AS TO THE ADMISSIBILITY OF

Application No. 30338/96
by Erkan KELES
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 23 January 1996 by Erkan KELES against Austria and registered on 28 February 1996 under file No. 30338/96;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen, born in Austria in 1979. He had been residing in Innsbruck but is staying at present in Turkey. Before the Commission he is represented by Mr. P. Delazer, a lawyer practising in Innsbruck.

On 20 May 1994 the applicant, was convicted by the Innsbruck Regional Court (Landesgericht) of, inter alia, theft and sentenced to fifteen months' imprisonment suspended for a probationary period of three years.

Having regard to the above conviction, the Innsbruck Federal Police Authority (Bundespolizeidirektion), on 13 October 1994, imposed a residence prohibition on the applicant. The applicant, represented by counsel, appealed and submitted that the residence prohibition constituted a disproportionate measure since he was born and brought up in Austria and his family was living there.

On 10 April 1995 the Innsbruck Federal Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal. It found that

notwithstanding his private and family situation the residence prohibition was necessary in the public interest in view of the serious and numerous criminal offences the applicant had committed.

On 11 May 1995 the applicant introduced a complaint with the Constitutional Court (Verfassungsgerichtshof). On 13 June 1995 the Constitutional Court refused to deal with the complaint and referred the case to the Administrative Court (Verwaltungsgerichtshof). The proceedings before the Administrative Court are still pending.

On 3 May 1995, while the applicant was kept in detention on remand with regard to further charges of theft, the Innsbruck Federal Police Authority issued an order for detention pending expulsion. It found that the residence prohibition had become enforceable and in view of the applicant's previous criminal behaviour it was necessary to impose such detention in order to ensure his removal from Austria after his release from detention on remand.

On 5 May 1995 the applicant was again convicted of theft and sentenced to an unsuspended term of imprisonment of 3 months, the probationary period for his previous sentence was extended to 4 years.

On 12 May 1995 the applicant, represented by counsel, introduced a complaint against the detention order of 3 May 1995 with the Administrative Court and requested that legal aid be granted. He submitted in particular that Section 47 para. 2 of the Aliens Act (Fremdengesetz) provided that aliens under sixteen years of age be only taken into detention with a view to expulsion if appropriate accommodation and care was provided for. In his view these conditions were not met at the Innsbruck Police Prison and his detention with a view to expulsion would therefore be unlawful.

On 4 July 1995 the applicant was transferred from the Innsbruck Regional Court's Prison to the Police Prison.

On 28 July 1995 the Administrative Court refused to grant legal aid as it considered that the applicant's complaint was clearly without prospect of success. On the same day, in a separate decision, the Administrative Court dismissed the applicant's complaint against the detention order. It found that the order for detention with a view to expulsion was lawful because it was necessary in order to secure the applicant's removal. As regards the applicant's argument under Section 47 para. 2 of the Aliens Act, the Administrative Court found that from the heading of Section 47, i.e. "Modalities of Detention With a View to Expulsion" (Durchführung der Schubhaft) it was apparent that this provision merely concerned the conditions of detention. The conditions of detention, however, were of no relevance for the examination of the lawfulness of a detention order.

On 7 August 1995 the applicant was removed from Austria to Turkey and his detention with a view to expulsion ceased on that day.

COMPLAINTS

The applicant, invoking Article 5 para. 4 of the Convention, complains about the refusal of the Administrative Court to take into consideration his argument that his detention with a view to expulsion had been unlawful because the premises where he had been detained did not meet the requirements of Section 47 para. 2 of the Aliens Act. In his view the decision of the Administrative Court was wrong because the said provision did not merely concern the conditions but also the lawfulness of his detention. He further complains that the Administrative Court refused to grant legal aid for the proceedings concerning the detention order.

The applicant also submits that a complaint to the Constitutional

Court about the detention order would not have been an effective remedy, because the Constitutional Court most probably would have refused to deal with his complaint.

THE LAW

The applicant complains about the refusal of the Administrative Court to take into consideration his argument that his detention with a view to expulsion had been unlawful because the premises where he had been detained did not meet the requirements of Section 47 para. 2 of the Aliens Act.

The Commission finds that the applicant's above complaint concerns the alleged unlawfulness of his detention with a view of to expulsion and consequently falls to be considered under Article 5 para. 1 (f) (Art. 5-1-f) of the Convention, which 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 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 need not determine whether or not the applicant has exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention because the application is, in any event, manifestly ill-founded for the following reasons.

The Commission recalls that in the Bizzotto case the European Court of Human Rights has found that where a court, on the basis of the law in force, had made arrangements for implementing a sentence, such as the order that a term of imprisonment be effected in a specially equipped centre for drug addicts, the fact that the detention of the person concerned had not been carried out in conformity with this order cannot, in principle, have any bearing on the lawfulness of the deprivation of liberty (Eur. Court HR, Bizzotto v. Greece judgment of 15 November 1996, para. 34, to be published in Reports 1996-I).

The Commission finds that the above considerations also apply to the present case and notes in this respect that, according to the findings of the Administrative Court, Section 47 para. 2 of the Aliens Act on which the applicant relies in order to show that the detention order was unlawful, concerns the modalities of detention with a view to expulsion. Modalities of detention, however, do not raise an issue as to the lawfulness of deprivation of liberty.

Accordingly, there is no appearance of a violation of the applicant's rights under Article 5 para. 1 (f) (Art. 5-1-f) of the Convention.

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 further complains that the Administrative Court refused to grant legal aid for the proceedings concerning the detention order. Also in this respect he relies on Article 5 para. 4 (Art. 5-4) of the Convention which reads 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."

However, the Commission need not determine whether Article 5 para. 4 (Art. 5-4) of the Convention entitles a person to representation by an ex-officio lawyer appointed under a legal aid scheme in circumstances as those of the present case, since the applicant, in any event, was represented by a counsel of his choice throughout the domestic proceedings.

Accordingly, there is no appearance of a violation of the applicant's rights under Article 5 para. 4 (Art. 5-4) of the Convention.

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.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber