltungs-gerichtshof), upon the applicant's complaint, quashed the Ministry's decision as regards the refusal of asylum.

The Court found that the Ministry had not duly considered the applicant's argument that following the disclosure of his cover name and his membership in an illegal organisation, namely TKPML, he risked persecution. In particular it noted that the applicant had, in the appeal proceedings, submitted a newspaper article which showed his membership of the TKPML and thereby also proved its disclosure. The Ministry would have been required to deal with the applicant's submissions that the penalty he risked to incur in this context was disproportionate and was, in view of the practice of torture in Turkish prisons, to be qualified as persecution on account of his political beliefs. Without further investigations it was not possible to conclude that the applicant would not suffer political persecution. In addition, the Court, referring to its own case-law, noted that even a suspicion of participation in armed conflict with Government troops - which might possibly be indicated by the said newspaper article - did not prevent the granting of refugee status. The fact that the applicant had obtained a passport, under a wrong name, prior to the events which had caused his flight, did not in itself cast doubt on his credibility.

Moreover, the Court rejected the Ministry's reasoning as to the protection of the applicant in safe countries. If the Ministry had doubts as regards the information contained in the UNHCR document concerning Bulgaria and Rumania, which the applicant had presented, it would have been called upon to carry out further investigations. Hungary had limited its obligations under the Refugee Convention. Its application depended on whether the events causing the flight had occurred in Europe or not. It was irrelevant whether the applicant had been resident in the European or in the Asian part of Turkey, as the events relied on by him had possible repercussions in the entire country. Thus, the Ministry's arguments as regards protection in Hungary were not persuasive. Inasmuch as the Ministry had relied on observations of UNHCR of 4 July 1994 it had failed to hear the applicant. Moreover, this report was not enclosed in its file. A mere reference to Hungary's adherence to the European Convention on Human Rights was not sufficient either to qualify it as a safe country.

In conclusion, the Court found that the proceedings had suffered from considerable procedural defects, as the Ministry had failed to carry out the necessary investigations and to respect the applicant's right to be heard on their results.

On 19 March 1996 the applicant got married. His wife is also a Turkish national, who had been granted refugee status on 19 January 1995 by the Salzburg branch of the Federal Office for Asylum.

On 12 August 1996 the Ministry for the Interior in renewed proceedings rejected the applicant's request for asylum on the ground that prior to his arrival in Austria he had stayed in Hungary, which had to be considered a safe country. Thus, he should have requested asylum there. The Ministry again relied on the observations of UNHCR of 4 July 1994. It noted that it had now given the applicant the opportunity to comment on them. However, his submissions in which he referred to a report of UNHCR from November 1995 in order to show that Hungary was not a safe country, were irrelevant as the question had to be assessed on the basis of the situation pertaining at the time of the applicant's stay in Hungary. His request to hear a particular witness had to be rejected on the same ground.

On 6 September 1996 the applicant was taken into detention with a view to his expulsion at the Salzburg Stadt Police Prison. The Salzburg Federal Police Authority has already requested a "laissez-passer" (Heimreisezertifikat) in order to return him to Turkey.

On 10 September 1996 the applicant requested the Minister for the Interior to look into his case. According to the Government, the Salzburg Federal Police Authority was thereupon requested to submit a report and to refrain from expelling the applicant.

On 11 September 1996 the applicant again lodged a complaint with the Administrative Court and requested that it be given suspensive effect.

On 17 September 1996 the Salzburg Independent Administrative Panel (Unabhängiger Verwaltungssenat) dismissed the applicant's appeal finding that his detention was lawful. It noted in particular that the applicant was illegally residing in Austria and that there was an enforcable deportation order against him. Thus, his detention served the purpose of securing his expulsion. According to the case-law of the Administrative Court, the question whether expulsion to a specific State was permissible was not to be reviewed in the proceedings relating to the lawfulness of the detention with a view to expulsion, but in separate proceedings. The fact that proceedings under S. 54 of the Aliens Act were still pending did not render the applicant's detention unlawful. Moreover, the Federal Police Authority had already taken steps to obtain a "laissez-passer" for the applicant.

On 19 September 1996 the Salzburg Independent Administrative Panel dismissed the applicant's renewed appeal. It noted that contrary to its finding in the first decision, the applicant was married. However, this was rather an argument for and not against the assumption that he would try to evade his expulsion. Moreover, he was not unfit for detention. A medical examination of 18 September had shown that, despite the fact that he had been on hunger strike since thirteen days, his circulation was stable and he did not suffer from metabolic disturbances. In conclusion, his further detention with a view to his expulsion was lawful.

On 20 September 1996 the Administrative Court rendered a decision on the applicant's request that his complaint against the Ministry's decision of 12 August 1996 be given suspensive effect. It stated that the request was granted with the effect that the applicant obtained the legal status which he had had as an asylum seeker before the contested decision was issued.

On 23 September 1996 the Salzburg Independent Administrative Panel again found that his detention with a view to his expulsion was lawful. It referred to its decision of 19 September 1996 and noted that the applicant had, immediately after the service of this decision, lodged a new appeal without dealing with the arguments contained therein and without submitting any new facts. His submission of 20 September in which he referred to a letter of the Secretary of the European Commission of Human Rights of the same day was irrelevant as it only contained an indication of the Commission to the Austrian Government to refrain from the applicant's expulsion until the Commission could examine his application. However, the requirements for his detention were still met and his release could only be envisaged if his expulsion was impossible at all and not only temporarily.

The applicant was released on the same day.

B. Relevant domestic law

Asylum Act (Asylgesetz 1991)

S. 1 of the 1991 Asylum Act states that a refugee is a person,

who left his or her home country on account of a well-founded fear of being persecuted on account of his or her race, religion, nationality or adherence to a particular social group or political opinion.

S. 2 para. 3 states that asylum is not to be granted to a refugee who has already been safe from persecution in another country.

S. 4 provides that, upon request, the granting of asylum is to be extended to the spouse if the marriage has already existed before the entry into Austria.

According to S. 7 para. 1 an asylum seeker who has entered Austria in accordance with Article 6 (i.e. who has come directly from the State where he allegedly suffered persecution) and who has filed his request for asylum within one week, has a temporary right to residence.

S. 8 provides that the asylum authority, upon refusing a request for asylum, may in cases which merit particular consideration, ex officio grant the alien a temporary right to residence, if his expulsion is impossible for legal of factual reasons or if he cannot be expected to return to his country of origin on account of the situation pertaining there or for other important reasons (paragraph 1). This temporary right to residence may be granted for a period of up to one year and may be prolonged for a further period of up to one year if the reasons for granting it persist (paragraph 2).

Aliens Act (Fremdengesetz 1992)

S. 17 para. 2 (6) of the Aliens Act states that a deportation order may be issued against an alien in the interest of public order, if he has entered Austria contrary to the provisions regulating the entry of aliens or by evading boarder controls and has been discovered within one month.

S. 37 deals with cases where it is prohibited to expel an alien. Paragraph 1 states that an alien may not be expelled to a specific State if there are firm reasons to believe that he would be in danger of being subjected to inhuman treatment or punishment or to capital punishment in that State.

S. 37 para. 2 refers to Article 33 (1) of the Refugee Convention, and provides that an alien may not be expelled to a State if there are firm reasons to believe that in that State his life or his security would be endangered on grounds of his race, religion, nationality or adherence to a social group or on the ground of his political opinions.

According to S. 37 para. 6 an alien may not be expelled as long as this would be contrary to an interim measure taken by the European Commission of Human Rights or the European Court of Human Rights.

S. 54 para. 1 states that the Authority, at the alien's request, has to render a declaratory decision on whether or not there are firm reasons to believe that the alien, in a State indicated by him, is endangered within the meaning of S. 37 para. 1 or 2.

S. 54 para. 2 provides that such a request may only be made during proceedings concerning the issue of an expulsion order or of a residence ban and that the alien has to be informed in time of the possibility to make the request.

S. 54 para. 4 states that an expulsion may not be carried out as long as the decision relating to the request under S. 54 has not become final.

Federal Constitutional Act (Bundes-Verfassungsgesetz)

Article 130 para. 1 of the Federal Constitutional Act provides

that the Administrative Court decides on complaints about the alleged unlawfulness of decisions of the administrative authorities including the Independent Administrative Panels.

According to Article 144 para. 1 of the Federal Constitutional Act, the Constitutional Court decides on complaints about decisions of the administrative authorities including the Independent Administrative Panels, if the applicant alleges that the decision violated his constitutionally guaranteed rights or that the decision was based on an illegal decree, an unconstitutional law or an unlawful international treaty and thereby violated his or her rights.

COMPLAINTS

1. The applicant complains that his expulsion to Turkey would expose him to a real risk of being subjected to treatment contrary to Article 3 of the Convention. In particular he risks being tortured and being subjected to a disproportionate penalty on account of his membership of the TKPML, an illegal leftist party. Being a journalist, he stayed in the mountains with rebels of TIKKO, the militant wing of the TKPML. Reports which also contained his picture were published in Turkish newspapers. He points out that even the Austrian Administrative Court has found that his membership and activity for TKPML were established. In his observations of 10 February 1997 the applicant also invokes Article 2 of the Convention. He submits that he risks to be prosecuted for offences which carry the death penalty, namely treason or attempt to owerthrow the constitution. Further, there is also a risk of arbitrary execution for persons like him who are suspected of terrorist activities or political offences.

2. In his observations of 16 October 1996 the applicant also complains under Article 5 of the Convention that his detention was unlawful and that the review by the Independent Administrative Panel was not in conformity with paragraph 4 of this Article. He submits in particular that the Panel could only review the formal aspects of the lawfulness of his detention with a view to his expulsion, e.g. whether it had been ordered by a decision and whether the time-limits were respected, whereas it could not review the lawfulness of the expulsion as such.

3. Also in his observations of 16 October 1996 the applicant complains under Article 8 of the Convention that his expulsion would violate his right to respect for his family life as he is married to a Turkish national who has been granted refugee status in Austria in 1995 and can therefore not be expected to follow him to Turkey.

4. Again in his observations of 16 October 1996 the applicant complains under Article 13 of the Convention that the proceedings under S. 54 of the Aliens Act do not provide an effective remedy against an expulsion which would be contrary to Article 3. In his submissions of 29 November 1996 the applicant further complains that he has no effective remedy against a violation of his right to respect for his family life under Article 8.

5. In further submissions of 25 October 1996 the applicant complains under Article 6 that, in the proceedings under S. 54 of the Aliens Act, he cannot obtain a decision by an impartial tribunal. He argues that these proceedings concern his right to freedom from injury, which has to be classified as a civil right.

6. In his submissions of 29 November 1996 the applicant complains that the proceedings under S. 54 of the Aliens Act are not in conformity with Article 14 of the Convention. He refers to his submissions relating to the question whether these proceedings provide an effective remedy as regards complaints under Article 3.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 September 1996 and registered on 20 September 1996.

On 19 September 1996 the President of the Commission decided to apply Rule 36 of the Commission's Rules of Procedure and to communicate the application to the respondent Government.

The Government's written observations were submitted on 4 October 1996. The applicant replied on 16 October 1996. The Government made further submissions on 17 October 1996, to which the applicant replied on 25 October 1996.

On 24 October 1996 the Commission decided to prolong the application of Rule 36 of its Rules of Procedure and to communicate the applicant's complaints which he had raised in his submissions of 16 October 1996 to the respondent Government.

The Governments written observations were submitted on 15 November 1996. The applicant replied on 29 November 1996.

On 6 December 1996 the Commission decided to prolong the application of Rule 36 of its Rules of Procedure and to put a further question to the Government as to the merits of the applicant's complaint under Article 3 of the Convention.

The Government's further observations were submitted on 17 January 1997, after an extension of the time-limit. The applicant replied on 10 February 1997.

THE LAW

1. The applicant complains under Article 3 (Art. 3) of the Convention that his expulsion to Turkey would expose him to a real risk of being tortured and subjected to a disproportionate penalty on account of his membership of the TKPML, an illegal leftist party. The applicant also relies on Article 2 (Art. 2) of the Convention, claiming that he risks to be persecuted for offences which carry the death penalty.

Article 2 para. 1 (Art. 2-1) of the Convention reads as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3 (Art. 3) of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that the expulsion of an alien may give rise to an issue under Article 3 (Art. 3) of the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to torture or inhuman or degrading treatment in the country to which he is expelled (see Eur. Court HR, Chahal v. the United Kingdom judgment of 15 November 1996, to be published in Reports of Judgments and Decisions 1996, paras. 73-74).

The Government submit that the applicant failed to exhaust domestic remedies in accordance with Article 26 (Art. 26) of the Convention. They submit in particular that the Administrative Court, on 20 September 1996, granted the applicant's request that his

complaint against the refusal of asylum be given suspensive effect. Moreover, the applicant failed to lodge a complaint with the Constitutional Court. The Government refer to the case of C.R. and Others v. Austria (No. 18101/91, Dec. 7.5.93, unpublished), concerning the complaint of a group of Tamils from Sri Lanka that their expulsion would violate Article 3 (Art. 3) of the Convention. In this case the Commission found that the applicants failed to exhaust domestic remedies on the ground that they had not lodged a complaint with the Constitutional Court and the Administrative Court.

Further, the Government argue that proceedings under S. 54 of the Aliens Act with the purpose of establishing whether the applicant's expulsion to Turkey is permissible are still pending before the Neusiedel District Administrative Authority. Inasmuch as the applicant complains that no decision has been taken in these proceedings, the Government submit that he failed to make a request for transfer of jurisdiction to the higher authority (Devolutionsantrag). In any case, as long as no final decision has been taken in these proceedings, the applicant's expulsion is prohibited by S. 54 para. 4 of the said Act. Moreover, the applicant could lodge a complaint with the Constitutional Court and the Administrative Court against a decision in these proceedings.

Finally, the Government refer to S. 37 para. 6 of the Aliens Act, according to which the applicant may not be expelled as long as this would be contrary to an interim measure indicated by the Commission.

The applicant contests the Government's view. He points to the wording of the Administrative Court's decision of 20 September 1996 according to which he obtains the legal status he had before the decision refusing his request for asylum. However, he did not have a right to stay in Austria under S. 7 of the 1991 Asylum Act, as he had not travelled to Austria directly from the persecuting state. The special leave to stay, based on S. 8 of the Asylum Act, which the Ministry for the Interior had granted him by decision of 29 September 1994 had expired on 20 March 1995 and had not been renewed. Thus, despite the Administrative Court's decision, he was illegally in Austria. As regards the Commission's decision in Application No. 18101/91, the applicant submits that it concerned proceedings under the 1968 Asylum Act, according to which the applicants in that case had a temporary right to residence. Moreover, the Commission did not only rely on the non-exhaustion of domestic remedies when declaring this case inadmissible, but found that the applicants' complaint was in any case manifestly ill-founded. Furthermore, the applicant points out that the deportation order against him is final and can be executed at any time.

As regards the proceedings under S. 54 of the Aliens Act, the applicant submits that his request for a decision that his expulsion to Turkey would not be permissible has been pending at first instance since 2 September 1994. No decision has been taken to date, whereas the deportation order against him has become final. He points out that he could only make a request under S. 54 of the Aliens Act while proceedings concerning the deportation order were pending and that he had no possibility of invoking this provision once he was taken into detention with a view to expulsion.

Furthermore the applicant submits that these proceedings suffer from various general defects. Firstly, the same authorities, namely the Federal Police Authorities and the Public Security Authorities which order detention with a view to expulsion are competent to decide whether his expulsion to a specific country would be permissible. Once a negative decision has been taken at second instance the expulsion is permissible. It is true that the person concerned may lodge a complaint with the Constitutional Court and with the Administrative Court together with a request for suspensive effect. However, until these courts take a decision on such a request the expulsion may be carried

out. The applicant alleges that this actually happens and that it comes to a virtual race between the alien's counsel and the immigration authorities. He submits a newspaper article and a number of documents relating to the case of a Turkish national of Kurdish origin who was expelled five days after the Public Security Authority had given a negative decision in proceedings under S. 54 of the Aliens Act, and on the very day the Constitutional Court granted his complaint against this decision suspensive effect.

The Commission recalls that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Convention organs that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, to be published in Reports of Judgments and Decisions 1996, para. 68).

The Commission further recalls that a remedy which does not suspend execution of a decision to expel an alien to a specified country is not effective for the purposes of Article 26 (Art. 26) of the Convention (cf. 17550/90 and 17825/91, Dec. 4.7.91, D.R. 70 p. 298, 315 with further references).

The Commission notes that the Administrative Court, by decision of 20 September 1996, granted the applicant's complaint suspensive effect. Thereby the applicant obtained the legal status which he had had as an asylum seeker before the Ministry's decision of 12 August 1996. The Commission considers that it is not decisive whether or not the applicant has a temporary right to residence under the 1991 Asylum Act. What is important is that he has again the status of an asylum seeker whose request for asylum has not yet been finally rejected. In this context the Commission notes in particular that, although the deportation order against the applicant has been final since 20 September 1994, the police authorities did not take steps to expel him before the rejection of his request for asylum became final by the Ministry's decision of 12 August 1996. Moreover, they released him from detention with a view to his expulsion three days after the Administrative Court had taken its decision to grant his complaint suspensive effect. In the circumstances of the case, the Commission has no reasons to believe that the police authorities would proceed to the applicant's expulsion while the proceedings before the Administrative Court are still pending and despite the fact that his complaint has been granted suspensive effect.

Moreover, the Commission notes that the applicant, in accordance with Article 130 para. 1 of the Federal Constitutional Act, may complain before the Administrative Court that the decision of the Ministry for the Interior, refusing his asylum request, was unlawful, i.e. contrary to the Asylum Act. Thus, the Administrative Court has to consider basically the same elements the Commission has to consider under Article 3 (Art. 3), in particular the question whether the applicant has left Turkey on account of a well-founded fear of persecution. The same considerations apply as regards the applicant's submissions under Article 2 (Art. 2) that he would be subjected to the death penalty on account of his illegal political activities. If the Administrative Court finds that the asylum authorities wrongly applied the law or violated certain procedural requirements, it has to quash the decision. Thus, it is able to consider, in substance, the complaints raised by the applicant and to redress the situation complained of.

For these reasons, the Commission finds that the proceedings which are currently pending before the Administrative Court provide an effective remedy as regards the applicant's complaint that his expulsion would expose him to a real risk of being tortured and subjected to a disproportionate penalty or even the death penalty.

Having regard to this finding, the Commission is not required to decide whether, in the particular circumstances of the case, the proceedings under S. 54 of the Aliens Act also provide an effective remedy.

In conclusion, the Commission finds that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention.

It follows that this part of the application has to be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

2. The Commission will next examine the applicant's complaint under Article 8 (Art. 8) of the Convention that his expulsion would violate his right to respect for his private and family life as he is married to a Turkish national who has been granted refugee status in Austria in 1995 and can therefore not be expected to follow him to Turkey.

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 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."

As regards the exhaustion of domestic remedies the Government rely on the same arguments as above. Further, they point out that the applicant did not have a right to have his wife's right to asylum extended to him under S. 4 of the Asylum Act.

The applicant maintains that he has no effective remedy as regards his complaint under Article 8 (Art. 8) of the Convention.

The Commission recalls that the proceedings concerning the applicant's complaint about the refusal of his request for asylum are still pending before the Administrative Court and are having suspensive effect. In these circumstances, the applicant's separation from his wife is not yet imminent and his complaint appears to be premature.

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.

3. The applicant also complains under Article 5 (Art. 5) of the Convention that his detention was unlawful and that the scope of review of the Independent Administrative Panel was not in conformity with paragraph 4 of this Article.

Article 5 (Art. 5) of the Convention, so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following

cases and in accordance with a procedure prescribed by law:

...

f. the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

As regards the exhaustion of domestic remedies as required by Article 26 (Art. 26) of the Convention, the Government rely on the same arguments as above.

The applicant submits that he could have lodged a complaint with the Constitutional Court and the Administrative Court against the decision of the Independent Administrative Panel. However, he refers to case-law of the Constitutional Court according to which such complaints would not have offered prospects of success.

The Commission is not required to examine whether the applicant has exhausted domestic remedies, as this part of the application is in any event inadmissible for the reasons set out below.

As to the merits of the complaint, the Government point out in particular that the Salzburg Independent Administrative Panel found that there was a final deportation order against the applicant and that, thus, his detention with a view to his expulsion was lawful.

The applicant submits that the Independent Administrative Panel could only review the formal aspects of the lawfulness of his detention, e.g. whether it had been ordered by a proper decision and whether the time-limits were respected, whereas it could not review the lawfulness of the expulsion as such. The question whether his expulsion to Turkey was permissible had to be dealt with in separate proceedings under S. 54 of the Aliens Act.

The Commission notes that the applicant has not substantiated his complaint under Article 5 (Art. 5) that his detention was unlawful under domestic law. However, on the basis of the material before it, there is no doubt that he was detained from 6 to 23 September 1996 with a view to his deportation within the meaning of Article 5 para. 1 (f) (Art. 5-1-f).

The Commission recalls that all that is required under this provision is that "action is being taken with a view to deportation" and that it is, therefore, immaterial for the purposes of Article 5 para. 1 (f) (Art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law (Eur. Court HR, Chahal v. the United Kingdom judgment of 15 November 1996, to be published in Reports of Judgments and Decisions 1996, para. 112).

In the present case there was a final deportation order against the applicant and specific steps to enact his expulsion, such as requesting a "laissez-passer" for him, were taken. The applicant's detention was, thus, in conformity with Article 5 para. 1 (f) (Art. 5-1-f).

As to Article 5 para. 4 (Art. 5-4), the Commission recalls that the judicial review under this Article should be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 para. 1 (Art. 5-1). In cases of detention with a view to deportation it follows from the requirements

of Article 5 para. 1 (Art. 5-1) that Article 5 para. 4 (Art. 5-4) does not demand that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law (Chahal v. the United Kingdom judgment, loc. cit., paras. 127-128). In view of this case-law, the applicant's complaint that the scope of review of the Independent Administrative Panel was insufficient in that it could not examine the lawfulness of his expulsion, does not disclose any appearance of a violation of Article 5 para. 4 (Art. 5-4).

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.

4. The applicant complains under Article 6 (Art. 6) of the Convention that, in the proceedings under S. 54 of the Aliens Act, he cannot obtain a decision by an impartial tribunal. He argues that these proceedings concern his right to freedom from injury, which has to be classified as a civil right.

The Commission recalls that the proceedings under S. 54 of the Aliens Act deal with the question whether an alien may be expelled to a specific State or whether his expulsion would be prohibited on the ground that he would risk treatment contrary to Article 3 (Art. 3) of the Convention or political persecution within the meaning of the Refugee Convention in that country. They are, thus, closely linked to the proceedings concerning the deportation order and do not fall within the scope of Article 6 (Art. 6) (cf. No. 12972/87, Dec. 9.11.87, D.R. 54 p. 207, 212).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention, within the meaning of Article 27 para. 2 (Art. 27-2).

5. The applicant complains under Article 13 (Art. 13) of the Convention that the proceedings under S. 54 of the Aliens Act do not provide an effective remedy against an expulsion which would be contrary to Article 3 (Art. 3). He further complains that he did not have an effective remedy as regards his complaint that his expulsion would violate his right to respect for his family life under Article 8 (Art. 8).

Article 13 (Art. 13) reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government submit that the proceedings under S. 54 of the Aliens Act satisfy the requirements of Article 13 (Art. 13) of the Convention. They refer to the Commission's admissibility decision in the case of Ahmed v. Austria (No. 25964/94, Dec. 7.3.95, unpublished), in which the Commission found that these proceedings "may, in principle, provide an effective remedy against a foreigner's expulsion". Further they point out again that S. 54 para. 4 of the Aliens Act prohibits a foreigner's expulsion as long as no final decision is taken in these proceedings.

The applicant submits in particular that the immigration authorities which decide in the proceedings under S. 54 of the Aliens Act are not sufficiently independent and are, thus, not in conformity with the requirements of Article 13 (Art. 13). As regards a review by the Administrative Court he refers to his above submissions, alleging in particular that the immigration authorities in most cases carry out the expulsion without waiting for the Court's decision on a request for suspensive effect and that the Administrative Court holds that the

applicant has no longer a legitimate interest in the decision once an expulsion has taken place.

The Commission, having regard to its above finding that the Administrative Court granted the applicant's complaint in the asylum proceedings suspensive effect, considers that the applicant in the particular circumstances of the case, cannot claim to be a victim of a violation of his right to an effective remedy as regards his complaint under Article 3 (Art. 3) of the Convention. The applicant's submissions concerning the alleged lack of an effective remedy as regards his complaint under Article 8 (Art. 8) are unsubstantiated.

In conclusion, the Commission finds that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. Finally, the applicant complains that the proceedings under S. 54 of the Aliens Act are not in conformity with Article 14 (Art. 14) of the Convention. He refers to his submissions relating to the question whether these proceedings provide an effective remedy as regards complaints under Article 3 (Art. 3).

Article 14 (Art. 14) reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission recalls that this provision only prohibits discrimination regarding enjoyment of the rights and freedoms guaranteed by the Convention (cf. No. 19819/92, D.R. 78 p. 88).

It appears that the applicant wishes to complain that he has been discriminated against in the enjoyment of his rights under Article 3 (Art. 3) of the Convention. However, he has failed to substantiate in what respect the proceedings under S. 54 of the Aliens Act are discriminatory. The Commission finds that the applicant's submissions do not disclose any appearance of a violation of Article 14 in combination with Article 3 (Art. 14+3).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 14 (Art. 14) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

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