

AS TO THE ADMISSIBILITY OF

Application No. 20458/92
by A.P.
against Austria

The European Commission of Human Rights sitting in private on 5 July 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

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 3 August 1992 by A.P. against Austria and registered on 10 August 1992 under file No. 20458/92;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the Commission's decision of 11 January 1994 to communicate the application;
- the observations submitted by the respondent Government on 6 April 1994 and the observations in reply submitted by the applicant on 29 June 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1950 and living in Vienna. He is represented by Mr. A. Laimer, a lawyer practising in Vienna.

The facts as undisputed between the parties may be summarised as follows. The applicant was at the relevant time a student with part-time employment. His wife had already finished her university education and was a civil servant in a Federal Ministry. On 27 February 1989 his wife gave birth to a child. She continued to exercise her profession while the applicant took parental leave and took care of the child.

On 25 April 1989 the applicant made a request for long term parental leave payments (Karenzurlaubsgeld).

This request was rejected by the competent labour office (Arbeitsamt) on 26 May 1989 on the ground that parental leave payments could only be claimed by mothers on the occasion of maternity. According to Section 26, para. 1, lit. b of the Austrian Unemployment Insurance Act (Arbeitslosenversicherungsgesetz) of 1977, mothers had, at the relevant time, a claim to long term parental leave payments if, inter alia, they took leave on account of maternity for up to one year.

The applicant's appeal was rejected by the Regional Vienna Labour Office (Landesarbeitsamt) on 4 July 1989, also on the ground that only mothers qualified for such payments.

The applicant then lodged a constitutional complaint. On 12 December 1991 the Constitutional Court (Verfassungsgerichtshof) refused to consider the merits of the case referring to its jurisprudence according to which the legislative provisions on which the refusal in the applicant's case was based did not violate constitutional rights and were compatible with Articles 8 and 12 of the European Convention on Human Rights. Even having regard to recent legislative amendments which brought the regulation in question in line with changing conditions (Anpassung an geänderte Verhältnisse), the applicant's complaint was unfounded as the legislator was free to fix a date as from which onwards the new rules were applicable.

The Constitutional Court's decision was received by the applicant's counsel on 6 February 1992. In the meantime, an Act of 12 December 1989, which came into force on 1 January 1990, had created a claim for a father for parental leave benefits if he is employed, lives with the child in a common household, predominantly cares for the child himself and if either the mother is entitled to parental leave because of her motherhood and has partly or fully renounced her claim or the mother is not entitled to go on parental leave but is prevented from caring for her child by her job.

According to this Act it is, however, a legal prerequisite that the child be born after 31 December 1989. As the applicant's child had been born on 27 February 1989, the new regulation did not apply.

COMPLAINTS

The applicant complains that, as a father, long-term parental leave payments were denied him.

He submits that for personal reasons he and his wife decided that he should take care of their new-born child while his wife continued to exercise her profession. He considers that in these circumstances the denial of long-term parental leave payments amounts to a violation of Article 8 para. 1 of the Convention, not being justified for any of

the reasons mentioned in para. 2 of that provision.

He also considers that the denial amounts to a violation of Article 8 in conjunction with Article 14 of the Convention.

Finally, he invokes Article 13 of the Convention because the Constitutional Court refused to consider the merits of his case. In this context he points out that an appeal to the Administrative Court would have offered no prospects of success.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 August 1992 and registered on 10 August 1992.

On 11 January 1994 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 6 April 1994 the Government submitted their observations. The applicant submitted observations in reply on 29 June 1994, an extension of the time-limit having been granted before.

THE LAW

The applicant complains that the denial of long-term parental leave payments to him as a father violates the right to respect for his family life (Article 8) (Art. 8) and in particular amounts to discrimination within the meaning of Article 14 (Art. 14) of the Convention.

1. The first question which arises is whether the applicant can be considered to have respected the six-month time-limit as set out in Article 26 (Art. 26) of the Convention. He lodged his application on 3 August 1992 which is within six months of the date on which the Constitutional Court's decision was served on his counsel on 6 February 1992.

However, the Constitutional Court refused to examine the applicant's complaint on the merits stating that in view of its constant jurisprudence it offered no prospects of success.

The Commission holds that in view of the change of the law which was being prepared at the relevant time, the applicant did have justified reason nevertheless to consider a constitutional complaint to be an effective remedy in these particular circumstances. The Constitutional Court's decision of 12 December 1991 can therefore be taken into account as being the final domestic decision on the subject matter raised in the present case and consequently the six months' time-limit can be considered to have been respected.

2. Insofar as the applicant invokes the right to respect for his family life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention, the respondent Government submit that parental leave implies a financial aid to families which is as such not required by Article 8 (Art. 8). It is also pointed out that a right to parental leave benefits is not common in the legal order of all Council of Europe member States.

The Commission observes that the denial of the payments in question does not constitute an interference with the right to respect for family life as Article 8 (Art. 8) does not extend so far as to impose on States a general obligation to provide for financial assistance to individuals in order to enable one of two parents to stay

at home to take care of children (cf. No. 11776/85, Dec. 4.3.86, D.R. 46 p. 251).

It follows that there is no appearance of a violation of Article 8 (Art. 8) and to this extent the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains that he was denied an "effective remedy" within the meaning of Article 13 (Art. 13) of the Convention.

According to the established case-law of the Commission interpreting Article 13 (Art. 13), an applicant who claims that his rights guaranteed by the Convention have been violated, must have an effective remedy before a national authority for that claim. The word "remedy" in this sense does not however mean that the applicant's claim must be vindicated and that the applicant must "win". He must have an opportunity for his claim to be examined by a national authority in conformity with the requirements of Article 13 (Art. 13), which is able to examine the merits of his complaint (cf. No. 9276/81, Dec. 17.11.83, D.R. 35 p. 13).

The Commission notes that the applicant had the possibility to bring his case before the Constitutional Court as well as the Administrative Court. He made use of the former remedy and could, *inter alia*, invoke his alleged Convention rights. The fact that the applicant's arguments were considered by the Constitutional Court to be irrelevant does not imply that his arguments were not duly examined by this court. This part of the application is therefore also manifestly ill-founded.

4. The applicant maintains that he is the victim of discrimination on the ground of sex in breach of Article 14 taken in conjunction with Article 8 (Art. 14+8).

The case-law of the Convention organs shows that, although Article 14 (Art. 14) has no independent existence, it may play an important role by complementing the other normative provisions of the Convention and the Protocols: Article 14 (Art. 14) safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14 (Art. 14) therefore violates those two Articles taken in conjunction. It is as though Article 14 (Art. 14) formed an integral part of each of the provisions laying down rights and freedoms (see, *inter alia*, Eur. Court H.R., Marckx judgment of 13 June 1979, Series A no. 31, pp. 15-16, para. 32). The Commission has found that there was no appearance of a violation of the right to respect for family life as guaranteed by Article 8 (Art. 8) because this provision does not as such require States to provide financial assistance for families with a newborn child. The question arises whether the facts in issue fall completely outside the ambit of that Article (Art. 8) and, hence, of Article 14 (Art. 14).

The aid here in question, namely parental leave payments, is nevertheless destined to promote family life. The notion of discrimination comprises in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention. Therefore the facts at issue fall within the ambit of Article 8 (Art. 8) (cf. Eur. Court H.R., Abdulaziz and others judgment of 22 May 1984, Series A no. 94, p. 35, para. 71 and p. 39, para. 82).

The Government argue that in principle legislative amendments have no retroactive effect, in particular when they are the response to changed situations. Therefore it is common use that the effect of new legislation often be delimited in that it is expressly provided that it shall apply only from a fixed day onwards.

The applicant submits that parental leave payments are practised in various member States. Regardless of that, he considers that within a social system of a given State, social benefits have to be granted without discrimination.

The Commission considers that in this respect the case raises important issues of law and facts which require an examination on the merits. No other grounds for declaring this part of the application inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint concerning the denial of parental leave payments and the alleged discriminatory nature of this decision;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C. A. NØRGAARD)