AS TO THE ADMISSIBILITY OF

Application No. 28949/95
by Zoran MARTINOVIC
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 November 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 August 1995 by Zoran MARTINOVIC against Austria and registered on 19 October 1995 under file No. 28949/95;

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

Having regard to the observations submitted by the respondent Government on 12 March 1996 and the observations in reply submitted by the applicant on 1 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of former Yugoslavia, born in 1972 and residing in Lauterach (Austria). Before the Commission he is represented by Mr. H. Lumper, a lawyer practising in Bregenz.

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

On 20 November 1992 the Bregenz District Court (Bezirksgericht) convicted the applicant of having negligently caused bodily harm and sentenced him to a fine of 60 daily rates of ATS 150 each. On 29 July 1993 the Bregenz District Court convicted the applicant of having caused bodily harm with intent and sentenced him to a fine of 40 daily rates of ATS 180 each.

On 26 November 1993 the Court of Assizes (Geschwornengericht) at the Feldkirch Regional Court (Landesgericht) convicted the applicant and three co-accused of aggravated robbery (schwerer Raub). The applicant was sentenced to one year of imprisonment.

On 10 February 1994 the Innsbruck Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal against the

sentence but granted the appeal of the Public Prosecutor and increased the applicant's sentence to two years' imprisonment. The Court of Appeal found that the Regional Court had failed to take into consideration as aggravating circumstances the fact that the robbery was committed by a gang of six persons and that they were armed, inter alia, with a pistol loaded with live ammunition.

On 26 May 1994 the Bregenz District Administrative Authority (Bezirkshauptmannschaft) issued a residence prohibition for an indefinite period against the applicant under Section 18 para 2 (1) of the Aliens Act (Fremdengesetz). The District Authority noted that the applicant was convicted of aggravated robbery which was a serious crime. Therefore a residence prohibition had to be imposed on him in the public interest. As regards the applicant's private and family situation the Authority noted that the applicant was born in Austria and had been living there ever since. It further noted that he had a son, born in July 1991 with A.D., an Austrian citizen and that the applicant's parents and other relatives were living in Austria. However, on balance the applicant's personal situation did not outweigh the public interest in imposing a residence prohibition on him.

On 6 June 1994 the applicant, represented by counsel, appealed. He submitted that the authority did not sufficiently take into account his private and family situation which would militate against his expulsion. In this respect he submitted further that his new fiancee, K.H., was also an Austrian citizen and that they intended to marry. He was not familiar with the situation in Serbia and Montenegro and only spoke little Serbian.

On 27 September 1994 the Vorarlberg Federal Public Security Authority (Sicherheitsdirektion) dismissed the appeal.

On 20 October 1994 the applicant introduced a complaint with the Administrative Court (Verwaltungsgerichtshof). With regard to his private and family situation he submitted that he had meanwhile married Ms. K.H.

On 28 June 1995 the Administrative Court dismissed the applicant's complaint. It found that the administrative authorities had correctly considered the applicant's private situation and balanced it against the public interest.

The applicant did not file a complaint with the Constitutional Court (Verfassungsgerichtshof).

It appears that on 21 September 1995 the applicant left Austria and is presently living in Trieste (Italy). According to the Government his wife followed him to Trieste. According to the applicant his wife remained in Austria but is visiting him in Italy from time to time.

COMPLAINTS

The applicant complains that the residence prohibition imposed on him violates his right to respect for his private and family life as guaranteed by Article 8 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 August 1995 and registered on 19 October 1995.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 12 March 1996, after an extension of the time-limit fixed for that

purpose. The applicant replied on 1 April 1996.

THE LAW

The applicant complains that the residence prohibition imposed on him violates his right to respect for his private and family life as guaranteed by Article 8 (Art. 8) of the Convention.

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 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 submit that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention, since he did not file a complaint with the Constitutional Court against the residence prohibition. Such a complaint is an effective remedy, as under the Federal Constitution the Constitutional Court is competent to decide on complaints alleging that an administrative decision has infringed the constitutional rights of the person concerned. Since the Convention has been incorporated into the Austrian legal order at the level of the Federal Constitution, the applicant could and should have complained before the Constitutional Court about a violation of his rights under Article 8 (Art. 8) of the Convention. The Government, in this respect, refer to a decision of the Constitutional Court of 16 March 1995 in which the latter had quashed a decision by an administrative authority by which a residence permit had been refused as it considered this decision to be contrary to Article 8 (Art. 8) of the Convention.

The Government further submit that the imposition of a residence prohibition on the applicant was justified under Article 8 para. 2 (Art. 8-2) of the Convention. The residence prohibition was imposed on the applicant for a serious criminal offence, namely aggravated robbery and the Austrian courts found in particular that the robbery had been committed by a gang and with the use of a loaded weapon. Furthermore, prior to the above conviction the applicant had already been convicted twice of having caused bodily harm. This shows that the applicant's criminal behaviour had become more and more violent. The Austrian authorities carefully evaluated and balanced the public interest in imposing a residence prohibition on the applicant against his private interests and in that assessment his serious offence carried considerable weight.

As regards the applicant's family life and the fact that he is married to an Austrian citizen, the Government submit that the applicant's wife could follow him abroad, which is confirmed by the fact that the applicant has left Austria with his wife.

This is disputed by the applicant. He submits that his complaint to the Administrative Court was a proper remedy and the Administrative Court also found itself competent to consider the applicant's case.

The applicant submits further that the Austrian authorities have not properly weighed the public interest against his private interest. The authorities should have given more weight to his strong links to Austria, in particular that he was born there, that his relatives were living there and that his wife was Austrian. Moreover his wife is pregnant and does not speak Serbo-Croat. It was not true that she had

followed him to Italy, rather she is visiting him there from time to time.

As regards the seriousness of his criminal convictions, the applicant submits that his conviction by the Bregenz District Court of 20 November 1992 concerned a traffic accident. Besides that conviction he was convicted only two other times of criminal offences. Therefore the Government's allegation that he had been convicted of numerous and serious offences appeared exaggerated.

The Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 8 (Art. 8) of the Convention, as under Article 26 (Art. 26) of the Convention, it may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.

The Commission recalls that the obligation to exhaust domestic remedies requires normal use of remedies which are effective, sufficient and available (No. 12518/86, Dec. 4.10.89, D.R. 62 p. 189; Nos. 18926/91, 19777/92, Dec. 30.8.93, D.R. 75 p. 179). The burden of proving the existence of effective and sufficient remedies lies upon the State invoking the rule (No. 12686/87, Dec. 3.10.90, D.R. 66 p. 105).

The Commission notes that the applicant did not file a complaint with the Constitutional Court against the residence prohibition and that he has not explained why he did not do so.

Having regard to the fact that under Austrian law the Convention is part of the domestic legal order, that the applicant could therefore have relied on Article 8 (Art. 8) of the Convention before the Constitutional Court and that this court could have quashed the residence prohibition if it would have considered it contrary to Article 8 (Art. 8) of the Convention, the Commission finds that a complaint to the Constitutional Court, in the circumstances of the present case, has to be considered an effective remedy for the purpose of Article 26 (Art. 26) of the Convention.

Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant from compliance with the requirement of exhaustion of domestic remedies.

It follows that the applicant has failed to comply with the requirement of exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention.

Accordingly the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber