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. 32846/96
by Sevket YAGIZ
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 15 May 1996 by Sevket YAGIZ against Austria and registered on 3 September 1996 under file no. 32846/96;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish national, born in 1958, and living in Natters.

He is represented before the Court by Mr. Horst Lumper, a lawyer practising in Bregenz.

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

The applicant came to Austria in November 1989 without having a valid visa. In 1990 the Innsbruck District Administrative Authority (*Bezirkshauptmannschaft*) found him guilty of illegal entry and imposed a fine of 2,200 Austrian Schillings (ATS) on him. Subsequently, the applicant obtained a residence permit which was periodically renewed. In August 1991 his wife, who is also a Turkish national, as well as their son, born in 1975, and their daughter, born in 1985, were allowed to join him under a family reunion scheme. The applicant found employment as a worker. In 1993 the Innsbruck District Administrative Authority found him guilty of drunken driving and imposed a fine of ATS 12,100 on him. In 1994 the same authority found him guilty of refusing to undergo a breathalyser test when being reasonably suspected of drunken driving and imposed a fine of ATS 15, 400 on him.

On 9 February 1995 the Innsbruck District Administrative Authority issued a residence ban valid for five years against the applicant. Referring to S. 18 § 1 and § 2 (2) of the 1992 Aliens Act (*Fremdengesetz*), according to which a residence ban has to be issued against an alien, inter alia, if he has been convicted more than once of a serious administrative offence, it found that the applicant's convictions for drunken driving in 1993 and refusing to undergo a breathalyser test in 1994 constituted such serious offences. Although the residence ban constituted an interference with the applicant's private and family life, this measure was necessary, as there were specific reasons to fear that his further stay would be a danger for public security.

On 22 February 1995 the applicant, represented by counsel, filed an appeal. He argued that the residence ban against him was disproportionate, as the offences committed by him were not of a serious nature. Moreover, it forced him to separate from his family who were dependent on his income. Further, the applicant argued that Austria had become a member of the European Union on 1 January 1995 and was therefore bound by the Association Agreement between the European Union and Turkey. According to this Agreement and the decisions on its implementation, Turkish workers who had been legally employed in a member State for four years had a right of free access to the employment market and also to a residence permit. Moreover, measures of public security against such workers could not be based solely on criminal convictions but had to be justified by the specific conduct of the person concerned.

On 3 October 1995 the Tyrol Public Security Authority (*Sicherheitsdirektion*) dismissed the applicant's appeal. It confirmed that the applicant's convictions in 1993 and 1994, relating to drunken driving and refusing a breathalyser test, constituted serious administrative offences within the meaning of S. 18 § 2 (2) of the Aliens Act. Referring to S. 20 of the said Act which requires the authority to weigh the negative consequences the residence ban would have for the alien and his family against the public interest in issuing a residence ban, it found in particular that the applicant had only lived in Austria since 1989 and his family since 1991. Moreover, his family could leave Austria with him. Having regard

to the conduct of the applicant and the particular risks it entailed for life and limb as well as the property of others, he had to be considered as a danger for public safety. In sum, the interest in issuing the residence ban outweighed the interests of the applicant and his family in staying in Austria. Finally, the Association Agreement between the European Union and Turkey, relied on by the applicant, did not prohibit the issuing of a residence ban.

On 25 October 1995 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He repeated the arguments he had already forwarded in his appeal to the Public Security Authority.

On 27 November 1995 the Constitutional Court refused to entertain the applicant's complaint and referred the case to the Administrative Court (*Verwaltungsgerichtshof*).

On 20 March 1996 the Administrative Court dismissed the applicant's complaint. It found that the contested residence ban was necessary within the meaning of Article 8 § 2 of the European Convention on Human Rights in the interests of public safety and the prevention of crime. Referring on the one hand to the gravity of the offences committed by the applicant and on the other hand to his short stay in Austria, the Court confirmed that the Public Security Authority had duly weighed the interests involved.

COMPLAINT

The applicant complains under Article 8 of the Convention that the issuing of a residence ban against him violated his right to respect for his private and family life. He argues that the offences committed by him were of a minor nature. He points out that he has been living in Austria since 1989 and alleges that the residence ban would force him to separate from his family who have been living with him in Austria since 1991. Further, he submits that the residence ban was contrary to the Association Agreement between the European Union and Turkey which provides that Turkish workers who have been legally employed in a member State for four years have a right of free access to the employment market and also to a residence permit. Moreover, measures of public security against such workers cannot be based solely on criminal convictions but have to be justified by the specific conduct of the person concerned.

THE LAW

The applicant complains that the issuing of a residence ban against him violated his right to respect for his private and family life. He relies on Article 8 of the Convention, 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."

In the present case it may be open to doubt whether there was an interference with the applicant's right to respect for his private and family life. The Court recalls that the Commission has previously found that the deportation of a foreigner does not constitute an interference with his right to respect for his family life where close members of his family have a reasonable opportunity to follow him (see for instance no. 9478/81, Dec. 8.12.81, D.R. 27, p. 243; no. 7729/76, Dec. 17.12.76, D.R. 7, p. 164). Further, the Commission has found that the deportation of an alien whose presence in the Contracting State was only conditional and temporary did not interfere with his right to respect for his private life (no. 9478/81, loc. cit.).

The applicant alleges that the residence ban would separate him from his family, but does not adduce any particular reasons why they could not follow him to Turkey. However, it appears that the applicant's residence permit was not subject to any particular conditions and was renewed on a regular basis. The fact that his family joined him under a family reunion scheme also indicates that his permission to stay in Austria had a long-term perspective. The Court will, therefore, assume that the issue of a residence ban against the applicant constituted an interference with his right to respect for his private and family life.

It is, thus, necessary to examine whether it satisfied the conditions of paragraph 2 of Article 8, that is to say whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" for the achievement of that aim or aims.

The applicant contests the lawfulness of the residence ban, arguing that it was contrary to the Association Agreement between the European Union and Turkey. He claims in essence that he had a right to a residence permit under the said Agreement and that a residence ban against him could not solely be based on his convictions but had to be justified by his specific conduct.

The Court recalls that the expression "in accordance with the law" within the meaning of Article 8 § 2 requires that the impugned measure should have a basis in domestic law (Eur. Court HR, Kruslin v. France judgment of 24 April 1990, Series A no. 176-A, p. 20, § 27).

In the present case, the residence ban against the applicant was based on S. 18 § 1 and § 2 (2) of the 1992 Aliens Act. The Tyrol Public Security Authority noted the applicant's convictions for drunken driving and refusing to undergo a breathalyser test. Having regard to the applicant's conduct and the specific dangers emanating therefrom for the fundamental rights of others, it found that he had to be considered as a danger for public safety. It dismissed the applicant's argument that the Association Agreement between the European Union and Turkey prohibited the issue of a residence ban. Its decision was confirmed by the Administrative Court. In this context, the Court recalls that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (Kruslin judgment, op. cit., p. 21, § 29). Even assuming that the Association Agreement between the European Union and Turkey was directly applicable in the proceedings at issue, the Court finds that the applicant's submissions do not show that it conferred rights on him which were disregarded by the Austrian authorities. The Court concludes, therefore, that the interference was "in accordance with the law".

The interference complained of also served a legitimate aim, namely the prevention of disorder or crime.

As to the necessity of the interference, the Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. For that purpose they are entitled to order the expulsion of such persons convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. The Court's task accordingly consists in ascertaining whether the issue of a residence ban against the applicant struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other (see as a recent authority, Eur. Court HR, Dalia v. France judgment of 19 February 1998, Reports 1998-I, p. 91, § 52).

In the present case, the Austrian authorities, when issuing the residence ban against the applicant, relied on his convictions for drunken driving and refusing a breathalyser test, finding that the offences in question constituted serious administrative offences. The Court notes that, in both cases, the applicant was only ordered to pay a fine. However, the Court also notes that the applicant was already an adult when he arrived in Austria in November 1989 and had only lived and worked there for about five years and three months when the residence ban was issued against him in February 1995. His wife, who is also Turkish, and their children, born in 1975 and 1985, had joined him in August 1991. Thus, the whole family had at the relevant time only lived in Austria for three and a half years. Given the limited duration of the applicant's stay in Austria, there is no indication that he has lost his social ties in Turkey. Further, although his children may have received part of their schooling or other education while being in Austria, there is no indication that the applicant's family could not reasonably be expected to follow him to Turkey, and adapt or readapt to life there.

In these circumstances, the Court finds that the Austrian authorities, when issuing the contested residence ban against the applicant, struck a fair balance between the relevant interests involved.

In conclusion, the Court considers that the residence ban against the applicant cannot be regarded as disproportionate to the legitimate aim pursued. There is, thus, no appearance of a violation of Article 8 of the Convention.

It follows that the application is 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