AS TO THE ADMISSIBILITY OF

Application No. 25050/94
by Ayhan YAVUZ
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 16 January 1996, 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. 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 22 August 1994 by Ayhan YAVUZ against Austria and registered on 31 August 1994 under file No. 25050/94;

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 applicant is a Turkish citizen, born in 1965 and at the time of the events had been residing in Fußach (Austria). Before the Commission he is represented by Mr. W.L. Weh, a lawyer practising in Bregenz (Austria).

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

In November 1991 the applicant arrived in Austria. On 1 June 1992 he married an Austrian citizen. Subsequently he requested a working permit and a residence permit. In June 1992 he was issued a working permit.

On 12 May 1993 the Bregenz District Administrative Authority (Bezirkshauptmannschaft) refused to issue a residence permit to the applicant. It found that the applicant had entered Austria without a valid visa and had failed to comply with the border formalities. Furthermore he had entered into a marriage of convenience (Scheinehe) for the primary purpose of obtaining a working and a residence permit. In such circumstances a residence permit had to be refused.

On 12 August 1993 the District Administrative Authority issued a deportation order (Ausweisungsbescheid) against the applicant. It

found that the applicant had no residence permit and that his stay in Austria was therefore unlawful. Thus, his removal from Austria was necessary in the public interest.

On 19 August 1993 the applicant, assisted by counsel, appealed. He submitted that he was married to an Austrian citizen and that the authority should not have issued a deportation order.

On 10 November 1993 the Vorarlberg Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal. It found that the District Administrative Authority had acted correctly when imposing a deportation order on him because his stay in Austria was unlawful. He had arrived in Austria in November 1991 without a valid visa and by circumventing the procedures of border control and also later on he had not been granted a residence permit. His deportation was therefore in the public interest. It was necessary that the authorities had a comprehensive knowledge of aliens staying in Austria for the purpose of properly enforcing the laws on immigration of aliens. A prolonged unlawful stay of an alien, as in the applicant's case, ran counter to this public interest.

The Public Security Authority also found that the applicant's private interests in staying in Austria did not outweigh the public interest. As regards the applicant's marriage to an Austrian citizen, contracted on 1 June 1992, the Authority noted that on 9 September 1992 police officers had made an enquiry about the applicant at his address, his wife's apartment, but had not found him. When visiting him at his place of work the applicant did not know his own address but had agreed to show his home to the police. When they had arrived at his wife's apartment, the applicant had no keys and a third person living in the building had opened the apartment for him. In the apartment there had been none of the applicant's personal belongings. The third person had also informed the applicant and the police officers that the applicant's wife had gone to hospital the day before to give birth to a child, a fact of which the applicant had been ignorant. On 10 September 1992 the applicant, when questioned by the police officers, had stated that he had got to know his wife in Hamburg while visiting his uncle in 1991 and had arrived together with her in Austria only in April 1992. His wife when questioned on 8 October 1992, however, had stated that she had met her husband in December 1991 in Lindau and had never stayed with him in Germany. The Authority also noted that the applicant, although married to an Austrian for more than a year, did not speak any German and that he had had to be questioned with the assistance of an interpreter. The Authority concluded that the applicant's marriage was one of convenience which he had entered into merely for the purpose of obtaining a working permit and a residence permit. Thus he had no genuine family links in Austria which would militate against his deportation.

On 22 November 1993 the applicant introduced a complaint with the Constitutional Court (Verfassungsgerichtshof) against the deportation order and submitted that in view of his marriage to an Austrian citizen his expulsion from Austria violated Article 8 of the Convention.

On 14 December 1993 the Constitutional Court refused to deal with the applicant's complaint for lack of prospect of success. On 17 January 1994 it referred the case to the Administrative Court (Verwaltungsgerichtshof).

On 24 March 1994 the Administrative Court dismissed the complaint. It found that based on the result of their enquiries the authorities could reasonably conclude that the applicant had entered into a marriage of convenience and he had failed to submit any convincing arguments against the authorities' conclusions. Therefore the deportation order issued against the applicant was lawful. This decision was served on the applicant on 27 April 1994.

In October 1994 the applicant was deported to Turkey.

COMPLAINTS

The applicant complains under Article 8 of the Convention that the deportation order issued against him and its enforcement violated his right to respect for his private and family life. He complains in particular about the finding of the Austrian authorities that his marriage was one of convenience as, in his view, such a finding could only be the result of civil court proceedings for the annulment of a marriage. The applicant also relies on Article 12 of the Convention.

THE LAW

The applicant complains that the deportation order issued against him and its enforcement violated his right to respect for his private and family life. He relies on Article 8 para. 1 (Art. 8-1) of the Convention which provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

The Commission has repeatedly held that no right of an alien to enter or to reside in a particular country, nor a right not to be expelled from a particular country, is as such guaranteed by the Convention (see No. 12461/86, Dec. 10.12.86, D.R. 51 pp. 258, 264). However, in view of the right to respect for private and family life ensured by Article 8 (Art. 8) of the Convention, the exclusion of a person from a country in which his immediate family resides may raise an issue under this provision of the Convention (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 13654/88, Dec. 8.9.88, D.R. 57 pp. 287, 289).

Article 8 (Art. 8) of the Convention presupposes the existence of a family life and at least includes the relationship that arises from a lawful and genuine marriage even if a family life has not been fully established. The question of whether or not there is a family life for the purpose of Article 8 (Art. 8) of the Convention is essentially a question of fact, depending on the real existence in practice of close personal ties (see No. 10375/83, Dec. 10.12.84, D.R. 40 p. 196).

The Commission recalls further that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 (Art. 8) does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in the State concerned (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 34, para. 68; No. 19788/92, Dec. 9.2.92, unpublished).

The Commission has had regard to the findings of fact by the District Administrative Authority, as confirmed by the Public Security Authority, and its conclusion that, in light of these facts, the primary purpose of the marriage was to receive a working permit and a residence permit. The Commission finds that the decisions of the District Administrative Authority and the Administrative Court do not exhibit any arbitrariness. The applicant has no strong ties to Austria, never having lived there before, and did not lead a family life in the sense of Article 8 (Art. 8) of the Convention.

In these circumstances the Commission concludes that the decision not to grant the applicant a residence permit, to issue a deportation order against him and to enforce it has not failed to respect the applicant's right to respect for family life, ensured by Article 8 para. 1 (Art. 8-1) of the Convention.

Accordingly this aspect of the case is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The applicant complains further that the deportation order imposed on him and its enforcement violated his right under Article 12 (Art. 12) of the Convention which provides 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 Commission notes that the applicant married his wife unhindered. Furthermore, for the same reasons given above in respect of Article 8 (Art. 8) of the Convention, the Commission finds that Article 12 of the Convention also does not impose a general obligation upon Contracting States to respect a married couple's choice of the place where they wish to found a family or to accept non-national spouses for settlement to facilitate that choice (No. 14069/88, Dec. 14.12.88, unpublished; No. 19788/92, Dec. 9.2.92, unpublished).

It follows that this aspect of the case is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

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)