



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

FIRST SECTION

CASE OF RADOVANOVIC v. AUSTRIA

(Application no. 42703/98)

JUDGMENT

STRASBOURG

22 April 2004

FINAL

22/07/2004

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 Radovanovic v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr G. BONELLO,

Mrs F. TULKENS,

Mr E. LEVITS,

Mrs S. BOTOCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 27 March 2003 and 25 March 2004,

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

PROCEDURE

1. The case originated in an application (no. 42703/98) 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 Serbia and Montenegro, Mr Jovo Radovanovic (“the applicant”), on 9 July 1998.

2. The applicant, who had been granted legal aid, was represented by Mr H. Vana, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that the residence prohibition of unlimited duration imposed on him amounted to a violation of Article 8 of the Convention.

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).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 27 March 2003 the Court declared the application admissible.

8. The applicant and the Government each 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 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in Vienna in 1979 and lives at present in Serbia and Montenegro.

A. Conviction by the Vienna Juvenile Court

10. The applicant stayed with his parents, who are both citizens of Serbia and Montenegro and lawfully residing in Vienna, for about seven months after his birth in Austria. He then lived with his grandparents in the former Federal Republic of Yugoslavia, now Serbia and Montenegro. There he completed primary school, though he spent the yearly school holidays with his parents in Austria.

11. In 1989, at the age of 10 years, he came back to live with his parents and his sister in Austria, where he finished secondary school and completed a three-year vocational training as a butcher. During this time, he resided lawfully in Austria and, on 5 May 1993, he received an unlimited residence permit (*unbefristeter Sichtvermerk*).

12. On 30 July 1997 the Vienna Juvenile Court (*Jugendgerichtshof*) convicted the applicant of aggravated robbery and burglary and sentenced him to thirty months' imprisonment, out of which twenty-four months were suspended with a probationary period of three years. It found that the applicant, on 29 January 1997, together with his co-accused born in 1980, had knocked down the victim with a perfume bottle and had stolen cash in the amount of 65,000 Austrian schillings (ATS). On 11 and 14 April 1997 they had attempted to steal another victim's daily cash receipt by using a wheel nut tool. Still on 14 April 1997, they had broken into that victim's car and had taken away his daily cash receipt and a cheque, totalling almost ATS 125,000. When fixing the sentence, the court considered as mitigating circumstances that the applicant had so far no criminal record, that he had admitted the offences and had partly made amends (*Schadensgutmachung*), and that in two instances the offences remained attempts. As aggravating

circumstances the court considered the concurrence of two different offences, the amount of damage, the injury of the victim and the qualification of the burglary. The judgment became final in the absence of an appeal by the applicant.

B. Proceedings concerning the issuing of a residence prohibition against the applicant

13. On 30 September 1997 the Vienna Federal Police Office (*Bundespolizeidirektion Wien*) issued a residence prohibition of unlimited duration against the applicant. It referred to Section 18 §§ 1 and 2 (1) of the 1992 Aliens Act (*Fremdengesetz*) according to which a residence prohibition is to be issued against an alien, if he has been sentenced to more than three months' imprisonment by final judgment of a domestic court.

14. The applicant served his prison sentence until 14 October 1997. Subsequently he was transferred to a detention centre with a view to his expulsion.

15. On 28 October 1997 the Vienna Public Security Authority (*Sicherheitsdirektion*) dismissed the applicant's appeal. Noting that the applicant had lived for seven months after his birth in Austria and that, after his return from former Yugoslavia in 1989, he had continuously lived with his family in Austria for eight years, it found that the residence prohibition at issue constituted an interference with his right to private and family life. However, it was necessary to achieve the aims set out in Article 8 § 2 of the Convention, namely the prevention of disorder and crime and the protection of the rights of others. In particular, the applicant had committed aggravated robbery by using a weapon. Given the seriousness of the offences and the implied disrespect for physical safety and the property of others, no positive prognosis was possible. Therefore, the interest in issuing a residence prohibition of unlimited duration against the applicant prevailed over the applicant's interest in staying in Austria.

16. On 11 November 1997 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*). He argued that the lower authorities had incorrectly established the facts and had failed to give sufficient reasons for their decisions. He stressed in particular that his family had already been residing lawfully in Austria for decades and that he had completed secondary school and vocational training, upon which he had legally worked as a butcher. Before his conviction by the Juvenile Court, the applicant had had no criminal record and the offences had been committed within a very short period of two and a half months. Since his grandparents had died in the meantime, he had no other relatives in Yugoslavia. The centre of his private and family life was exclusively in Austria. Referring to the *Moustaquim* and *Beldjoudi* judgments of the European Court of Human Rights, the applicant argued that the authorities had failed to comply with

the Convention standards. In particular they had failed to balance correctly his interests in respect for his private and family life against public interests. There was no pressing need to issue an unlimited residence prohibition against him.

17. On 28 November 1997 the Constitutional Court declined to deal with the matter and remitted the complaint to the Administrative Court (*Verwaltungsgerichtshof*).

18. On 4 December 1997 the Administrative Court dismissed the complaint. It found that the Public Security Authority had duly considered the applicant's private and family situation and had correctly assessed the interests involved when issuing the residence prohibition. Furthermore the Administrative Court found that in the cases of *Moustaquim* and *Beldjoudi* the persons concerned had had stronger family ties in the host country than the applicant. The decision was served on the applicant's counsel on 16 January 1998.

19. On 4 February 1998 the applicant was expelled to the former Federal Republic of Yugoslavia, now Serbia and Montenegro.

C. Proceedings concerning the applicant's request to revoke the residence prohibition in view of the 1997 Aliens Act

20. On 14 October 1997 the applicant requested the Vienna Federal Police Office to revoke the residence prohibition issued against him in view of Section 38 § 1 (4) of the 1997 Aliens Act, which was to enter into force on 1 January 1998. Pursuant to that provision, a residence prohibition may not be issued "where a foreigner has grown up in Austria from an early age on and has been lawfully residing there for many years". Section 114 § 3 of the 1997 Aliens Act establishes that if a residence prohibition has not expired at the date of the entry into force of the 1997 Aliens Act, the residence prohibition has to be regarded as a residence prohibition issued under the 1997 Aliens Act. However, the residence prohibition has to be revoked if it was not lawful to issue it under the 1997 Aliens Act.

21. On 25 March 1998 the Federal Police Office dismissed this request. It noted in particular that the applicant did not comply with the requirements of the above provision, since he had not grown up in Austria within the meaning of Section 38 § 1 (4). Therefore, the imposition of the residence prohibition was also lawful under the 1997 Aliens Act.

22. In his appeal of 14 April 1998 the applicant complained that the Federal Police Office had incorrectly applied the provision at issue.

23. On 27 April 1998 the Vienna Public Security Authority dismissed his appeal. It noted that the provision at issue required that a foreigner had commenced growing up in Austria at the age of two or three years or even younger, whereas the applicant had only been in Austria during the first

seven months of his life and had come back when he was already ten. Therefore, he clearly did not comply with that provision.

24. The applicant did not appeal to the Constitutional Court and the Administrative Court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the issuance of the residence prohibition of unlimited duration against him was in breach of his right to respect for his private and family life under 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.”

26. The applicant argued that the measure constituted an interference with his rights under Article 8 of the Convention, which had also been conceded by the Austrian authorities. However, when applying the relevant provisions of the 1992 Aliens Act, the domestic authorities had wrongly found that the measure was “necessary in a democratic society”. In particular it did not correspond to a “pressing social need” for the prevention of disorder or crime. Unlike the administrative authorities, the Juvenile Court, by suspending the major part of the sentence, had obviously made a positive prognosis in respect of the applicant. The Juvenile Court had taken into account the applicant’s young age of eighteen years, the short period of time during which he had committed the offences, namely two and a half months, together with the fact that the applicant had no previous criminal record. Further, the administrative authorities had grossly disregarded the applicant’s high degree of integration in Austria, namely his lawful residence and that of his family for years, as well as his school education and completion of a vocational training on the one hand, and the lack of any family ties with Serbia and Montenegro after his grandparents’ death on the other. Thus, the imposition of a residence prohibition of an unlimited duration was disproportionate to the aims pursued.

27. The Government accepted that the residence prohibition interfered with the applicant’s right to respect for his private and family life. In the

Government's view, the measure at issue was justified under paragraph 2 of Article 8 of the Convention as being in accordance with the law, namely the relevant provisions of the 1992 and 1997 Aliens Act. In this respect they submitted that the applicant did not meet the requirements of Section 38 § 1 (4) of the 1997 Aliens Act, as he clearly had not grown up in Austria from an early age onwards since he had left Austria when he was only seven months old and did not return until he was ten. This had also been pointed out in the reasoning of the domestic authorities' decisions of 25 March and 27 April 1998 which dismissed his application for lifting the residence prohibition. The measure also pursued the legitimate aim of the prevention of disorder or crime. Having regard to the seriousness of the offence and the severity of the penalty, the Government argued that the measure had been necessary in a democratic society, within the meaning of Article 8 § 2 of the Convention and that the Austrian authorities had not overstepped their margin of appreciation.

28. 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 of the Convention. The Court endorses this assessment.

29. The dispute in the case relates to the question whether the interference was "necessary in a democratic society".

30. 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 (see *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

31. The Court reiterates 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. 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 *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 91, § 52; *Mehemi v. France*, judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; and *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX).

32. Accordingly, the Court's task consists in ascertaining whether the Austrian authorities, by imposing a residence prohibition of unlimited

duration on 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 and crime, on the other.

33. The Court notes that the applicant, a single young adult at the time of his expulsion, is not a second generation immigrant as, despite his birth in Austria, he did not permanently live there until the age of ten. Given the young age at which he arrived, the Court will nevertheless assess the necessity of the interference by applying the same criteria it usually applies in cases of second generation immigrants who have not yet founded a family of their own in the host country. These criteria, so far as material, are the nature and gravity of the offence committed by the applicant and the length of his stay in the host country. In addition the applicant's family ties and the social ties he established in the host country by receiving his schooling and by spending the decisive years of his youth there are to be taken into account (see *Benhebbba v. France*, no. 53441/99, §§ 32-33, 15 June 2003).

34. The Court considers the present case needs to be distinguished from a number of cases concerning the expulsion of second generation immigrants, in which the Court found no violation of Article 8 of the Convention (see *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42; *Bouchelkia v. France*, judgment of 29 January 1997, *Reports* 1997-I, p. 65, §§ 50-51; *El Boujaïdi v. France*, judgment of 26 September 1997, *Reports* 1997-I, p. 63, §§ 40-41; and *Dalia*, cited above, p. 92, §§ 53-54). These cases all involved second generation immigrants who arrived in the host country at an early age and were convicted of serious offences with lengthy terms of unconditional imprisonment. Furthermore, they concerned drug offences, the kind of offence, for which the Court has shown understanding of domestic authorities' firmness with regard to those who actively contribute to its spread (see *C. v. Belgium*, 7 August 1996, *Reports* 1996-III, p. 924, § 35; *Dalia*, cited above, p. 92, § 54, *Baghli v. France*, no. 34374/97, 30 November 1999, § 48 *in fine*, ECHR 1999-VIII; and *Yilmaz v. Germany*, no. 52853/99, § 46, 17 April 2003). In the present case, despite the shorter duration of the applicant's stay in Austria the Court attaches considerable weight to the fact that although the applicant was convicted of aggravated robbery, he was only sentenced to a six-month unconditional term of imprisonment, whereas twenty-four months were suspended on probation.

35. In the applicant's case the Austrian authorities balanced his right to respect for private and family life against the public interest and gave priority to the latter interest in order to prevent disorder and crime. Without disregarding the serious nature of the offences, the Court notes, however, that the applicant committed them as a juvenile, that he had no previous criminal record and that the major part of the relatively high sentence was

suspended on probation by the Juvenile Court. Therefore the Court is not convinced by the Government's argument and the administrative authorities' assessment that the applicant constituted such a serious danger to public order which necessitated the imposition of the measure concerned (see *mutatis mutandis*, *Ezzouhdi v. France*, no. 47160/99, § 34, 13 February 2001).

36. Given the applicant's birth in Austria, where he later also completed his secondary education and vocational training while living with his family, and also taking into account that his family had already lawfully stayed in Austria for a long time and that the applicant himself had an unlimited residence permit when he committed the offence, and considering that, after the death of his grandparents in Serbia and Montenegro, he no longer has any relatives there, the Court finds that his family and social ties with Austria were much stronger than with Serbia and Montenegro.

37. The Court therefore considers that, in the circumstances of the present case, the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration would have sufficed. The Court thus concludes that the Austrian authorities, by imposing a residence prohibition of unlimited duration against the applicant, have not struck a fair balance between the interests involved and that the means employed were disproportionate to the aim pursued in the circumstances of the case (see *mutatis mutandis*, *Ezzouhdi*, cited above, § 35; and *Yilmaz*, cited above, §§ 48-49).

38. Accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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.”

40. The applicant sought EUR 10,000 as compensation for non-pecuniary damage sustained on account of the imposition of the residence prohibition. He also requested reimbursement of costs and expenses incurred in the domestic proceedings and the Convention proceedings in the amount of EUR 9,649.93.

41. The Government contended that the applicant's claim in respect of non-pecuniary damage was not supported by any evidence. The Government further cast doubts on whether the costs claim, in particular in respect of unspecified telephone calls, had been necessary in order to prevent the violation found.

42. The Court considers the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicants (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that the question of the application of Article 41 was not ready for decision; accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 22 April 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President