AS TO THE ADMISSIBILITY OF

Application No. 25783/94
by Metin and Nurdine ÖZKARAN
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 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
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 16 August 1994 by Metin and Nurdine Özkaran against Germany and registered on 25 November 1995 under file No. 25783/94;

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, as they have been submitted by the applicants, may be summarised as follows.

The first applicant, born in 1974, is a Turkish national who joined his parents in Germany in August 1988 and has an unlimited residence permit. He is residing in Erlenbach. In August 1991 he married in Turkey the second applicant, a Turkish national born in 1976. In the proceedings before the Commission they are represented by Mr. H.H. Heldmann, a lawyer practising in Frankfurt/Main.

On 5 January 1994 the Miltenberg County Administration (Landratsamt), acting as Aliens Office (Ausländerbehörde), dismissed the second applicant's request for a residence permit and ordered her to leave the territory of the Federal Republic of Germany. The County Administration also ordered her expulsion in case that she should not leave Germany as ordered.

In its decision, the County Administration noted the second applicant's submissions that she had come to Germany in August 1993 with a three months' visa for visiting purposes. The Office, referring to the relevant provisions of the Aliens' Act, found that the mere reason of not having entered the territory with the visa for the

purpose of family unification would justify the refusal of her request for a residence permit. In any event, there were no special circumstances requiring that she be granted residence permit. In particular, the applicants' marriage had been concluded in August 1991 and thus a long time before the second applicant's arrival in Germany. Moreover, she had failed to show that the health situation of her mother-in-law necessitated her presence in Germany, the medical certificate in this respect being rather vague. Finally, the first applicant had not met the condition for family unification of residence in Germany of at least eight years, and the applicants had not submitted that they had a child or that the second applicant was pregnant. In this respect, the Office referred to the case-law of the Federal Constitutional Court (Bundesverfassungsgericht), according to which the condition of an eight years term of residence could not be objected to under constitutional law, as the general interest in permitting family unification only on the secure basis of an integration of one of the foreigners in Germany outweighed the individual interests.

The applicants, represented by Mr. Heldmann, lodged an administrative appeal (Widerspruch) and applied with the Würzburg Administrative Court (Verwaltungsgericht) for a stay of execution of the decision ordering the second applicant to leave Germany and the expulsion order.

On 16 February 1994 the Würzburg Administrative Court dismissed the applicants' request for a stay of execution. The Administrative Court found that the request was inadmissible to the extent that it had been lodged by the first applicant, who was not the addressee of the contested decisions and only indirectly concerned. As regards the second applicant, the Administrative Court noted that she had entered the territory of Germany with a visa for visiting purposes, although she had intended to join her husband for more than three months. Her entry in Germany had thus been illegal. In any event, she had no right to a residence permit for any of the special reasons laid down in the Regulations regarding the Aliens Act. In this respect the Administrative Court confirmed in detail the findings of the Miltenberg County Administration. The Court finally considered that the second applicant had no right under European community law to join her husband in Germany.

On 15 March 1994 the Bavarian Administrative Court of Appeal (Verwaltungsgerichtshof) dismissed the applicants' appeal (Beschwerde).

On 9 May 1994 the Federal Constitutional Court refused to admit the applicants' constitutional complaint (Verfassungsbeschwerde).

The main proceedings are apparently still pending.

COMPLAINTS

The applicants complain under Article 8 of the Convention about the decision of the Miltenberg County Administration of 5 January 1994 dismissing the second applicant's request for a residence permit. The applicants submit inter alia that the second applicant is entitled to join her husband under European community law.

THE LAW

The applicants complain that the decision of the Miltenberg County Administration of 5 January 1994 dismissing the second applicant's request for a residence permit amounts to a violation of their right to respect for their family life as guaranteed by Article 8 (Art. 8) of the Convention.

Article 8 (Art. 8) of the Convention states, so far as relevant:

"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 ... the economic well-being of the country, for the prevention of disorder or crime, ... "

The Commission notes that the applicants lodged an administrative appeal against the decision of 5 January 1994, and subsequently exhausted remedies in court proceedings with a view to obtaining a stay of execution. In these proceedings the administrative court, in a summary nature, considered the second applicant's submissions regarding her request for a residence permit. It does not appear that the second applicant also exhausted the remedies available to her in the main proceedings regarding the decision in question. The question, therefore, arises whether the applicant exhausted domestic remedies, as required by Article 26 (Art. 26) of the Convention. However, this question can be left open as the application is anyway manifestly ill-founded for the following reasons.

The Commission recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the refusal of entry, or expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed in Article 8 para. 1 (Art. 8-1) (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 9203/80, Dec. 5.5.81, D.R. 24 p. 239).

The Commission finds that the decision refusing the second applicant's request for a residence permit, filed while she was staying with the first applicant in Germany, and ordering her to leave Germany interferes with the applicants' right to respect for their family life within the meaning of Article 8 para. 1 (Art. 8-1). Such interference is in breach of Article 8, unless it is justified under Article 8 para. 2 (Art. 8-2) of the Convention.

As regards the lawfulness of the interference, the Commission observes that the German authorities, when refusing the second applicant's request for a residence permit and ordering her to leave Germany, relied on the relevant provisions of the German Aliens Act. The authorities also considered that under European Community law the second applicant had no right to join the first applicant in Germany. The applicants' arguments as to the applicability and interpretation of the said rules do not relate to any non-observance of the Aliens Act or of European community law, but do no more than evince their disagreement with the decisions of the County Administration and the administrative courts. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2).

Moreover, when taking their decisions, the German authorities considered the public interest in the regulation of the entry of aliens, and compliance of aliens with the prevailing rules on immigration, such as visa regulations, and in securing that a family unification of aliens in Germany takes place only after integration of one of the spouses in Germany. The impugned decisions thus pursued the interests of the economic well-being of the country and the prevention of disorder. These are a legitimate aims mentioned in Article 8 para. 2 (Art. 8-2).

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether such a need for an interference exists, but it goes hand in hand with European supervision (see, Eur. Court H.R., Berrehab

judgment of 21 June 1988, Series A no. 138, p. 15, para. 128; Funke judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission notes that the administrative authorities had regard to the applicants' family situation, in particular to the fact that their marriage had been concluded in Turkey in 1991, and that the second applicant had illegally entered Germany with a three months visa for visiting purposes, although she intended to join the first applicant. The German authorities further considered that the first applicant, born in 1974, had only joined his parents in Germany in 1988 and did not fulfil the requirement of a minimum period of residence in Germany in order to allow for the second applicant to join him on the basis of family unification. They also found that the applicants failed to show any other circumstances exceptionally entitling the second applicant to stay.

In these circumstances, the Commission considers that there are relevant and sufficient reasons for the challenged decisions. Weighing the applicants' interests in pursuing their married life in Germany, and the public interests at stake, the Commission finds that the German authorities did not overstep the margin of appreciation left to them. In this respect the Commission had particular regard to the fact that the first applicant only came to Germany at the age of fourteen, that he married the second applicant in 1991 in Turkey, while they were or should have been aware of the prevailing immigration rules, and that the second applicant illegally entered Germany. Moreover, the applicants failed to show that they are prevented to pursue their married life together in Turkey.

Consequently, the interference with the applicants' right to respect for their private and family life was justified under Article 8 para. 2 (Art. 8-2) in that it can reasonably be considered "necessary in a democratic society ... in the interest of the economic well-being of the country" and "for the prevention of disorder and crime".

Accordingly, there is no appearance of a violation of Article 8 (Art. 8) of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

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)