



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

THIRD SECTION

CASE OF JAKUPOVIC v. AUSTRIA

(Application no. 36757/97)

JUDGMENT

STRASBOURG

6 February 2003

FINAL

06/05/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jakupovic v. Austria,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr G. RESS, *President*,

Mr I. CABRAL BARRETO,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mrs H.S. GREVE,

Mr K. TRAJA,

Mrs E. STEINER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 15 November 2001 and 16 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36757/97) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Bosnia-Herzegovina, Elvis Jakupovic (“the applicant”), on 8 April 1997.

2. The applicant was represented by Mr F. Schwarzinger, a lawyer practising in Wels (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department of the Federal Ministry of Foreign Affairs.

3. The applicant complained under Article 8 of the Convention that a residence prohibition imposed on him by the Austrian authorities violated his right to respect for his private and family life.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 15 November 2001 the Court declared the application partly admissible.

7. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

8. The applicant was born in 1979 and lived at the time of the events in Vöcklabruck (Austria). He presently lives in Banova Jaruga (Croatia).

9. In February 1991 the applicant arrived in Austria together with his brother, born in 1985, and joined his mother who had already been living and working there. Subsequently his mother remarried. The applicant's family now consists of his mother, his stepfather, his brother and two half sisters, born in 1993 and 1995.

10. On 14 January 1994 the Police Authorities filed a criminal complaint against the applicant on suspicion of burglary. On 14 March 1994 the Wels Regional Court (*Landesgericht*) provisionally discontinued the criminal proceedings and ordered the applicant to compensate the victims for the damage caused. On 11 May 1995 the Vöcklabruck District Administrative Authority issued a prohibition to possess arms (*Waffenverbot*) under the Weapons Act (*Waffengesetz*) against the applicant as he had, in April 1995, attacked several persons with an electroshock device. On 31 May 1995 the applicant was remanded in custody on suspicion of having committed some fifty burglaries.

11. On 28 August 1995 the Wels Regional Court convicted the applicant of burglary and sentenced him to five months' imprisonment, suspended for a probationary period of three years. On the same day the applicant was released from detention on remand.

12. On 28 September 1995 the Vöcklabruck District Administrative Authority (*Bezirkshauptmannschaft*) issued a ten year residence prohibition against the applicant. Having regard to the above events and in particular the applicant's conviction, it found that his further stay in Austria was contrary to the public interest. These considerations were not outweighed by his family links in Austria. On 16 October 1995 the applicant, assisted by counsel, appealed against this decision. Relying on Article 8 of the Convention he submitted, *inter alia*, that the District Administrative Authority had failed to take sufficiently into account his private and family situation.

13. On 18 December 1995 the applicant was again remanded in custody on suspicion of having committed further burglaries in December 1995. On 26 February 1996 the Wels Regional Court again convicted the applicant of burglary and sentenced him to a further term of imprisonment of ten weeks,

suspended for a probationary period of three years. On the same day the applicant was released from detention on remand.

14. On 2 May 1996 the Upper Austria Public Security Authority (*Sicherheitsdirektion*) dismissed the applicant's appeal against the District Administrative Authority's decision of 28 September 1995. As regards the applicant's family situation, the authority noted that the applicant's mother, his brother and two half sisters were living in Austria. However, having regard to the applicant's serious criminal behaviour the issue of a residence prohibition was nevertheless necessary in the public interest.

15. On 21 June 1996 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*) against the residence prohibition. On 30 September 1996 the Constitutional Court declined to deal with the matter for lack of prospects of success and remitted the case to the Administrative Court (*Verwaltungsgerichtshof*).

16. On 9 December 1996 the applicant supplemented his complaint to the Administrative Court which dismissed it on 19 February 1997. It found that the authorities had correctly found that the residence prohibition was necessary in the public interest and did not constitute a disproportionate interference with the applicant's family situation.

17. On 4 April 1997 the applicant was taken into detention with a view to his expulsion and, on 9 April 1997, he was deported to Sarajewo.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complains that the residence prohibition imposed on him violated his right to respect for his private and family life. He relies on Article 8 of the Convention which reads as far as relevant as follows:

“1. Everyone has the right to respect for his private and family life....

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 ... for the prevention of disorder or crime....”

19. The applicant submits that the residence prohibition imposed on him constitutes a disproportionate measure as the offences of which he was convicted were merely minor acts of juvenile delinquency, and the Austrian authorities did not sufficiently consider his private and family situation. The applicant further submits that before his deportation in April 1997 he had developed strong ties with Austria. He had lived with his mother and siblings and had a close relation with them, whilst he no longer had contacts

with his father. He last met him in 1988 and since then his father was reported missing after the armed conflict in Bosnia and Herzegovina. The applicant also submits that he has a fiancée in Austria, Mrs A.S., who has given birth to his son (April 1998).

20. The Government accept that the residence prohibition interfered with the applicant's right to respect for his private and family life. However, the measure at issue was justified under paragraph 2 of Article 8, being in accordance with the law – the relevant provisions of the Aliens Act – and having pursued the legitimate aim of the prevention of disorder or crime. The Government further contend that 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.

21. The Government submit that the applicant's convictions justified the residence prohibition. In 1995, after having been in Austria for four years, he was convicted of burglary and in 1996 he was again convicted for this offence. Furthermore, in 1995 a prohibition on the possession of arms was issued against the applicant, after he had attacked several persons with an electroshock device. Considering these serious breaches of public order, the Austrian authorities could reasonably conclude that the applicant's further stay would run counter to the public interest. As regards the applicant's private and family life, the Government submit that the applicant had only come to live with his mother in Austria at the age of eleven and is able to speak the language of his native country. He can therefore reasonably be expected to find there a job, similar to the one he had in Austria.

22. The Court notes that it was common ground between the parties that the residence prohibition constituted an interference with the applicant's right to respect for his private and family life, as guaranteed by Article 8 § 1 of the Convention. Furthermore, there was no dispute that the interference was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime, within the meaning of Article 8 § 2. The Court endorses this assessment.

23. The dispute in the case relates to the question whether the interference was “necessary in a democratic society”.

24. The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 § 1 of the Convention (*Moustaquim v. Belgium* judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

25. 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. To that end they have the power to deport aliens 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 (see the *Dalia v. France* judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 91, § 52; the *Mehemi v. France* judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; *Boultif v. Switzerland*, no. 54273/00, § 46, 2 November 2001).

26. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances 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 and crime, on the other.

27. The Court notes that the Austrian authorities imposed a ten year residence prohibition on the ground that the applicant had been convicted twice between 1995 and 1996 to suspended imprisonment sentences of ten weeks and five months for burglary. The Austrian authorities found that in view of this criminal record a residence prohibition was necessary in the public interest and that the applicant's private interests in staying in Austria did not outweigh the public interest.

28. The Court observes that at the time of the expulsion the applicant had not been in Austria for a long time – just four years. Furthermore his situation was not comparable to that of a second generation immigrant, as he had arrived in Austria at the age of eleven, had previously attended school in his country of origin and must therefore have been well acquainted with its language and culture. However, the residence prohibition seriously upset his private and family life: he had arrived in Austria with his brother to join his mother and the new family she had founded there and has apparently no close relatives in Bosnia. The applicant's father remained in Bosnia, a fact which is emphasised by the Government, but the applicant points out that he last saw his father in 1988 and the father has been reported missing since the end of the armed conflict in that country.

29. Thus, the Court considers that very weighty reasons have to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which has recently experienced a period of armed conflict with all its adverse effects on living conditions and with no evidence of close relatives living there.

30. The Government rely in this respect on the applicant's criminal record. The Court finds that this record, which is the essential element of justification for the expulsion, must be examined very carefully. It consists of two convictions for burglary. The Court cannot find that these convictions – even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the applicant – for which the Austrian courts had only imposed conditional

sentences of imprisonment can be considered particularly serious as these offences did not involve elements of violence. The only element which may indicate any tendency of the applicant towards violent behaviour was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it cannot be compared to a conviction for an act of violence, and there is no indication that such charges have ever been brought against the applicant.

31. However, the Court does not consider the applicant's relation to Mrs A.S. a weighty element to be taken into account when balancing the interests at issue, because the applicant has not argued that he had entered into this relationship before September 1995, when the residence prohibition was issued against him and after this time he must have been aware that his further stay in Austria was unlawful.

32. Taking all the above elements into account, the Court finds that by imposing the residence prohibition in the particular circumstances of the case, the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

33. There has accordingly been a breach of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

35. The applicant claimed 12,000 euros (EUR) in compensation for the non-pecuniary damage he had allegedly suffered on account of the infringement of his right to respect for his private and family life.

36. The Government did not comment of the applicant's claim.

37. The Court considers that the present judgment in itself constitutes sufficient just satisfaction with regard to the non-pecuniary damage alleged (see *Mehemi* judgment, *op. cit.*, § 41).

B. Order to the respondent State

38. The applicant asked the Court to order the Austrian Government to lift the residence prohibition issued and to grant him a residence permit.

However, the Court reiterates that under Article 41 it does not have jurisdiction to issue such an order to a Contracting State (see *Nasri v. France* judgment of 13 July 1995, Series A no. 320-B, § 50; *Mehemi* judgment, *op. cit.*, § 43).

C. Costs and expenses

39. The applicant claimed 13,669.22 EUR for costs and expenses incurred in the domestic court proceedings.

40. The Government did not comment on the applicant's claim.

41. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III, § 80). The Court considers that these conditions are only met as regards the costs incurred in the proceedings on the residence prohibition, which the applicant puts at 4,220.98 EUR. Consequently the Court awards this sum.

42. The applicant further claims 3,715.11 EUR for costs incurred in the Convention proceedings.

43. The Government did not comment on the applicant's claim.

44. The Court finds this claim reasonable, and consequently allows it in full.

D. Default interest

45. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds* unanimously

- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 7,936.09 EUR (seven thousand nine hundred thirty six euros and nine cents) in respect of costs and expenses;
- (b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Caflisch, Mr Kūris and Mr Ress is annexed to this judgment.

G. R.
V. B.

JOINT DISSENTING OPINION OF JUDGES CAFLISCH,
KÜRIS AND RESS

We do not share the views of the majority in this case. It is true, on the one hand, that the measure directed at the applicant is a harsh one, as the centre of his family life has been localised in Austria and as ten years is a long period for a residence prohibition. On the other hand, the applicant lived in Austria for a relatively short time (six years). It is not as if he had spent all his life there. He speaks the language of his country of destination and presumably could, from the moment of his expulsion onwards, build a new existence in that country. The presence of an Austrian fiancée and of a son born out of this relationship seem to be subsequent to the relevant facts. All these circumstances relativise a measure which, otherwise, could have been viewed as disproportionate, account being taken, especially, of the applicant's relatively young age.

The decisive element, however, appears to be that, shortly after having been convicted for a second series of offences, in 1995 (judgement, § 11), and a consecutive ten-year residence prohibition (*ibid.*, § 1), the applicant committed a new series of burglaries for which he was, again, convicted (*ibid.*, § 13). This is evidence of the applicant's callousness and of the contempt in which he held the laws and institutions of his host country, and also of the danger he presented to that country. To us, these elements should override any doubts one might otherwise have had regarding the proportionality of the measure.

Accordingly, we see no violation of Article 8.