

EUROPEAN COMMISSION OF HUMAN RIGHTS

FIRST CHAMBER

Application No. 17371/90

C. G.

against

Austria

REPORT OF THE COMMISSION
(adopted on 11 January 1995)

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. Until, apparently, September 1987 he lived in Hörsching, in Upper Austria, and since then he has lived in Izmir in Turkey. He was represented before the Commission by Mr. H. Blum, lawyer, of Linz.

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

4. The case concerns the refusal by the Austrian courts - based on the relevant legislation - to grant the applicant a specific social welfare benefit. The applicant invokes Articles 6, 8 and 14 of the Convention, and Article 1 of Protocol No. 1 to the Convention.

B. The proceedings

5. The application was introduced on 17 May 1990 and registered on 29 October 1990.

6. On 2 September 1992 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 19 November 1992 and the applicant submitted his observations in reply on 8 January 1993. On 5 March 1993 the Government submitted a translation of their observations.

8. On 11 January 1994 the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 28 January 1994 and they were invited to submit such further information or observations on the merits as they wished. The applicant submitted observations on 2 March 1994 and the Government submitted observations on 7 April 1994. On 27 April 1994 the Government submitted a reply to the applicant's observations of 2 March, and the applicant submitted comments thereon on 8 July 1994.

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:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

12. The text of this Report was adopted on 11 January 1995 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. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

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 6 July 1987 the applicant applied for an advance on his pension by way of emergency payment (Antrag auf Gewährung der Notstandshilfe in Form eines Pensionsvorschusses in Form der Notstandshilfe) under the the Unemployment Insurance Act (Arbeitslosenversicherungsgesetz - ALVG).

17. The application was refused by the Linz Labour Office (Arbeitsamt) and the Upper Austrian Regional Labour Office (Landsarbeitsamt) because the applicant failed to fulfil the requirement of Section 33 para. 2 (a) of the ALVG that only Austrian citizens qualify for such payments.

18. The applicant made a complaint to the Constitutional Court (Verfassungsgerichtshof) in which he alleged violation of Article 6 of the Convention, of Article 5 of the Basic Law of 21 December 1867 (Staatsgrundgesetz) and Article 1 of Protocol No. 1 to the Convention, and of Article 8 of the Convention. On 26 February 1988 the Constitutional Court declined to deal with the case. It found, by general reference to its case-law, that the application had no adequate prospect of success, and also found that it was not excluded from the jurisdiction of the Administrative Court (Verwaltungsgerichtshof) (Article 144 para. 2 of the Federal Constitution). The Constitutional Court referred the case to the Administrative Court.

19. As a result of the Administrative Court being seized of the case, the applicant was requested to complete his application. He replied on 7 July 1988, referring to his right under the law to an advance on his pension. He requested the Administrative Court to quash the decision of the Upper Austrian Labour Office and to have the constitutionality of Section 33 para. 2 (a) of the ALVG determined by the Constitutional Court. On 19 September 1989 (received by the applicant's representative on 20 November 1989) the Administrative Court rejected the complaint. It referred to previous cases in which it had found that complaints concerning the application of, inter alia, unconstitutional laws fell to be decided by the Constitutional Court. It considered that the applicant's complaint - namely that of the requirement of Austrian citizenship for payment of an advance on pension by way of emergency payment under the ALVG - was such a complaint. Accordingly, the complaint fell outside the jurisdiction of the Administrative Court and was duly rejected.

B. Relevant domestic law

20. Section 33 of the Unemployment Insurance Act provides, so far as relevant, as follows:

[German]

"(1) Arbeitslosen, die den Anspruch auf Arbeitslosengeld ... erschöpft haben, kann auf Antrag Notstandshilfe gewährt werden.

(2) Voraussetzung für die Gewährung der Notstandshilfe ist, daß der Arbeitslose

a) die österreichische Staatsbürgerschaft besitzt ..."

[Translation]

"(1) An emergency payment can be made to any unemployed person who is no longer entitled to claim unemployment benefit ..

(2) It is a precondition for the grant of an emergency payment that the unemployed person

a) has Austrian nationality ..."

21. Emergency payments are assessed on the basis of need, but must not exceed a fixed proportion of the unemployment benefit a person would receive if still entitled to such benefit. Unemployment benefit is earnings-related and is funded partly from contributions and partly from various Government sources.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

22. The Commission has declared admissible the complaints that the applicant's ineligibility for an advance on his pension by way of emergency payment was in violation Articles 6, 8 and 14 of the Convention and of Article 1 of Protocol No. 1 to the Convention.

B. Points at issue

23. The issues to be determined are:

- whether there has been a violation of the applicant's right to a tribunal within the meaning of Article 6 para. 1 of the Convention;
- whether there has been a violation of Article 1 of Protocol No. 1 to the Convention, either alone or taken together with Article 14 of Protocol No. 1, and
- whether there has been a violation of Article 8 of the Convention.

C. As to Article 6 of the Convention

24. Article 6 para. 1 of the Convention provides, so far as relevant, as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

25. The applicant points out that emergency payments are inextricably linked to the recipient of such payments having had a contract of employment, as the possibility of a payment under Section 33 para. 2 (a) only arises where unemployment benefit, or payments whilst on special leave, is no longer being paid. Since both of these categories can apply only to persons who have worked for the requisite time under private-law contracts, he sees the payment as "civil" in nature.

26. The Government emphasise the public-law characteristics of emergency payments under the ALVG, in particular that emergency payments are based on need rather than income, and that the various Government sources for the payments indicate that the scheme is not managed as a private or private-type scheme. They consider that Article 6 was not at all applicable to the proceedings at issue, but that if it was, then the Constitutional Court in declining to deal with a case in fact has to form a view as to its merits, such that the applicant had access to that court. They also point out that the Administrative Court was bound to state that it had no jurisdiction because of the nature of the applicant's complaints, and consider that the Administrative Court's decision should be disregarded, with the result that the applicant has failed to comply with the six months time-limit in Article 26 of the Convention. The Government underline that the Constitutional and Administrative Courts are part of the Austrian judicial system and the judges are independent of the executive. As to the extent to which the courts review facts, the Government point to the comprehensive possibility to review which they say derives from Section 42 para. 2 (a) - (c) of the Administrative Court Act (Verwaltungsgerichtshofgesetz).

27. The Commission recalls that the civil guarantees of Article 6 of the Convention only apply to proceedings in which there is a "dispute" over a "right". There must be a right which can be said, at least on arguable grounds, to be recognised in domestic law, the dispute must be genuine and serious, and the result of the proceedings must be directly decisive for the right in question (see, for example, Eur. Court H.R., Mats Jacobsson of 28 June 1990, Series A no. 180, p. 29, paras. 30, 31 with further references).

28. In the present case, Section 33 para. 2 (a) of the ALVG states that it is a precondition for the grant of an emergency payment that the unemployed person has Austrian nationality. The provision is unambiguous, and the applicant did not contend in the domestic proceedings that he had Austrian nationality. It must have been apparent to the applicant from the clarity of the replies he received from the Linz Labour Office and the Upper Austrian Labour Office that ordinary law precluded a successful application for an emergency payment.

29. The Commission finds that ordinary Austrian law unequivocally excluded the applicant from the operation of Section 33 (1) of the ALVG.

30. The applicant, however, made a constitutional complaint in which he alleged violation of various provisions of the Convention and Protocol No. 1, and Article 5 of the Basic Law of 21 December 1867, which guarantees the right to property. The Commission must therefore also decide whether the allegations the applicant made in those constitutional proceedings were capable of amounting to the serious and genuine dispute as to the existence of a right to the particular social welfare benefit at issue.

31. The European Court of Human Rights has found in a case in which there were close links between underlying proceedings which were "civil" and constitutional proceedings taken in the course of those underlying proceedings, that those constitutional proceedings also fell to be considered under Article 6 of the Convention (Eur. Court H.R., Ruiz-Mateos judgment of 23 June 1993, Series A no. 262, p. 24, para. 59).

32. The present case is different from the Ruiz-Mateos case. Whilst in that case there were in existence proceedings which were undoubtedly "civil" within the meaning of Article 6, and the constitutional proceedings were inextricably intertwined with the underlying proceedings, in the present case, there were no underlying civil proceedings within the meaning of Article 6 of the Convention as the applicant did not have - even arguably - a right in ordinary domestic law to the benefit he claimed (see para. 29 above).

33. In such circumstances, the constitutional proceedings can only be regarded in isolation.

34. The subject matter of the applicant's constitutional complaint was not an alleged right to a particular social welfare benefit, but an allegation that the legislation which denied him such a right was in conflict with the constitutional provisions of Austrian law, including the Convention. Such an allegation is not, of itself, sufficient to constitute a "right" in domestic law. In particular, before the applicant could have benefitted from the allegation of unconstitutionality, the Constitutional Court would have had to adjourn

the proceedings brought by the applicant for norm control proceedings to be instituted, and those norm control proceedings would have had to result in the quashing of the provision at issue.

35. That the applicant did not have a right to the contested social welfare benefit in ordinary domestic law, is confirmed in that if there had been a right, he would have been able to allege before the Administrative Court that it had not been properly determined. As there was no right, he was able merely to allege before the Constitutional Court that he ought to have one.

36. In the context of the constitutional complaints which were made in the present case, that is, completely divorced from any proceedings to which the guarantees of Article 6 attach, the Commission finds that, for the purposes of Article 6 of the Convention, the applicant was not making allegations that he had a "right" in domestic law.

37. Accordingly, there was no "right" in domestic law, and the Commission is not required to determine whether any dispute was genuine and serious, or whether the outcome of the proceedings was decisive.

CONCLUSION

38. The Commission concludes, by 12 votes to 1, that there has been no violation of Article 6 para. 1 of the Convention.

D. As to Article 1 of Protocol No. 1 to the Convention and Article 14 of the Convention

39. Given that the applicant was excluded from the operation of Section 33 of the ALVG by law, such that he is complaining effectively that Austrian law operates discriminatorily, the Commission will consider his complaint under Article 14 of the Convention in connection with Article 1 of Protocol No. 1.

40. Article 1 of Protocol No. 1 to the Convention provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

41. Article 14 of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

42. The applicant considers that the right to an emergency payment has its basis in private law since it results from the acquisition of credits based on the period during which a person has been insured under a private-law contract of employment. He considers it impossible to justify the difference in treatment between Austrians and non-Austrians when each has paid contributions on exactly the same basis.

43. The Government point out that the applicant did not fall within the class of persons eligible for an emergency payment under the legislation, so that his unsuccessful, public-law claims could not give rise to a violation of Article 1 of Protocol No. 1.

44. In their submissions made subsequent to the Commission's admissibility decision, the Government consider that the applicant was in any event not entitled to the benefit claimed as advances on pensions - not emergency payments as the applicant claims - can only be made where a person is able and willing to work. The applicant had applied for an invalidity pension on 29 October 1985 (before he made the application at issue in the present case), and so in effect declared that he was not willing to work on ground of alleged infirmity. The application for an invalidity pension was finally rejected on 17 August 1987 as the applicant was not infirm, and so the request for an advance could only have been in connection with the period to that date. Finally, the Government point out that after the applicant left Austria he was in any event not entitled to an advance on his pension, and would not have been so entitled if he had been Austrian.

45. In reply to these submissions, the applicant confirms that he applied for an emergency payment in the form of an advance on his pension, and he refers to Sections 23 and 33 of the ALVG. He points out that the application was refused on the sole ground that the applicant did not have Austrian nationality, and that reference was made to Section 33 para. 2 (a) of the ALVG. He considers that the rejection of his application for an invalidity pension is irrelevant, as the ALVG does not require repayment of advances where a substantive request for an invalidity pension is refused. Had he been Austrian, he would have received the advance. He adds that the only reason why he left Austria was because he no longer had any means of support.

46. In connection with Article 14 of the Convention, the Government state that the legislature considered it admissible to limit the benefit to Austrian citizens only, and that it did so in the expectation that other states would look after the emergency needs of their own citizens. The Government also refer to the difficult financial situation.

47. The Commission notes that the social welfare benefit the applicant was claiming, and which the Austrian authorities refused him on the ground that he was not Austrian, formed part of the benefits to which persons who have contributed to the relevant fund are, in general, entitled if they comply with the statutory conditions. The Commission considers that, as the obligation to pay "taxes or other contributions" falls within the field of application of Article 1 of Protocol No. 1, the ensuing benefits also fall with the field of application of that provision. Accordingly, Article 14 is also applicable (cf. Eur. Court H.R., Darby judgment of 23 October 1990, Series A no. 187, p. 12, para. 30).

48. Article 14 of the Convention protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in treatment of one of these individuals will only be discriminatory if it has no "objective and reasonable justification", that is if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised (above-mentioned Darby judgment, p. 12, para. 31).

49. The Commission notes that the Government do not deny that Section 33 para. 2 (a) of the ALVG sets up a condition which excludes those who are not Austrians, and they do not contend that the contributions made by Austrians differ from those made by non-Austrians. They do argue that the applicant was not entitled to the benefit he applied for on grounds which were not discriminatory as they would have applied equally to Austrian nationals. Thus they state that the applicant's original application cannot have been for an emergency payment but must have been for an advance on his pension, and they say that this must have related to the invalidity pension he had already applied for. They also argue that as he left Austria in 1987, an Austrian would thereafter not have been entitled to a benefit, either.

50. The Commission notes that the Government do not proffer a justification for the difference in treatment, but merely refer to the fact that the Austrian Parliament deemed it admissible and necessary to grant such benefits to Austrian citizens only, and they refer to the expectation that other states would ensure minimum subsistence levels for their own nationals, and to the difficult financial position. The Commission finds no indication of a justification in this. If foreign citizens are permitted to enter and to work in a country, and if they make payments into the prevailing system of insurance on the same basis as nationals, the difference in treatment does not appear to have objective and reasonable justification within the meaning of the case-law to Article 14 of the Convention.

51. The Government have contended that the applicant was not - apart from the criterion of nationality - entitled to the benefit he applied for. The Commission would, however, note that the domestic decisions without exception rely on Section 33 para. 2 (a) rather than any of the considerations referred to by the Government. Moreover, even if it is correct that from September 1987 the applicant had left the country and so would not have been eligible for the benefit even if he had been Austrian, there is no doubt that from 6 July 1987 until that date he was in the country and was treated differently from an Austrian in otherwise the same position.

CONCLUSION

52. The Commission concludes, unanimously, that there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

E. As to Article 8 of the Convention

53. The applicant also alleges violation of Article 8 of the Convention.

54. In the light of its conclusions above, the Commission finds that the application raises no separate issue in connection with Article 8 of the Convention.

CONCLUSION

55. The Commission concludes, unanimously, that no separate issue is raised in connection with Article 8 of the Convention.

F. Recapitulation

56. The Commission concludes, by 12 votes to 1, that there has been no violation of Article 6 para. 1 of the Convention (para. 38).

57. The Commission concludes, unanimously, that there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 (para. 52).

58. The Commission concludes, unanimously, that no separate issue is raised in connection with Article 8 of the Convention (para. 55).

Secretary to the First Chamber



(M.F. BUQUICCHIO)

President of the First Chamber



(C. R. ROZAKIS)

(Or. English)

PARTIALLY CONCURRING AND PARTIALLY DISSENTING
OPINION OF Mrs. J. LIDDY

With hesitation I voted for a finding of violation of Article 6 in this case.

The majority are of the view that an allegation that the legislation at issue conflicted with the constitutional guarantee of the right to property is not, in itself, sufficient to constitute a "right" in domestic law. This is because the successful invocation of the constitutional right would only have resulted in the quashing of the relevant legislative provision.

While I see the force in the latter argument, this seems to me to relate more to whether the proceedings would have been "decisive" for the determination of the applicant's right, rather than whether there was a "right" in domestic law to begin with. It appears to me inconceivable that the quashing of such a provision would not result in the legislature taking fresh action to remedy a situation which, in the eyes of the Constitutional Court, infringed a fundamental right of an individual. On the facts of the present case, the position is even clearer. Section 33(2)(a) of the Unemployment Insurance Act, which provides for the nationality condition, is clearly severable and the offending words could have been deleted by the Constitutional Court, without any lacuna in the law calling for legislative action. The Constitutional Court could then have remitted the case to the administrative appeal authority in order for a decision to be made on the basis of the law as it stood in the light of the deletion, and the applicant would then have obtained a decision on the facts of his own case. Accordingly, a challenge to the constitutionality of the law would have been decisive for the applicant's rights.

Moreover, the right in issue was "civil": the Commission has accepted the applicability of Article 1 of Protocol No. 1. The right was of a pecuniary nature. It is true that emergency payments under the ALVG have public-law characteristics, but as pointed out by the applicant, they are inextricably linked to the fact that the recipient had a contract of employment. I note in this connection that the amount of an emergency payment is assessed by reference to the individual's entitlement to unemployment benefit, which is earnings-related and funded partly from contributions.

The applicant was unable to obtain a hearing of his case before the Constitutional Court, which declined to deal with the case. The Administrative Court was not competent to deal with his complaint. Accordingly, there was no fair hearing before an independent and impartial tribunal.

For these reasons I voted in the sense indicated.