AS TO THE ADMISSIBILITY OF

Application No. 14620/89
by Caslav, Slobodanka, Zaklina and
Zarko ZIKIC
against Austria

The European Commission of Human Rights sitting in private on 3 May 1993, the following members being present:

Present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 29 September 1988 by Caslav, Slobodanka, Zaklina and Zarko ZIKIC against Austria and registered on 6 February 1989 under file No. 14620/89;

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

The applicants, a couple and their two children, are Yugoslav nationals. The first applicant, the father, was born in 1951 and has lived in Austria since 1970. The second applicant, his wife, was also born in 1951. She joined him in Austria shortly after his arrival there. Their children, the third and fourth applicants, were born in 1973 and 1974, respectively. They were brought up and attended school in Austria. They are resident in Bürs. The first applicant is a shift-worker.

Before the Commission the applicants are represented by Mr. W.L. Weh, a lawyer practising in Bregenz.

A. Particular circumstances of the case

On 4 March 1987 the Bludenz District Administrative Authority (Bezirkshauptmannschaft) imposed a residence prohibition for a period of five years, until 4 March 1992, on the first applicant. The District Authority found in particular that, in the years 1976 - 1985 he had been punished five times for drunken driving of a motor vehicle, and had thus endangered public peace, order and security.

On 20 October 1987 the Vorarlberg Security Directorate (Sicherheitsdirektion) dismissed the first applicant's appeal. It considered in particular that over the past years he had been repeatedly fined for drunken driving, and had also committed other traffic offences. In 1976 the Bludenz District Administrative Authority had imposed on the first applicant a fine of AS 7.000, in 1981 a fine of AS 8.000, in 1985 a fine of AS 10.000 and in 1986 a fine of AS 14.000, all for drunken driving. On 14 November 1985 the Bludenz District Authority had warned the first applicant that if he committed further serious offences, in particular driving a motor vehicle under the influence of alcohol, a residence prohibition would have to be imposed. On 24 November 1986 he had nevertheless driven a motor vehicle under the influence of alcohol and had therefore been fined on 5 December 1986. After a residence prohibition had been imposed on 4 March 1987, he drove again a motor vehicle under the influence of alcohol on 2 June 1987, a blood test showing blood alcohol of 2 per mille. The Security Directorate concluded that repeated fines, a suspension of his driving licence and even the warning about a residence prohibition could not induce the first applicant to observe the traffic regulations. His residence in Austria, therefore, presented a danger to public peace, order and security. Personal circumstances, especially the length of his residence as well as his and his family's integration in Austria could not outweigh the public interest in the residence prohibition.

On 29 September 1987 the Constitutional Court (Verfassungsgerichtshof) annulled Section 3 of the Aliens Act (Fremdenpolizeigesetz) as amended by Federal Law No. 555/1986 - the legal basis for residence prohibitions - with effect from 31 December 1987.

On 18 November 1987 the first applicant lodged a complaint with the Constitutional Court which on 7 December 1987 refused to entertain his complaint. The Court found in particular that the first applicant could not challenge Section 3 of the Aliens Act, which had been annulled by its judgment of 29 September 1987. The Constitutional Court referred the complaint to the Administrative Court (Verwaltungsgerichtshof) on 20 January 1988.

On 2 March 1988 the Administrative Court dismissed the complaint. It found that neither the Aliens Act nor Article 8 of the Convention required the authority to balance the residence prohibition against less restrictive administrative measures in the present case, as the first applicant had been punished for repeated and serious offences and the prohibition of his further residence in the country was necessary for the maintenance of public peace and order, for the prevention of further offences and for the protection of the health of others (Section 3 para. 3 lit. b, d and e of the Aliens Act). The Administrative Court further noted that the first applicant had not been deterred from committing further serious offences either by the warning about or by the imposition of the residence prohibition.

By letter of 5 June 1990 the first applicant was informed by the Bludenz District Administrative Authority that he had to leave the country within a period of two weeks after receipt of the letter, otherwise punitive and coercive measures (detention pending

deportation) would be taken. On 3 December 1990 the first applicant was granted a visa by the Bludenz District Administrative Authority and on 20 November 1991 the same authority granted him a visa valid until 31 January 1993. On 10 January 1992 the Vorarlberg Security Directorate, which had received instructions from the Federal Ministry of the Interior, instructed the Bludenz Administrative Authority, with an express reference to the application pending before the European Commission of Human Rights, to refrain from deporting the first applicant until further notice.

B. Relevant domestic law

Section 3 of the Austrian Aliens Act (Fremdenpolizeigesetz) in the former version in force until 31 December 1987, insofar as relevant to the case, reads as follows:

[Translation]

"(1) A residence prohibition may be imposed on aliens whose residence in the Federal territory endangers public peace, order or security, or contravenes other public interests.

(2) In particular, a residence prohibition may be imposed on aliens,

a) on whom a sanction has been imposed by a final decision of a domestic administrative authority for serious or repeated offences;

b) ....

(3) The authority, when imposing a residence prohibition, shall balance the personal situation of the alien, especially the right to respect for his private and family life, against the public interests supporting the residence prohibition. An interference with this right is only lawful if it is necessary

a) for the protection of the internal and external security of the Republic of Austria,

b) for the maintenance of public peace and order,

c) for the protection of the economic well-being of the Republic of Austria,

d) for the prevention of crime,

e) for the protection of the health and morals of others, or

f) for the protection of the rights and freedoms of others."

[German]

"(1) Gegen Fremde, deren Aufenthalt im Bundesgebiet die öffentliche Ruhe, Ordnung oder Sicherheit gefährdet oder anderen öffentlichen Interessen zuwiderläuft, kann ein Aufenthaltsverbot erlassen werden.

(2) Insbesondere kann ein Aufenthaltsverbot gegen Fremde erlassen werden,

a) die von einer inländischen Verwaltungsbehörde wegen schwerwiegender oder wiederholter Übertretungen rechtskräftig bestraft worden sind;

b) ....

(3) Die Behörde hat bei Erlassung eines Aufenthaltsverbotes die persönlichen Verhältnisse des Fremden, insbesondere das Recht auf Achtung seines Privat- und Familienlebens, gegen die für die Erlassung eines Aufenthaltsverbotes sprechenden öffentlichen Interessen abzuwägen. Ein Eingriff in dieses Recht ist nur zulässig, wenn dieser

a) zum Schutz der inneren oder äusseren Sicherheit der Republik Österreich,

b) zur Aufrechterhaltung der öffentlichen Ruhe und Ordnung,

c) zum Schutz des wirtschaftlichen Wohles der Republik Österreich,

d) zur Verhinderung von strafbaren Handlungen,

e) zum Schutz der Gesundheit und der Moral anderer, oder

f) zum Schutz der Rechte und Freiheiten anderer notwendig ist."

Section 6 para. 1 of the Aliens Act reads as follows:

[Translation]

"(1) An alien on whom a residence prohibition has been imposed has to leave the territory where residence has been prohibited within a week after the decision becomes enforceable. During the period of validity of the residence prohibition he must not re-enter this territory without permission."

[German]

"(1) Der Fremde, gegen den ein Aufenthaltsverbot erlassen worden ist, hat das Gebiet in dem ihm der Aufenthalt verboten ist, innerhalb einer Woche nach Rechtskraft des Bescheides zu verlassen. Er darf dieses Gebiet während der Geltungsdauer des Aufenthaltsverbotes ohne Bewilligung nicht wieder betreten."

Section 25 of the Passport Act (Paßgesetz) reads, in its passages relevant to the case, as follows:

[Translation]

"(1) A visa may be issued to an alien upon his request, if no reasons for a refusal as mentioned in para. 3 exist.

(3) The issuing of a visa shall be refused if

...

c) an enforceable residence prohibition had been imposed on the applicant, unless he had been issued a permission according to Section 6 para. 1 of the Aliens Act, Federal Law Gazette No. 75/1954 ..."

...

[German]

"(1) Ein Sichtvermerk kann einem Fremden auf Antrag erteilt werden, sofern kein Versagungsgrund gemäß Abs. 3 vorliegt.

(3) Die Erteilung eines Sichtvermerks ist zu versagen, wenn

...

(c) gegen den Sichtvermerkswerber ein rechtskräftiges Aufenthaltsverbot besteht, es sei denn, daß ihm eine Bewilligung gemäß Paragraph 6 Abs. 1 des Fremdenpolizeigesetzes, BGBl. Nr. 75/1954, erteilt worden ist ..."

Section 27 of the Passport Act (Paßgesetz) provides:

[Translation]

"(1) A visa shall be declared invalid by the authority if subsequently facts become known or occur, which would have justified the refusal of a visa or would justify it.

(2) If a residence prohibition imposed on an alien becomes enforceable, the visa issued to him becomes invalid."

[German]

"(1) Ein Sichtvermerk ist von der Behörde für ungültig zu erklären, wenn nachträglich Tatsachen bekannt werden oder eintreten, die die Versagung des Sichtvermerks gerechtfertigt hätten oder rechtfertigen würden."

(2) Erwächst ein gegen einen Fremden verhängtes Aufenthaltsverbot in Rechtskraft, wird der ihm erteilte Sichtvermerk ungültig."

COMPLAINTS

1. The applicants complain under Article 8 of the Convention that the residence prohibition was not imposed in accordance with law on the first applicant, as the authority had applied a law which had already been declared unconstitutional by the Constitutional Court. Furthermore they consider the residence prohibition imposed on the first applicant as a disproportionate measure.

2. Under Article 8 of the Convention the applicants also complain about the delay in the proceedings before the Vorarlberg Directorate of Security on the first applicant's appeal against the residence prohibition.

3. Lastly the applicants complain under Article 6 para. 1 of the Convention of the unfairness of and the unreasonable delay in the appeal proceedings before the Security Directorate.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 September 1988 and registered on 6 February 1989.

On 1 July 1991 the Commission decided to communicate the application to the respondent Government and request them to submit their written observations on its admissibility and merits. The Government's observations were submitted on 2 January 1992. On 10 April 1992 the applicants submitted their observations in reply.

THE LAW

1. The applicants complain under Article 8 (Art. 8) of the Convention that the residence prohibition imposed on the first applicant constituted an unjustified interference with their right to respect for private and family life as it was neither in accordance with Austrian law nor necessary in a democratic society for one of the aims mentioned in Article 8 para. 2 (Art. 8-2).

Article 8 (Art. 8) of the Convention 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 freedom of others."

The Government submit that the residence prohibition imposed on the first applicant, which expired on 4 March 1992, had not been enforced. Moreover, he had been granted a visa on 3 December 1990 and again on 20 November 1991, the latter valid until 31 January 1993. These visas had a suspensive effect on the enforcement of the residence prohibition. Thus, since 3 December 1990 the applicants could no longer claim to be victims of a violation of the Convention.

The applicants contend that they are still victims within the meaning of Article 25 (Art. 25) of the Convention. Though the residence prohibition was never enforced, it continued to be upheld and the legal position of the first applicant continued to be uncertain. To the applicants' knowledge the residence prohibition imposed on the first applicant was still in force and no suspension of its enforcement or other temporary toleration of the first applicant's stay in Austria could change the fundamental problem of the residence prohibition. In the applicants' view the visa issued on 20 November 1991 to the first applicant was legally invalid under the mandatory provisions of Section 27 para. 2 of the Passport Act, as it was issued in spite of a residence prohibition imposed on the first applicant. The first applicant could therefore remain in Austria without a residence permit only by virtue of the instruction to refrain from deporting him, issued by the Ministry of the Interior. The applicants submit that also in the Beldjoudi case, the European Court of Human Rights had found a violation of Article 8 (Art. 8) of the Convention although the applicant had not been deported (judgment of 26 March 1992, Series A no. 234-A). Therefore, already the imposition of a residence prohibition and not its enforcement constitutes an interference with Article 8 para. 1 (Art. 8-1) of the Convention.

Under Article 25 para. 1 (Art. 25-1) of the Convention the Commission may only deal with an application if the applicant can claim to be a victim of a violation, by one of the High Contracting Parties, of the rights set forth in the Convention or its Protocols.

On the question whether the applicants may still claim to be victims under Article 25 para. 1 (Art. 25-1) of an alleged violation of Article 8 (Art. 8) of the Convention, the Commission observes that the residence prohibition expired already on 4 March 1992 and can no longer be enforced. The Commission notes further that even before that date no steps for its enforcement have been taken and that the applicants were able to stay together in Austria.

Moreover, on 3 December 1990 and again on 20 November 1991 the first applicant had been issued a visa, the latter valid until 31 January 1993. It is true that the applicants contest the legal validity of the visas issued to the first applicant, as they were issued despite a residence prohibition imposed on the first applicant. However, the Commission notes that according to Sections 25 para. 3 and 27 para. 1 of the Passport Act a visa issued despite an enforceable residence prohibition would have to be revoked by the authorities. The applicants, however, do not submit that the authorities actually did revoke the first applicant's visa.

Lastly, it transpires from the Government's submissions, not disputed by the applicants, that the residence prohibition imposed on the first applicant lasted from 4 March 1987 to 4 March 1992. The applicants have not argued that after 4 March 1992, the date when the residence prohibition imposed on the first applicant expired, a new residence prohibition was imposed on him.

In these circumstances the Commission concludes that the applicants' complaint under Article 8 (Art. 8) of the Convention is resolved in such a way that, in the particular circumstances of the present application, they are no longer able to claim to be victims within the terms of Article 25 para. 1 (Art. 25-1) of the Convention (see No. 9856/82, Dec. 14.5.87, D.R. 52 p. 38, at p. 73; No. 18417/91, Dec. 2.12.92, unpublished; No. 15291/89, Dec. 11.1.93, unpublished). It follows that this part of the application is inadmissible under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also complain under Article 6 para. 1 (Art. 6-1) of the Convention of the unfairness of, and the unreasonable delay in, the proceedings before the Security Directorate. Under Article 8 (Art. 8) of the Convention the applicants complain that the Security Directorate had delayed its decision on the appeal of the first applicant to prevent him from benefiting from the Constitutional Court's test case ruling on Section 3 of the Aliens Act.

The Commission has examined these complaints under Article 6 (Art. 6) of the Convention.

It recalls however, that a decision as to whether an alien should be allowed to stay in a country does not involve the determination of civil rights or of a criminal charge within the meaning of Article 6 (Art. 6) of the Convention (No. 8118/77, Dec. 19.3.1981, D.R. 25 p. 105, at p. 119).

It follows that Article 6 para. 1 (Art. 6-1) of the Convention is not applicable in the present case. The remainder of the application is therefore incompatible ratione materiae with the provisions of the Convention 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 Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)