

EUROPEAN COMMISSION OF HUMAN RIGHTS

FIRST CHAMBER

Application No. 22342/93

Erol Dür

against

Austria

REPORT OF THE COMMISSION

(adopted on 16 October 1996)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Turkish citizen, born in 1964 and resident in Vienna. He was represented before the Commission by Mr. H. Pochieser, a lawyer practising in Vienna.

3. The application is directed against Austria. The respondent Government were represented by their agent, Ambassador F. Cede, Head of the International Law Department of the Federal Ministry for Foreign Affairs.

4. The case concerns the refusal of the Austrian courts to summon and hear the applicant's brother as witness in criminal proceedings instituted against the applicant. The applicant invokes Article 6 paras. 1 and 3 (d) of the Convention.

B. The proceedings

5. The application was introduced on 17 June 1993 and registered on 26 July 1993.

6. On 12 October 1994 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 23 January 1995 after an extension of the time-limit fixed for this purpose. The applicant replied on 17 March 1995.

8. On 16 January 1996 the Commission declared admissible the applicant's complaint about the alleged unfairness of the criminal proceedings against him. It declared inadmissible the remainder of the application.

9. The text of the Commission's decision on admissibility was sent to the parties on 30 January 1996 and they were invited to submit such further information or observations on the merits as they wished. No such observations were submitted.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mrs. J. LIDDY, President  
MM. M.P. PELLONPÄÄ  
E. BUSUTTIL  
A. WEITZEL  
B. MARXER  
G.B. REFFI  
B. CONFORTI  
N. BRATZA  
I. BÉKÉS  
G. RESS  
A. PERENIC  
C. BÎRSAN

K. HERNDL  
M. VILA AMIGÓ

12. The text of this Report was adopted on 16 October 1996 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

16. On 21 November 1991 the chief of the Deutsch Wagram Police Station (Postenkommandant) laid a criminal information against the applicant and his brother I. with the Korneuburg Public Prosecutor's Office (Staatsanwaltschaft). According to the criminal information, on 21 November 1991, at 5.20 hours, the applicant's brother had tried to resist his arrest, which had been ordered with a view to his deportation to Turkey, by hitting and kicking the police officers concerned. The applicant had also resisted public authority in that he too had attacked the police officers. The applicant and his brother had finally been arrested. The applicant's brother had then been brought to the airport and at 9.30 hours had been handed over to the airport police for deportation. At about 11.30 hours the detention order (Schubhaftbescheid) had been served on counsel for the applicant's brother. The deportation had taken place at 13.15 hours. The applicant himself had been released at 11.30 hours. The Public Prosecutor, who had been informed of the events by telephone, had made no objections to the deportation of the applicant's brother, as he found that any possible criminal prosecution could be taken over by the Turkish authorities.

17. On 26 November 1991 the Korneuburg Public Prosecutor filed a bill of indictment against the applicant charging him with attempted resistance to public authority (versuchter Widerstand gegen die Staatsgewalt). The Public Prosecutor requested that the five police officers concerned and the applicant's brother be heard as witnesses at the trial.

18. On 17 January 1992 the applicant, who was then assisted by counsel, requested that his brother and A.T., who had been present at the events on 21 November 1991, be heard as witnesses.

19. On 23 March 1992 the trial (Hauptverhandlung) of the applicant took place before the Korneuburg Regional Court (Kreisgericht). In the course of the trial the Regional Court heard the five police officers and A. T. as witnesses. As regards the events in the morning of 21 November 1991, A.T. stated that after the police officers had arrived he had left to make a telephone call. On his return he had told the applicant, who had a heated discussion with the police officers, to calm down and had then started to prepare breakfast. He had not

paid attention to what was going on around him. The applicant's counsel requested again that the applicant's brother be heard as a witness. This request was refused by the Regional Court, which found that the applicant's brother had been deported to Turkey and therefore had to be considered as an "unobtainable means of evidence" (nicht greifbares Beweismittel).

20. On the same day the Regional Court convicted the applicant of attempted resistance to public authority and sentenced him to four months' imprisonment suspended for a probationary period of three years. The Regional Court, having regard to the evidence taken, found that the applicant had hit and kicked the police officers who carried out his brother's and his own arrest. The arrest had initially been carried out by two police officers, who, in view of the resistance, had called for reinforcement. Subsequently three more police officers had arrived and it had taken three police officers to break the applicant's resistance and to carry out his arrest.

21. On 24 June 1992 the applicant introduced an appeal with the Court of Appeal. He submitted that the Regional Court had wrongly refused to hear his brother as a witness for the defence. He submitted further that in the meantime his brother had introduced a complaint with the Independent Administrative Panel (Unabhängiger Verwaltungssenat) complaining that his arrest and deportation to Turkey had been unlawful.

22. On 29 June 1992 the Lower Austrian Independent Administrative Panel, upon the complaint by the applicant's brother about his arrest, subsequent detention and deportation to Turkey, decided that the applicant's brother's arrest on 21 November 1991 at 5.30 hours and his detention until 11.30 hours, when the detention order was served on the lawyer, had been unlawful and dismissed the remainder of the complaint. The Administrative Panel found that, at the time of the arrest of the applicant's brother, the order for detention with a view to his deportation had not yet been served on the lawyer of the applicant's brother. Therefore the arrest and the detention until 11.30 hours had been unlawful. The subsequent detention and the deportation to Turkey, however, had been based on a lawful and enforceable detention order and on an enforceable residence prohibition.

23. On 25 August 1992 a hearing took place before the Court of Appeal on the applicant's appeal, in the presence of the applicant and his counsel. The applicant filed the decision of the Administrative Panel of 29 June 1992.

24. On the same day the Court of Appeal dismissed the applicant's appeal against his conviction but replaced the prison sentence by a fine of 100 daily rates of ATS 100 each.

25. The Court of Appeal found that the Regional Court had acted correctly when refusing to hear the applicant's brother as a witness. His brother had not been a means of evidence available to the court as he was staying in Turkey and a residence prohibition in Austria had been imposed on him. In particular it was not for the trial court to arrange, pursuant to Section 6 of the Aliens Act, that the enforcement of the residence prohibition be suspended for the purposes of the trial. Furthermore the Court of Appeal noted that the public prosecutor had agreed to the applicant's brother's deportation because he had found that any possible criminal prosecution could be taken over by the Turkish authorities.

The Court of Appeal had no doubts as to the Regional Court's assessment of evidence, which it found sufficient in that, based on the personal impression the witnesses had made on the Regional Court, it had provided the main reasons for considering the witnesses credible, and was in accordance with the principles of logic and the contents of the file. The Court of Appeal further found that the Administrative

Panel's decision of 29 June 1992 had no effect on the lawfulness of the applicant's own arrest, which was not based on the detention order.

B. Relevant domestic law

26. Section 6 para. 1 of the Aliens Police Act (Fremdenpolizeigesetz), as in force at the relevant time, provides as follows:

[Translation]

"An alien on whom a residence prohibition has been imposed must leave the area to which the prohibition applies within a week after the decision has become legally effective. While the prohibition is in force, he may not return to the area without official permission."

[German]

"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."

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

27. The Commission has declared admissible the applicant's complaint about the alleged unfairness of the criminal proceedings conducted against him.

B. Point at issue

28. Accordingly the issue to be determined is whether there has been a violation of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

C. Article 6 (Art. 6) of the Convention

29. Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention, insofar as relevant, read as follows:

"1. In the determination of ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

30. The applicant maintains that the criminal proceedings conducted against him were unfair because the Austrian courts refused to summon his brother as witness for the defence. The Regional Court heard as witnesses only several police officers and A.T., who, according to his statement, had not himself witnessed the events or could not remember them. Therefore his brother was the only eye witness who could have exonerated him. The Regional Court also did not consider the statements of his brother to be irrelevant for the proceedings. He contradicts the Regional Court's reasoning that this witness was an unobtainable means of evidence.

31. In the applicant's view it would have been preferable to have his brother questioned in Austria. The Austrian courts could have summoned his brother to appear at the trial. In this respect the Government's description of the legal situation under Section 6 para. 1 of the Aliens Police Act is misleading. It is true that the courts themselves could not have granted permission to the applicant's brother to return to Austria nor could they have requested the administrative authorities to issue a permission under Section 6 para. 1 of the Aliens Police Act to the applicant's brother. However, if the Austrian courts had summoned the applicant's brother, he could have requested the administrative authorities to grant him a permission to re-enter Austria under Section 6 para. 1 of the Aliens Police Act. According to this provision a person on whom a residence prohibition has been imposed may be allowed to re-enter Austria for a short stay if this is necessary in the private or public interest. According to case-law of the Administrative Court the necessity to appear before a court is a valid reason for applying for a permission under Section 6 para. 1 of the Aliens Police Act.

32. The Government submit that according to the Convention organs' case-law Article 6 para. 3 (d) (Art. 6-1, 6-3-d) of the Convention does not grant an unlimited right to question or summon defence witnesses. The trial court can refuse to hear witnesses if it finds that the statements expected are not relevant to the establishment of the truth. In the present case the Regional Court heard six witnesses, including A.T., who had been called as witness for the defence. Not even A.T. supported the applicant's defence according to which he had not resisted the police officers and had remained calm throughout the events. Rather, A.T. stated that at a certain moment he had told the applicant to calm down. In these circumstances the Austrian courts could reasonably have concluded that the statements of the applicant's brother would have been irrelevant to the case.

33. Furthermore the Austrian courts had found correctly that the applicant's brother did not offer an available means of evidence. The courts could have asked the Turkish authorities to question the applicant's brother under letters rogatory, but since the courts would not have got a direct impression of the witness and such proceedings were very lengthy this would not have been a very effective means of gathering evidence. Moreover, the Austrian courts were unable to summon the applicant's brother to appear at the trial because a residence prohibition had been imposed on him. The courts were not competent to lift the residence prohibition nor could they formally request the competent administrative authorities to issue a permission under Section 6 para. 1 in fine of the Aliens Police Act to the applicant's brother allowing him to re-enter Austria.

34. The Commission recalls that the guarantees contained in paragraph 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the general concept of fair trial set forth in paragraph 1 of this Article. In the circumstances of the present case, it will consider the applicant's complaint under the two provisions taken together (see Eur. Court HR, Isgro v. Italy judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

35. The Commission recalls further that Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give an absolute right to the examination of every witness proposed by the defence. In particular it is in the trial court's discretion to refuse to take evidence which is considered irrelevant and unobtainable (Eur. Court HR, Engel and others v. the Netherlands judgment of 6 June 1976, Series A no. 22, p. 38, para. 91; No. 8417/78, Dec. 4.5.79, D.R. 16 p. 200; No. 18962/91, Dec. 30.6.93, unpublished).

36. The Commission observes that the Austrian courts did not address the issue of the relevance of the evidence to be given by the

applicant's brother. Indeed, their refusal to hear the applicant's brother as witness was not based on any considerations concerning the relevance of the evidence to be given. Rather, noting that he had been deported following a residence prohibition, the Austrian courts regarded him as an "unobtainable means of evidence". The Commission observes that the Austrian courts arrived at this conclusion without making any attempt at all to obtain the testimony of this witness. In the first place, the Austrian courts could have summoned the applicant's brother as witness notwithstanding the residence prohibition imposed on him. In that case the applicant's brother could have applied for a permission to re-enter Austria. There is nothing to show that such a request by the applicant's brother would have been without any prospect of success from the outset. Furthermore, there were no legal obstacles to questioning the applicant's brother under letters rogatory with the assistance of the Turkish authorities.

37. The Commission finds that in such circumstances the failure of the Austrian courts to make any attempt to obtain the testimony of the applicant's brother amounted to a violation of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

#### CONCLUSION

38. The Commission concludes, unanimously, that in the present case there has been a violation of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

M.F. BUQUICCHIO  
Secretary  
to the First Chamber

J. LIDDY  
President  
of the First Chamber