CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33500/96
by Dragi and Martina PEJCINOSKI
against Austria

The European Court of Human Rights (Third Section) sitting on 23 March 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, J*udges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 July 1996 by Dragi and Martina PEJCINOSKI against Austria and registered on 21 October 1996 under file no. 33500/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant is an Austrian national, born in 1970. The second applicant is a Slovakian national, born in 1973. They are living in Vienna.

They are represented before the Court by Mr. Johannes Hock, a lawyer practising in Vienna.

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

On 27 October 1993 the second applicant filed a request for a residence permit, indicating that the first applicant and herself intended to get married.

On 20 March 1994 the Vienna Regional Government (*Landesregierung*) dismissed this request. It noted that under S. 2 of the 1992 Residence Act (*Aufenthaltsgesetz*) a quota for issuing new residence permits was fixed every year. In administering the quota, priority had to be given, inter alia, to cases of family reunion under S. 3 of the said Act, in which marriage with an Austrian citizen had already existed for at least one year at the time of the request. However, the second applicant did not fulfil this requirement.

On 5 April 1994 the applicants got married. It appears that they were already living together before their marriage.

On 11 April 1994 the second applicant, represented by counsel, filed an appeal. She referred in particular to the marriage which she and the first applicant had meanwhile concluded. She further submitted that the first applicant had been living in Vienna since 1979. He was employed as a worker and was able to maintain his family.

On 5 September 1994 the Federal Ministry for the Interior (*Bundesministerium für Inneres*) dismissed the appeal. It noted that the quota fixed under S. 2 of the 1992 Residence Act was already filled. According to S. 9 of the said Act, any requests which could not be based on a right to family reunion under S. 3 had to be dismissed.

On 4 October 1994 the second applicant filed a complaint with the Administrative Court (*Verwaltungsgerichtshof*). She submitted in particular that she had a right to a residence permit under S. 3 of the 1992 Residence Act in view of her marriage to an Austrian national.

On 5 October 1994 the second applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*). She submitted that the decision refusing her a residence permit violated her right to respect for her private and family life. She argued in particular that S. 3 § 1 of the 1992 Residence Act granted non-national spouses of Austrian nationals the right to a residence permit. However, according to S. 3 § 2 the right was subject to the condition that the marriage had already lasted for a year at the time of lodging the request. Such a restriction of the right to a residence permit was contrary to Article 8 of the European Convention on Human Rights and was, therefore, unconstitutional. The impugned provision obliged an Austrian national and his foreign spouse to live separately for at least one year. It therefore interfered with their right to private and family life. It was not apparent that this interference served any of the legitimate aims set out in the second paragraph of Article 8 of the European Convention on Human Rights. Inasmuch as S. 3 § 2 of the 1992 Residence Act

might serve to prevent fictitious marriages, the interference was disproportionate as it equally affected spouses truly wishing to lead a marital life. In her case, a separation from the first applicant would be particularly difficult as she was expecting a baby which would be born with a defect of the abdominal wall necessitating an operation immediately after its birth.

Also on 5 October 1994 the applicants' daughter was born in Vienna.

On 6 October 1994 the first applicant requested the Constitutional Court to review the constitutionality of S. 3 § 2 of the 1992 Residence Act. He argued that the impugned provision had direct consequences for him. Adducing the same arguments as the first applicant he pleaded that the impugned provision was contrary to Article 8 of the European Convention on Human Rights. Further he argued that it also violated the principle of non-discrimination as real marriages were treated in the same way as fictitious marriages.

On 27 November 1995 the Constitutional Court refused to deal with the second applicant's complaint for lack of prospects of success.

Also on 27 November 1995 the Constitutional Court rejected the first applicant's request. It found that S. 3 § 2 of the 1992 Residence Act was not addressed to or directed against the first applicant. That the impugned provision, being addressed to the second applicant as an alien, produced certain factual consequences for him did not suffice to entitle him to request the review of its constitutionality.

On 15 December 1995 the Administrative Court dismissed the second applicant's complaint. It noted that it was uncontested that she had filed her request for a residence permit on 27 October 1993 while her marriage with the first applicant had only been concluded on 5 April 1994. As S. 3 of the 1992 Residence Act only conferred a right to a residence permit on the foreign spouse if the marriage with an Austrian national had already existed for a year at the time of filing the request, the second applicant could not rely on this provision.

This decision was served on the second applicant on 19 April 1996.

COMPLAINTS

1. The applicants complain under Articles 8 and 12 of the Convention that the refusal to grant the second applicant a residence permit violated their right to respect for their family life, in that it made it impossible for them as a married couple to establish their common residence in Austria, despite the fact that the first applicant is an Austrian national. Under S. 3 § 2 of the 1992 Residence Act they would either have been obliged to live separately for a year, which would have been particularly harsh as they were expecting a child who moreover required particular medical care, or the first applicant would have been obliged to follow his wife abroad.

2. The first applicant also complains under Article 13 of the Convention that no remedy was available to him in order to challenge the decisions which had the effect of denying him the possibility of establishing a common domicile with his wife in Austria.

THE LAW

1. The applicants complain under Articles 8 and 12 of the Convention that the refusal to grant the second applicant a residence permit violated their right to respect for their family life, in that it made it impossible for them as a married couple to establish their common residence in Austria, despite the fact that the first applicant is an Austrian national.

The Court will examine the applicants' complaint under Article 8, which 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 Court recalls that, by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family. However, this does not mean that all intended family life falls entirely outside its ambit (see Eur Court HR, Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 32, § 62). The Court notes that the applicants had apparently already cohabited when the second applicant's request for a residence permit was rejected. They married and had a child while the appeal proceedings were pending. In these circumstances there is no doubt that their relationship constituted family life within the meaning of Article 8.

The Court, therefore, has to ascertain whether there was an interference with the applicants' right to respect for their family life.

The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (Gül v. Switzerland judgment of 19 February 1996, Reports 1996-I, p. 174-75, § 38).

The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory the foreign relatives of its citizens. The Court recalls that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered (Gül v. Switzerland

judgment, loc. cit.; Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment, op. cit., p. 34, §§ 67-68).

The Court notes that the applicants concluded their marriage after the second applicant's request for a residence permit had been refused. At the time of their marriage it was clear to them that the foreign spouse of an Austrian national, in accordance with S. 3 § 2 of the 1992 Residence Act, only obtained a right to a residence permit after one year of marriage. Thus they could not legitimately expect to be able to establish their common residence in Austria during this first year. Further, they have not shown that there were obstacles to establishing family life in Slovakia, the second applicant's home country, for that period. The Court notes that, having regard to the short distance between Vienna and the Slovakian border it is not even proven that the first applicant would have been obliged to give up his employment in Vienna. Finally, there is no indication that they would not have been able to obtain the necessary medical treatment for their daughter in Slovakia.

In these circumstances, the Court finds that there has been no interference with the applicants' right to respect for their family life within the meaning of Article 8 of the Convention.

The applicants also invoked Article 12 of the Convention, which reads as follows.

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The Court notes that the applicants were not prevented from contracting their marriage. Insofar as the right to marry and to found a family encompasses the right to live together (Abdulaziz, Cabales and Balkandali judgment, loc. cit., p. 32, § 62) the Court, having regard to its above considerations, finds that the complaint under Article 12 does not raise a separate issue.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The first applicant also complains that no remedy was available to him in order to challenge the decisions which had the effect of denying him the possibility of establishing a common domicile with his wife in Austria. He relies on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court recalls that Article 13 of the Convention requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention. In this context the Court has previously found that it is "difficult to conceive how a claim that is 'manifestly ill-founded' can nevertheless be 'arguable' and vice versa" (Eur. Court HR, Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, pp. 14-15, §§ 31-33). The Court, having regard to its above findings as regards the alleged violation of Articles 8 and 12 of the Convention, considers that the applicant's submissions in this respect cannot be considered as an arguable claim in terms of

the Convention. Consequently, there is no appearance of a violation of Article 13 of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

N. Bratza
President