AS TO THE ADMISSIBILITY OF

Application No. 25777/94
by Milun JANKOVIC
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 28 June 1995, 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
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN

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 30 June 1994 by Milun Jankovic against Austria and registered on 24 November 1994 under file No. 25777/94;

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 facts of the case, as they have been submitted by the applicant, may be summarised as follows.

The applicant is a national of former Yugoslavia born in 1950 and at the time of the introduction of the application had been residing in Dornbirn (Austria). Before the Commission he is represented by Mr. W. L. Weh, a lawyer practising in Bregenz.

On 28 September 1992 the applicant applied to the Dornbirn District Administrative Authority (Bezirkshauptmannschaft) for a residence permit.

On 8 February 1993 the District Administrative Authority refused to grant the applicant a residence permit. The Authority relied on Section 10 para. 1 subpara. 6 of the Aliens Act, Federal Law Gazette No. 838/1992 (Fremdengesetz).

On 16 March 1993 the applicant introduced a complaint to the Constitutional Court against the District Administrative Authority's decision of 8 February 1993. He submitted that the District Administrative Authority had failed to take his private and family situation into account. He had lived in Austria since 1990, where his

daughter and his son-in-law were also living and since 13 March 1992 he had been a partner in a building cleaning company which he owned together with his daughter and son-in-law.

On 15 April 1993 the District Administrative Authority issued a deportation order (Ausweisungsbescheid) against the applicant, relying on Section 17 para. 1 of the Aliens Act. The Authority found that his request for a residence permit had been refused on 8 February 1993 and his stay in Austria was therefore unlawful. It noted further that the applicant had entered Austria in June 1990 without a visa and registered with the police on 18 June 1990. Since at that time the applicant could enter Austria without a visa for a period of three months his stay in Austria had been lawful until 16 September 1990. He was a partner in a building cleaning company and worked in this company. His wife lived in Yugoslavia. The Authority concluded that the applicant was not strongly integrated into Austria and that his connections to his home country were much stronger. The Authority concluded that the applicant's deportation was necessary in the interest of public peace and order and for the economic well being of the country.

On 3 May 1993 the applicant appealed against the deportation order.

On 2 July 1993 the Constitutional Court refused to entertain the applicant's complaint of 16 March 1993 for lack of prospect of success and referred the case to the Administrative Court (Verwaltungs-gerichtshof).

On 22 June 1993 the Vorarlberg Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal of 3 May 1993. The Public Security Authority found that the applicant's deportation could interfere with his private and family life. However, since 16 September 1990 he had stayed unlawfully in Austria and waited for more than two years before he even tried to regularise his stay in Austria. It was necessary in the public interest that the authorities had a comprehensive knowledge of aliens staying in Austria. A long unlawful stay of an alien, like in the applicant's case, ran counter to this interest. The interference with the applicant's private and family life was therefore justified.

On 19 July 1993 the applicant introduced a complaint to the Constitutional Court against the Public Security Authority's decision. He submitted that the Authority failed to take into account that he had lived in Austria from 1972 to 1982, that his daughter and son-in-law lived in Austria and that he ran the building cleaning company he partly owned together with them.

On 28 September 1993 the Constitutional Court refused to entertain the applicant's complaint of 19 July 1993 for lack of prospect of success and referred the case to the Administrative Court. The Constitutional Court also found that the applicant could at any time request a residence permit from abroad and re-enter Austria legally once he had complied with the deportation order.

On 25 November 1993 the Administrative Court dismissed the applicant's complaint of 16 March 1993. It found that the District Administrative Authority had acted correctly when it did not take the applicant's private and family situation into account as this was not provided for under Section 10 para. 1 subpara. 6 of the Aliens Act.

On 8 September 1994 the Administrative Court dismissed his complaint concerning the deportation order. The Administrative Court found that the authorities had considered sufficiently the applicant's private and family situation. However, in view of the fact that the applicant had continued to stay illegally in Austria since 17 September 1990, the public interest in the applicant's removal from

Austria prevailed over his personal interests.

On 6 December 1994 the applicant was deported to Yugoslavia.

B. Relevant domestic law

Section 10 para. 1 subpara. 6 of the Aliens Act, Federal Law Gazette No. 838/1992 (Fremdengesetz) provides that a residence permit has to be refused if it would have to be issued immediately following a tourist visa or following a stay in Austria for which no visa was required. Thus, a residence permit can in practice only be obtained through an Austrian Consulate abroad.

According to Section 17 para. 1 of the Aliens Act a deportation order against an alien has to be issued if he is not staying lawfully in Austria.

According to Section 19 of the Aliens Act, in cases in which a deportation order could interfere with the alien's private and family life, the authority must consider whether this interference is necessary for the reasons set out in paragraph 2 of Article 8 of the Convention.

In its decision of 1 July 1993, Collection of Decisions of the Constitutional Court No. 13497/93, the Constitutional Court examined the constitutionality of Section 10 para. 1 subpara. 6 of the Aliens Act. It found that it was compatible with Article 8 of the Convention that for certain groups of cases which normally would not give rise to an issue under this provision of the Convention, the legislator did not require the authority to take the private and family situation of the person concerned into account. It had been the legislator's intention to establish a system whereby an alien who wanted to stay in Austria for a longer period should manifest this intention in advance in order that the authorities could consider whether his stay was compatible with the public interest. Furthermore, such a system did not hinder family contacts with relatives of an alien living in Austria because the alien could visit them on the basis of a tourist visa or without any visa at all if a visa was not required. In case a residence permit had been refused on the basis of Section 10 para. 1 subpara. 6 of the Aliens Act the alien could subsequently request a residence permit from abroad.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the refusal of the Austrian authorities to grant him a residence permit violated his right to respect for his private and family life.

He submits that the residence permit had not been issued in accordance with the law as required by paragraph 2 of Article 8 of the Convention as the provisions on which the refusal was based entered into force long time after he had arrived in Austria. At the time he entered Austria he could not have been aware of the provisions on which the refusal was later on based.

He submits further that in refusing a residence permit the authorities had failed to take his long stay in Austria and his private and family situation duly into account.

THE LAW

The applicant complains under Article 8 (Art. 8) of the Convention that the refusal of the Austrian authorities to grant him a residence permit violated his right to respect for his private and family life.

Article 8 (Art. 8) of the Convention reads 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 interest 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 and morals, or for the protection of the rights and freedoms of others."

The Commission has repeatedly held that no right of an alien to enter or to reside in a particular country, nor a right not to be expelled from a particular country, is as such guaranteed by the Convention (see No. 12461/86, Dec. 10.12.86, D.R. 51 pp. 258, 264). However, in view of the right to respect for private and family life ensured by Article 8 (Art. 8) of the convention, the exclusion of a person from a country in which his immediate family resides may raise an issue under this provision of the Convention (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 13654/88, Dec. 8.9.88, D.R. 57 pp. 287, 289).

The question whether or not there is family life is essentially a question of fact, depending on the real existence in practice of close personal ties. Relationships between adults do not necessarily attract the protection of Article 8 (Art. 8) of the Convention without further elements of dependency, involving more than the normal emotional ties (see No. 10375/83, Dec. 10.12.84, D.R. 40 p. 196).

The Commission recalls further that an applicant can only claim to be a victim of an alleged violation of Article 3 (Art. 3) of the Convention, or, as in the instant case, of Article 8, within the meaning of Article 25 para. 1 (Art. 25-1) if an expulsion order has been made against him, the mere refusal of a residence permit not being sufficient to meet this requirement (Eur. Court H.R., Vijayanathan and Pusparajah judgment of 27 August 1992, Series A no. 241-B, p. 87, para. 46).

The Commission therefore finds that it has to examine whether the deportation order issued against the applicant violated his rights under Article 8 (Art. 8) of the Convention.

In the present case the applicant has lived in Austria from 1972 to 1982 and arrived again in Austria in June 1990. There is no indication in the applicant's submissions that his daughter, who is an adult, married and a partner in a building cleaning company she owns together with her husband and the applicant, is dependent on him. Furthermore, his wife is living in Yugoslavia.

The Commission further observes that the District Administrative Authority issued a deportation order against the applicant as it noted that his stay in Austria since September 1990 was unlawful and in particular that the applicant had waited for more than two years before he tried to regularise his stay. It also found that the applicant was not strongly integrated in Austria and that his family ties to his country of origin were stronger.

The Commission finds therefore that there are no elements concerning respect for family or private life which in this case outweigh the valid considerations relating to proper enforcement of immigration controls. Accordingly, the applicant's removal does not exhibit a lack of respect for the applicant's right to respect for family or private life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

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.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)