CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## FIRST SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 42703/98
by Jovo RADOVANOVIC
against Austria

The European Court of Human Rights (First Section), sitting on 27 March 2003 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 9 July 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

# THE FACTS

The applicant, Mr Jovo Radovanovic, is a national of Serbia and Montenegro who was born in 1979 and lives at present in Serbia and Montenegro. He is represented before the Court by Mr H. Vana, a lawyer practising in Vienna.

## A. The circumstances of the case

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

### *1. Conviction by the Vienna Juvenile Court*

The applicant stayed with his parents, who are both citizens of Serbia and Montenegro and lawfully residing in Vienna, for about seven months after his birth in Austria. He then lived with his grandparents in Serbia and Montenegro. There he completed primary school, though he spent the yearly school holidays with his parents in Austria.

In 1989, at the age of 10 years, he came back to live with his parents and his sister in Austria, where he finished secondary school and completed a three year's vocational training as a butcher. During this time, he resided lawfully in Austria and, on 5 May 1993, he received an unlimited residence permit (*unbefristeter Sichtvermerk*).

On 30 July 1997 the Vienna Juvenile Court (*Jugendgerichtshof*) convicted the applicant of aggravated robbery and burglary and sentenced him to thirty months' imprisonment, out of which twenty four months were suspended for a three years' probation period. It found that the applicant, on 29 January 1997, together with his co-accused born in 1980, had knocked down the victim with a perfume bottle and had stolen cash in the amount of 65,000 Austrian schilling (ATS). On 11 and 14 April 1997 they had attempted to steal another victim's daily cash receipt by using a wheel nut tool. Still on 14 April 1997, they had broken into that victim's car and had taken away his daily cash receipt and a cheque, totalling almost ATS 125,000. When fixing the sentence, the court considered as mitigating circumstances that the applicant had so far no criminal record, that he had admitted the offences and had partly made amends (*Schadensgutmachung*), and that in two instances the offences remained attempts.

As aggravating circumstances the court considered the concurrence of two different offences, the amount of damage, the injury of the victim and the qualification of the burglary. The judgment became final in the absence of an appeal by the applicant.

*2. Proceedings concerning the issuing of a residence prohibition against the applicant*

On 30 September 1997 the Vienna Federal Police Office (*Bundespolizeidirektion Wien*) issued a residence prohibition of unlimited duration against the applicant. It referred to Section 18 §§ 1 and 2 (1) of the 1992 Aliens Act (*Fremdengesetz*) according to which a residence prohibition is to be issued against an alien, if he has been sentenced to more than three months' imprisonment by final judgment of a domestic court.

The applicant served his prison sentence until 14 October 1997. Subsequently he was transferred to a detention centre with a view to his expulsion.

On 28 October 1997 the Vienna Public Security Authority (*Sicherheitsdirektion*) dismissed the applicant's appeal. Noting that the applicant had lived for seven months after his birth in Austria and that, after his return from Yugoslavia in 1989, he had continuously lived with his family in Austria for eight years, it found that the residence prohibition at issue constituted an interference with his right to private and family life. However, it was necessary to achieve the aims set out in Article 8 § 2 of the Convention, namely the prevention of disorder and crime and for the protection of the rights of others. In particular, the applicant had committed aggravated robbery by using a weapon. Given the seriousness of the offences and the implied disrespect for physical safety and the property of others, no positive prognosis was possible. Therefore, the interest in issuing a residence prohibition of unlimited duration against the applicant prevailed over the applicant's interest in staying in Austria.

On 11 November 1997 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He argued that the lower authorities had incorrectly established the facts and had failed to give sufficient reasons for their decisions. He stressed in particular that his family had already been residing lawfully in Austria for decades and that he had completed secondary school and vocational training, upon which he had legally worked as a butcher. Before his conviction by the Juvenile Court, the applicant had had no criminal record and the offences had been committed within a very short period of two and a half months. Since his grandparents had died in the meantime, he had no other relatives in Yugoslavia.

The centre of his private and family life was exclusively in Austria. Invoking the *Moustaquim* and *Beldjoudi* judgments of the European Court of Human Rights, the applicant argued that the authorities had failed to comply with the Convention standards. In particular they had failed to balance correctly his interests in private and family life against public interests. There was no pressing need to issue an unlimited residence prohibition against him.

On 28 November 1997 the Constitutional Court declined to deal with the matter and remitted the complaint to the Administrative Court (*Verwaltungsgerichtshof*).

On 4 December 1997 the Administrative Court dismissed the complaint. It found that the Public Security Authority had duly considered the applicant's private and family situation and had correctly assessed the interests involved when issuing the residence prohibition. Furthermore the Administrative Court found that in the cases of *Moustaquim* and *Beldjoudi* the persons concerned had had stronger family ties in the host country than the applicant. The decision was served on the applicant's counsel on 16 January 1998.

On 4 February 1998 the applicant was expelled to the Federal Republic of Yugoslavia, now Serbia and Montenegro.

### *3. Proceedings concerning the applicant's request to revoke the residence prohibition in view of the 1997 Aliens Act*

On 14 October 1997 the applicant requested the Vienna Federal Police Office to revoke the residence prohibition issued against him in view of Section 38 § 1 (4) of the 1997 Aliens Act, which was to enter into force on 1 January 1998. According to that provision, a residence prohibition may not be issued "where a foreigner has grown up in Austria from an early age on and has been lawfully residing there for many years." Section 114 § 3 of the 1997 Aliens Act establishes that if a residence prohibition has not expired at the date of the entry into force of the 1997 Aliens Act, the residence prohibition has to be regarded as a residence prohibition issued under the 1997 Aliens Act. However, the residence prohibition has to be revoked if it was not lawful to issue it under the 1997 Aliens Act.

On 25 March 1998 the Federal Police Office dismissed this request. It noted in particular that the applicant did not comply with the requirements of the above provision, since he had not grown up in Austria within the meaning of Section 38 § 1 (4). Therefore, issuing the residence prohibition was also lawful under the 1997 Aliens Act.

In his appeal of 14 April 1998 the applicant complained that the Federal Police Office had incorrectly applied the provision at issue.

On 27 April 1998 the Vienna Public Security Authority dismissed his appeal. It noted that the provision at issue required that a foreigner had commenced growing up in Austria at the age of two or three years or even

younger, whereas the applicant had only been in Austria during the first seven months of his life and had come back when he was already ten. Therefore, he clearly did not comply with that provision.

The applicant did not appeal to the Constitutional Court and the Administrative Court.

## COMPLAINT

The applicant complains under Article 8 of the Convention that the residence prohibition issued against him violated his right to private and family life.

## THE LAW

The applicant complains that the issuance of the residence prohibition of unlimited duration against him has been in breach of his right to private and family life 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."

1. The Government argue that the applicant failed to exhaust domestic remedies in that he had not complained to the Constitutional Court and the Administrative Court in the proceedings to revoke the residence prohibition.

The applicant maintains that his complaint is limited to the residence prohibition issued against him by the Vienna Federal Police Office on 30 September 1997. After having unsuccessfully exhausted all domestic remedies, he was expelled to Serbia and Montenegro. The proceedings instituted in an attempt to revoke the residence prohibition only constituted follow-up proceedings and were a consequence of the entry into force of a new Aliens Act.

The Court reiterates that the rule of the exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right

through their own legal system. Under Article 35 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Akdivar and others v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, §§ 65-66).

The Court considers that the two proceedings cannot be considered together as contended by the Government. The Court notes that the applicant exhausted all available remedies in the proceedings concerning the imposition of the residence prohibition. These proceedings were terminated by the Administrative Court's decision of 4 December 1997, i.e. before the entry into force of the 1997 Aliens Act on 1 January 1998. It was on the basis of this decision that the applicant was expelled on 4 February 1998. The possibility to institute proceedings under the new Aliens Act in order to have the residence prohibition revoked, provided certain conditions were met, could not redress the grievance which had already occurred as a result of the applicant's expulsion. Therefore the Court rejects the Government's objection of non-exhaustion of domestic remedies.

2. As regards compliance with Article 8 of the Convention, the Government accept that the residence prohibition interfered with the applicant's right to respect for his private and family life. In this respect they point out that, although the applicant was born in Austria and had stayed there for a few months after his birth, he had spent his childhood in Serbia and Montenegro until he returned to join his parents and sister in Vienna at the age of around eleven years. When the residence prohibition was issued, the then 19-year-old applicant had been living together with his family in Austria for some eight years. In the Government's view, the measure at issue was justified under paragraph 2 of Article 8 as being in accordance with the law, namely the relevant provisions of the 1992 and 1997 Aliens Act. In this respect they submit that the applicant did not meet the requirements of Section 38 § 1 (4) of the 1997 Aliens Act, as he clearly had not grown up in Austria from an early age onwards since he had left Austria when he was only seven months old and did not return until he was ten. This had also been pointed out in the reasoning of the domestic authorities' decisions of 25 March and 27 April 1998 which dismissed his application for lifting the residence prohibition. The measure also pursued the legitimate aim of the prevention of disorder or crime. Having regard to the seriousness of the offence and the severity of the penalty, the Government argue that the measure was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention and that the Austrian authorities have not overstepped their margin of appreciation.

In reply, the applicant referred to his submissions in his application.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits.

The Court concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously *declares* the application admissible, without prejudging the merits.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President