

AS TO THE ADMISSIBILITY OF

Application No. 19066/91
by S.S., A.M. and
Y.S.M.
against Austria

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

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M. 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 9 August 1991 by
S.S., A.M. and Y.S.M. against Austria and registered on 12 November
1991 under file No. 19066/91;

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 are Lebanese citizens of Maronite faith. The
first applicant, born in 1964, is a goldsmith. He has left Austria and
his place of residence is unknown. The second applicant, born in 1963,
is a metal worker. The third applicant, born in 1961, is a student.
The second and third applicants are a married couple currently residing
at Grosshöflein in Austria and in possession of an Austrian visa.
Before the Commission they are represented by Mr H. Pochieser, a lawyer
practising in Vienna.

Particular circumstances of the case

I.

On 9 March 1990 the applicants flew from Larnaca in Cyprus to Warsaw in Poland with a stopover at Vienna airport. At Warsaw airport they were refused entry into Poland whereupon they returned to Vienna. The Austrian police was informed of their arrival in Vienna which was scheduled on the same day at 15h00.

Upon arrival at Vienna Schwechat airport, police officers at first refused to let the applicants out of the plane. The applicants then explained that they were seeking asylum as they were being persecuted in Lebanon where they had refused to participate in the combats. Eventually they were allowed to leave the plane and were shown to an airport building where they explained that they were seeking asylum. They stated that they had reasons to fear for their lives as a civil war was raging in Lebanon. The first and second applicants explained that at home they would be obliged to fight for one of the parties to the civil war. The third applicant stated that she had reason to fear for her life there; militant groups had tried to force her husband to take part in the civil war.

The applicants were refused entry into Austria and taken to a special part of the airport transit area (Sondertransiträume) in order to enable them as quickly as possible to board a return flight.

The transit area in which the applicants stayed at Vienna Schwechat airport was closed off from the remainder of the airport. It consisted of three bedrooms, a living room, and sanitary installations. Apart from a small window measuring 30 x 200cm in one of the bedrooms there was only artificial illumination in these rooms. The airport social services (Flughafensozialdienst) have access to the area.

The applicants remained in this transit area, together with ten other persons, from 9 until 16 March 1990. On 11, 14 and twice on 15 March 1990 the authorities offered them the possibility to board a plane to Larnaca, but the applicants refused. Eventually, when a member of the airport social services offered a security, the applicants were granted entry visas (Sichtvermerke) for a limited period of time, and on 16 March 1990 they left the transit area and entered Austria.

II.

On 20 June 1990 the applicants filed an appeal with the Austrian Constitutional Court (Verfassungsgerichtshof) in which they complained under Article 5 of the Convention and Article 8 of the Basic Law (see below Relevant domestic law and practice) of their unlawful detention in the transit area at the airport during which they risked expulsion from Austria.

The Constitutional Court dismissed the appeal on 26 November 1990. On the basis of the administrative file it first determined the proven facts. Referring to its case-law, the Court found that the authorities had not intended to restrict the applicants' freedom. Rather, they had hindered the applicants from entering Austria but not from returning to Cyprus or anywhere else. Insofar as the applicants claimed that at the airport they had orally asked for asylum and the relevant asylum laws had not been applied correctly, the Court found that this issue was to be dealt with by the Administrative Court (Verwaltungsgerichtshof). The appeal was transferred to that Court.

On 18 September 1991 the Administrative Court dismissed the appeal. It found that the applicants had not forcibly been held in the airport transit area and had not been restricted in their freedom of movement. Rather, they had at all times been free to leave the area by continuing their journey.

Relevant domestic law and practice

I.

Section 8 of the Basic Law (Staatsgrundgesetz) of 1867 states that "the liberty of the person is guaranteed" ("Die Freiheit der Person ist gewährleistet"). This provision has been interpreted by the Austrian Constitutional Court as offering protection where the authorities intentionally and primarily deprive persons of their liberty (see VfSlg. 8879/1980).

According to Section 5 para. 1 of the Asylum Act (Asylgesetz) the person seeking asylum is entitled to reside on Federal territory until the determination proceedings have been finally concluded, if the person has made the request within two weeks from the moment when he entered Federal territory.

According to Section 9 (c) of the Border Control Act (Grenzkontrollgesetz) officials are entitled to give instructions necessary for purposes of an orderly, efficient and speedy border control. These instructions concern the presentation of travel documents, waiting in or leaving the vehicle, following the official into the border post (Mitfolge in die Grenzkontrollstelle), the order of dealing with the control etc. According to Section 10 para. 1 of the Border Control Act, persons present in the border control area must obey instructions issued under Section 9 (c).

II.

Certain laws relevant to the present application have been amended with effect from 7 April 1990.

According to Section 2a of the amended Asylum Act, applications for asylum in Austria may be lodged at an Austrian border control point; the district administrative authorities, or the Federal police authority, have to verify within a week in each individual case whether a claim has been made which relies on the conditions set forth in the Geneva Convention relating to the Status of Refugees.

According to Section 23 para. 4 of the amended Passport Act (Passgesetz), "if the departure is not immediately possible, an official may order <the person> to stay in a particular place until his departure" ("Ist die Ausreise nicht sofort möglich, so kann ihm vom Organ aufgetragen werden, sich für die Zeit bis zur Ausreise an einem bestimmten Ort aufzuhalten").

III.

Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 9 November 1990

A delegation of the Committee visited the transit area at Vienna Schwechat airport in the period from 20 to 27 May 1990 and commented thereupon in its report of 9 November 1990. Subsequently, the

Government made no observations on the comments concerning the transit room. The Committee's report states, insofar as relevant (all original emphases omitted):

"Special transit room at Schwechat airport

89. This room, situated in the airport and administered by it, is not a place of detention in the formal sense. Nevertheless, there are de facto restrictions on the freedom of movement of asylum seekers. Officers of the frontier and security police keep watch over the special transit room and monitor those entering and leaving it.

90. The room is in fact a string of several rooms, one serving as a living room, one room with 12 beds, another with 10 beds, and yet another with 4 beds. 30 people can be accommodated there. The delegation was told, however, that it had never yet been filled to capacity. Showers and washing facilities were located in a prefabricated annex. The door for entering and leaving the premises could only be opened from the outside.

91. The airport authority is responsible for the upkeep of these premises. It is also responsible for the people staying there (food and health care). The delegation found that living conditions and standards of hygiene could be considered acceptable in these premises. In summer, however, living conditions could prove rather difficult in these premises in view of their structure and poor ventilation. The delegation was unable to speak with the 6 people present (2 men and 4 women) for linguistic reasons.

92. The head of the airport's criminal police department, Mr. <R.> told the delegation that voluntary social workers had free access to this transit room. Mr. <R.> also mentioned that asylum seekers were at liberty to call a lawyer and ask for an interpreter. There would seem to be some confusion surrounding this point because, according to other sources of information, the authorities do not allow asylum seekers to contact a lawyer. In some cases, voluntary social workers have reportedly asked asylum seekers to sign blank proxy forms for this purpose. Where interpreters are concerned, apparently no interpreter has yet been allowed to enter the transit room. The only possible contact would be by telephone from the outside police offices. In fact, it would seem that no-one has access to the transit room apart from authorised airport staff. Mr. <R.> acknowledged that, in this room, people were in practice deprived of their liberty.

The <Committee> wishes to underline the importance of guaranteeing access to such transit rooms for persons whom asylum seekers might wish to contact, such as lawyers, interpreters or family members already in Austria.

93. During its visit, the delegation also learned that a plan for the construction of a new transit room was under consideration. The <Committee> would like to be kept informed of any further action taken on this plan."

COMPLAINTS

Under Article 3 of the Convention the applicants complain that their confinement in the enclosed special transit area at Vienna airport amounted to inhuman treatment. Also under this provision they complain of the threat of expulsion, during their stay in the transit area, from Austria to Cyprus, and from there to Lebanon, where they

would individually be forced to participate in the civil war. As they refuse to do this they may be captured by the Christian militia; they then risk detention, torture and execution.

Under Article 5 para. 1 of the Convention the applicants complain that there was no legal basis for their deprivation of liberty in the transit area which was not therefore "lawful" and did not occur according to a "procedure prescribed by law" as required by that provision.

Under Article 13 of the Convention the applicants complain that the Austrian Constitutional Court regarded itself bound by the facts as determined by the administrative authorities rather than establishing the facts itself.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 August 1991 and registered on 12 November 1991.

On 10 February 1992 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application insofar as it related to the complaint under Article 5 para. 1 of the Convention.

The Government's observations were received by letter dated 31 July 1992. The applicants' observations in reply are dated 20 October 1992.

THE LAW

1. Under Article 3 (Art. 3) of the Convention the applicants complain that their confinement in the enclosed special transit area at Vienna airport amounted to inhuman treatment.

Also under Article 3 (Art. 3) the applicants complain of the threat of expulsion, during their stay in the transit area, from Austria to Cyprus, and from there to Lebanon where they would have had to expect detention, torture and execution. They submit that, as members of the Maronite Christian minority, they had refused to participate in fighting in the civil war; as a result, they had been threatened with arrest and execution by members of the Christian militia.

Article 3 (Art. 3) of the Convention states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission need not examine whether the applicants have in respect of all complaints complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention since this part of the application is in any event inadmissible for the following reasons.

The Commission has first examined the applicants' complaints about the conditions in the transit area at Vienna airport.

The Government have referred in this context to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 9 November 1990.

According to the Convention organs' case-law, ill-treatment within the meaning of Article 3 (Art. 3) of the Convention must attain a certain minimum level of severity if it is to fall within the scope of this provision. The assessment of this minimum is, in the nature of things, relative and will depend on all the circumstances of the case (see Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 39, para. 100).

In the present case, the quarters appeared cramped: the applicants were in the transit area together with ten other persons. Apart from a small window measuring 30 x 200cm in one of the bedrooms, there was only artificial illumination.

On the other hand, the Commission notes that the transit area had separate bedrooms, living and sanitary areas. Moreover, the airport social services had constant access to the transit area.

The Commission therefore finds that the conditions of the applicants' stay in the transit area may have been uncomfortable but did not attain the level of severity as is required for these conditions to fall within the scope of Article 3 (Art. 3) of the Convention.

The Commission finds this confirmed in the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 9 November 1990. A delegation of the Committee had visited the transit area at around the time when the applicants were there. It considered in paragraph 91 of its report that the living conditions and standards of hygiene in the transit area were acceptable.

The Commission has next examined the applicants' complaints of the threat of expulsion, during their stay in the transit area.

The Government submit that the applicants had Yugoslav visas. They could have returned to their first country of refuge, which was Cyprus, or they could have gone to Yugoslavia or any other country willing to take them. From the statements which the applicants had made from the very beginning in broken English it was clear that theirs was not a case of well-founded fear of persecution within the meaning of the Geneva Convention relating to the Status of Refugees.

The Commission has constantly held that the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, expulsion may in exceptional circumstances involve a violation of the Convention, for example where there is a serious fear of treatment contrary to Article 3 (Art. 3) of the Convention in the country to which the person is to be expelled (see No. 12102/86, Dec. 9.5.86, D.R. 47 p. 286 with further references; *mutatis mutandis* Eur. Court H.R., Soering judgment, *loc. cit.*, p. 32 et seq., para. 81 et seq.).

In the present case the applicants raised the complaints at issue after they had left the transit area and entered Austria. Thus, while in the transit area, the applicants were not in fact expelled from Austria. Moreover, they do not complain that after their entry into Austria they continued to risk expulsion.

In any event, even assuming that the applicants would have been expelled to Lebanon, they have not referred to concrete past incidents showing that they were subjected to ill-treatment. It has furthermore not been alleged that, upon their return to Lebanon, they could not reside in parts of the country where they would not risk the ill-treatment complained of. Thus, the applicants have failed to show that

they would face a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if expelled from Austria.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Under Article 5 para. 1 (Art. 5-1) of the Convention the applicants complain that there was no legal basis for their deprivation of liberty in the transit area which was not therefore "lawful" and did not occur according to a "procedure prescribed by law" as required by that provision.

Article 5 para. 1 (Art. 5-1) of the Convention states:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

With reference to Section 5 of the Asylum Act the applicants point out that they duly asked for asylum within the time-limit prescribed, for which reason they would be entitled to reside in Austria until the asylum proceedings have been concluded. The purpose of their coercive detention in the transit area was to prevent them from entering Austria as asylum-seekers and to force them to withdraw their applications for asylum. The possibility of leaving the transit area was thus directly linked to the applicants being forced to expose themselves to the danger of torture and inhuman treatment in Lebanon.

The respondent Government submit that Article 5 para. 1 (Art. 5-1) of the Convention does not authoritatively define the criteria of deprivation of liberty. In the present case, the Austrian authorities did not cause the applicants' arrival at the airport and did not prevent them from leaving the country. The only measure taken was not to let the applicants enter the country under refugee status.

There were possibilities to leave Austria not entailing a danger to their lives. On the other hand, if a deprivation of the applicants' liberty is assumed, this could not be justified under Section 9 (c) of

the Border Control Act.

The Commission must first examine whether the applicants were "deprived of (their) liberty" within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention.

According to the Convention organs' case-law, the "right to liberty" enshrined in Article 5 para. 1 (Art. 5-1) contemplates the physical liberty of a person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether somebody has been "deprived of his liberty" within the meaning of this provision, account must be taken inter alia of the type, duration, effects and manner of implementation of the measure in question (see Eur. Court H.R., Guzzardi judgment of 6 November 1980, Series A no. 39, p. 33, para. 92).

In the present case the Commission notes that the applicants arrived of their own free will at Vienna airport on 9 March 1990. Thereupon, they were housed in the transit area until 16 March 1990. During this period they were free at any time to leave Austria. Indeed, they were offered the possibility of boarding a plane to leave Austria on 11, 14 and twice on 15 March 1990, but they refused.

It is true that in their submissions the applicants claim that they could not leave the transit area as, upon their return to Lebanon, they would have been exposed to the danger of torture and inhuman treatment.

However, the Commission notes that the Austrian authorities offered the applicants the possibility of returning to Larnaca in Cyprus from where they had left on 9 March 1990 when they flew to Vienna. In the Commission's opinion, the applicants have not sufficiently demonstrated that, upon their return to Cyprus, the Cypriot authorities would have expelled them immediately to Lebanon.

In any event, the Commission has just found that the applicants have failed to show that in Lebanon they would face a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention.

In these circumstances it cannot be said that during their stay at the airport transit area the applicants were "deprived of (their) liberty" within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention.

This part of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Article 13 (Art. 13) of the Convention the applicants complain that the Austrian Constitutional Court regarded itself bound by the facts as determined by the administrative authorities rather than establishing the facts itself.

Article 13 (Art. 13) of the Convention states:

"Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

This provision guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms. In particular, the domestic authorities must be in a position to examine the lawfulness and the substantive justification

of the matter complained of and to grant appropriate relief (see Eur. Court H.R., Soering judgment, loc. cit. p. 47, para. 120; No. 12474/86, Dec. 11.10.88, D.R. 58 p. 94, at p. 99).

In the present case the applicants filed appeals with the Constitutional and the Administrative Courts. Both Courts were free to, and in fact did, examine whether the applicants' stay in the transit area of Vienna airport constituted unlawful detention contrary to domestic law and the Convention.

It follows that the applicants had an effective remedy before a national authority at their disposal within the meaning of Article 13 (Art. 13) of the Convention. The remainder of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H.C. Krüger)

(C.A. Nørgaard)