AS TO THE ADMISSIBILITY OF

Application No. 13826/88
by Tursun KARA
against Austria

The European Commission of Human Rights sitting in private on 8 February 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

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 21 April 1988 by Tursun Kara against Austria and registered on 3 May 1988 under file No. 13826/88;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the observations submitted by the respondent Government on 19 October 1990 and the observations in reply submitted by the applicant on 28 January 1991;

- the Commission's decision of 3 September 1991 to postpone further examination of the case until after the hearing in the Majerotto case (No. 13816/88) on 16 October 1991;

- the Commission's decision of 16 October 1991 to adjourn further examination of the case until other cases concerning the reservation at issue have been considered;

Having deliberated;

Decides as follows:

THE FACTS

The facts agreed between the parties may be summarised as follows.

The applicant is a Turkish citizen born in 1935 who had lived in Austria between 1971 and 1985. He is represented by W.L. Weh, a lawyer

practising in Bregenz.

He submits complaints in relation to his detention prior to being expelled to Turkey on 13 February 1985.

On 9 November 1984 an expulsion order (Aufenthaltsverbot) was issued against the applicant by the District Authority (Bezirks-hauptmannschaft) of Dornbirn under the Aliens Act (Fremdenpolizei-gesetz) on the ground that he was suspected of a criminal offence under Section 298 of the Penal Code (false allegations of a criminal offence), having once before been convicted of such an offence in 1980.

On 20 December 1984 the Vorarlberg Directorate of Public Security (Sicherheitsdirektion) confirmed the expulsion order which became enforceable on 4 January 1985. The applicant's appeals to the Constitutional Court (Verfassungsgerichtshof) and to the Administrative Court (Verwaltungsgerichtshof) were subsequently rejected. Pending these appeals he also requested the Constitutional Court and the Administrative Court to order suspensive effect and applied to the District Authority to stay the execution of the expulsion order at least until the Constitutional Court had ruled on the request for suspensive effect. However, on 16 January 1985 the District Authority rejected his application, ordering him to leave the country before 22 January 1985. The Administrative Court subsequently granted suspensive effect on 30 May 1985. However, by this time the applicant had already been deported to Turkey.

Due to his hospitalisation in a psychiatric clinic, the applicant himself did not receive the District Authority's decision of 16 January 1985. It was served on his lawyer who was not informed of the applicant's hospitalisation. The applicant himself, therefore, was not actually aware of the time-limit by which he was required to leave the country. On 23 January 1985 the District Authority ordered his detention in view of his expulsion (Schubhaft) under Section 5 of the Aliens Act. This decision was again only served on his lawyer on Friday, 25 January. On the same day the latter lodged an appeal against the detention order which reached the District Authority on Monday, 28 January, but was not submitted to the Directorate of Public Security until 1 February 1985. The Directorate rejected the appeal by a decision of 7 March 1985, which was notified to the applicant's lawyer on 19 March 1985, more than one month after the applicant had been expelled on 13 February 1985.

The applicant had been arrested on 9 February, following release from the psychiatric hospital. His detention on the basis of the above detention order of the District Authority had lasted 41/2 days, from 0.30 hours on 9 February to approximately 14.00 hours on 13 February. During this period he had not been brought before any authority, and he claims that he had been refused permission to contact his la The Government contest the latter allegation. The applicant refers to the testimony of two witnesses.

On 29 April 1985 the applicant complained to the Constitutional Court of the detention, the detention order and the refusal of suspensive effect of his remedies. On 17 June 1985 the Constitutional Court declared the complaint inadmissible insofar as it was directed against the detention because the detention was based on an administrative decision and therefore did not constitute an act of immediate administrative compulsion. It refused to deal with the complaint against the detention order as confirmed by the Directorate of Public Security as it considered that the complaint lacked sufficient prospects of success. It observed that an administrative decision could violate the constitutional right to personal liberty only if it had no legal basis, if the law had been applied in a perverse manner (denkunmögliche Gesetzesanwendung) or if it was unconstitutional. Having regard to the Constitutional Court's case-law there was no sufficient prospect of finding unconstitutionality in the

present case which therefore was referred to the Administrative Court.

This Court rejected the applicant's complaints by a decision of 30 September 1987 which was served on the applicant's lawyer on 21 October 1987. The Administrative Court considered that there had been sufficient suspicion of the applicant having committed new criminal offences and sufficient grounds for the administrative authority to assume that he would not comply with the expulsion order. As regards the applicant's complaint that the decision on his appeal had not been taken speedily by the Directorate of Public Security, the Administrative Court referred to Section 73 of the General Code of Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz) according to which the time limit for administrative decisions was six months.

The applicant then brought a civil action against the State (Amtshaftungsklage) claiming compensation for unlawful detention. In this context he suggested that the civil courts should again seize the Constitutional Court with the case as the Administrative Court's view according to which a decision on an appeal against a detention order could be taken within a period of six months was untenable under Article 5 para. 4 of the Convention. However, on 8 April 1988 the Regional Court (Landesgericht) of Feldkirch rejected the action essentially on the ground that it was bound by the Administrative Court's decision.

The applicant appealed against this decision and suggested a reference to the Constitutional Court also on the ground that the relevant provision of the Official Liability Act (Amtshaftungsgesetz) was unconstitutional if it excluded a reference to the Constitutional Court of allegations that an administrative act violated constitutional rights.

The Innsbruck Court of Appeal (Oberlandesgericht) rejected the appeal on 30 September 1988. It considered that the exclusion of the possibility, in official liability proceedings, to refer the case to the Constitutional Court on a point of alleged unconstitutionality did not infringe Article 13 of the Convention because that point could also be decided by the competent civil court itself. As regards the main question whether the applicant's right to a speedy decision on the lawfulness of his detention (Article 5 para. 4 of the Convention) had been violated and whether for this reason he was entitled to compensation under Article 5 para. 5 of the Convention, the Court left it open whether Article 5 para. 4 was directly applicable in Austria and had modified the provision in Section 73 of the General Code of Administrative Procedure according to which administrative decisions must be taken "without unnecessary delay". Article 5 para. 4 was applicable only from the moment of actual arrest and would have been violated only if it had been possible and appropriate for the Directorate of Public Security to decide earlier on the applicant's appeal and thereby to shorten his detention. Even taking into account the fact that the applicant's appeal had been lodged 9 days before his arrest, the fact that the Directorate's decision had not been handed down during the five days in which the applicant was actually detained did not constitute an unlawful delay. An appellate jurisdiction required the period in question for the preparation of its decision even in an urgent case, and it could not be held against it that during the same period it had participated in the preparation of the applicant's expulsion, a measure which had also led to a reduction of the length of detention. After the expulsion the case had no longer been urgent. Therefore the handling of the case had infringed neither Article 5 para. 4 of the Convention nor Section 73 of the General Code of Administrative Procedure. Hence the applicant's compensation claim had to be rejected.

COMPLAINTS

The applicant complains under Article 5 para. 1 of the Convention that the detention in view of his expulsion was unlawful and disproportionate in the circumstances of the case.

The applicant complains of a violation of Article 5 para. 2 of the Convention in that the detention order was not served upon him, but only upon his lawyer whom he was refused to contact during his detention. He claims that he was never informed personally of the grounds for his detention.

The applicant complains of a violation of Article 5 para. 4 of the Convention in that his appeal against the detention order was not decided speedily, in particular not before his deportation, despite the obvious urgency of the matter.

The applicant finally complains under Article 5 para. 5 and Article 13 of the Convention that he did not have an effective remedy by which he could claim compensation on the ground that in the proceedings concerning his detention Article 5 para. 4 had been violated. The competent civil court was bound by the decision of the Administrative Court, which, however, was not competent to deal with the alleged violation of a constitutional right while Section 11 of the Official Liability Act excluded a reference to the Constitutional Court for the purpose of obtaining a decision on this question.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 April 1988 and registered on 3 May 1988.

On 2 July 1990 the Commission decided to give notice of the application to the respondent Government and to invite them to submit observations in writing on the admissibility and merits of the case before 17 October 1990. Following an extension of the time-limit, the Government submitted their observations on 19 October 1990. The applicant replied, also after an extension of the relevant time-limit, on 28 January 1991.

The Commission again considered the case on 3 September 1991 and 16 October 1991.

THE LAW

1. The applicant alleges a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

Article 5 para. 1 (Art. 5-1) provides, so far as relevant, 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 to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

The Commission recalls that, under this provision, the Convention organs examine the lawfulness of the detention of "the person against whom action is being taken with a view to deportation". However, the review is limited to examining the legality of the detention, including the lack of arbitrariness.

In the present case, the detention order was made on 23 January 1985. It was served on the applicant's representative on 25 January 1985. The representative lodged an appeal against it on the same day. The Directorate of Public Security rejected the appeal on 7 March 1985. The decision was notified to the applicant's lawyer on 19 March 1985, and the applicant subsequently put the case before the Constitutional and Administrative Courts.

The Government and the applicant are unanimous in their approval of the system of notification of detention orders to representatives rather than to individuals, as the appropriate appeals, if any, may thus be made.

The applicant was detained for some four and a half days under the detention order, from 0.30 hrs. on 9 February to approximately 14.00 hrs on 13 February 1985.

The Commission recalls that the Constitutional Court, in its decision of 17 June 1985, observed that an administrative decision could violate the constitutional right to personal liberty only if it had no legal basis, if the law had been applied in a perverse manner, or if it was unconstitutional. To this, the Administrative Court, on 30 September 1987, added that there had been sufficient suspicion of the applicant having committed new criminal offences, and sufficient grounds for the administrative authority to assume that he would not comply with the expulsion order.

In the circumstances of the present case, the Commission finds that there was a legal basis for the detention, namely the detention order of 23 January 1985 in application of Section 5 of the Aliens Act. Moreover, it cannot be said that the order was arbitrary.

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 alleges a violation of Article 5 para. 2 (Art. 5-2) of the Convention in that his representative, but not he himself, was informed of the reasons for his detention.

Article 5 para. 2 (Art. 5-2) of the Convention provides as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

However, the Commission is not required to decide whether or not the facts alleged by the applicant in this respect disclose any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant has not established that he has put this complaint to any domestic authority. In particular, he failed to raise this matter in his constitutional complaint of 29 April 1985. Moreover, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies in this respect, and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant alleges a violation of Article 5 para. 4 (Art. 5-4) of the Convention in that his appeal against the detention order was not decided speedily, and in particular that it was not decided before his deportation.

Article 5 para. 4 (Art. 5-4) provides as follows:

> "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."

The Government consider that the effect of the Austrian reservation to Article 5 (Art. 5) of the Convention is to exclude the operation of Article 5 para. 4 (Art. 5-4) from the case altogether, with the result that only Article 73 para. 1 of the General Code of Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz) applies. They underline that this provision states that decisions on appeals must be taken within six months after they are received. In the alternative, they submit that the effect of the reservation is either (i) that a prior decision by an administrative authority (the decision of the Dornbirn District Authority of 23 January 1985) is sufficient justification for the detention (cf. Eur. Court H.R., Van Droogenbroeck judgment of 24 June 1982, Eur. Court H.R., Series A no. 50, p. 23, para. 45), or (ii) that the decision of the Directorate of Public Security of 7 March 1985 (which concerned the lawfulness of the applicant's detention) complied with the requirements of Article 5 para. 4 (Art. 5-4) with respect to a "court".

The Government consider that the Directorate of Public Security in any event decided the applicant's appeal against his detention order "speedily".

The applicant, who considers that the Austrian reservation to Article 5 (Art. 5) of the Convention is neither valid nor applicable, considers that the delay caused by the Directorate of Public Security was unconscionable, before, during and after the applicant's detention.

The Commission is not required to decide on the validity or applicability of the Austrian reservation in the present case as this part of the application is in any event inadmissible for the following reasons.

The Commission notes that the applicant was detained from 0.30 hours on 9 February 1985 until approximately 14.00 hours on 13 February 1985, that is a total of some 41/2 days. The Directorate of Public Security decided on the applicant's appeal against the detention order on 7 March 1985, and the Constitutional Court rejected the applicant's constitutional complaint on 17 June 1985. In the circumstances of the present case, the Commission finds that there must be considerable doubt as to whether the question of the lawfulness of the applicant's detention was determined "speedily". However, the Commission recalls that it has previously held that a review of detention pending expulsion is not required by Article 5 para. 4 (Art. 5-4) of the Convention in circumstances where the period of detention is shorter than that which would have been necessary for the application of the procedure envisaged by Article 5 para. 4 (Art. 5-4) (cf. No. 7376/76, Dec. 7.10.76, D.R. 7 p. 123; No. 7447/76, Dec. 13.12.76). The European Court of Human Rights confirmed this approach in its judgment in the Fox, Campbell and Hartley case (judgment of 30 August 1990, Series A no. 182, p. 20 para. 45). The Commission has held that, in connection with detention justified by Article 5 para. 1 (f) (Art. 5-1-f) of the Convention, a period of up to 10 days may still fall within the period permissible under Article 5 para. 4 (Art. 5-4) of the Convention. In the present case, too, the applicant's detention was substantively justified under Article 5 para. 1 (f) (Art. 5-1-f). The specific period which falls to be considered is 41/2

days, that is, the period of the applicant's actual detention. The Commission, having regard to all the circumstances of the case, finds that this period is less than that which would be necessary even for a speedy procedure in conformity with 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 also alleges a violation of Article 5 para. 5 (Art. 5-5) of the Convention.

The Commission recalls that Article 5 para. 5 (Art. 5-5) of the Convention may only be invoked where the Convention organs or the domestic authority have established a violation, either formally or in substance, of one of the other provisions of Article 5 (Art. 5) (cf. No. 6821/74, Huber v. Austria, Dec. 5.7.76, D.R. 6 p. 65). The Commission has found above that there has been no violation of one of the other provisions of Article 5 (Art. 5) in the present case; in the proceedings in Austria, the Administrative and Constitutional Courts, and the courts dealing with the applicant's official liability action, found no violation of Article 5 (Art. 5), in form or in substance.

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.

5. The applicant also alleges a violation of Article 13 (Art. 13) of the Convention. The Commission recalls that Article 5 para. 4 (Art. 5-4) is the lex specialis in relation to complaints under Article 5 (Art. 5) of the Convention. In any event, to the extent that any of the applicant's complaints do not fall within the ambit of Article 5 para. 4 (Art. 5-4) of the Convention, the Commission finds that the applicant has no "arguable" claim under the Convention which might necessitate a remedy pursuant to Article 13 (Art. 13) of the Convention (cf. Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, pp. 23-24, paras. 52-58).

It follows that the applicant's complaints about a lack of remedies are also 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)