

In the case of Gaygusuz v. Austria (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,  
 Mr F. Gölcüklü,  
 Mr F. Matscher,  
 Mr R. Macdonald,  
 Mr C. Russo,  
 Mr I. Foighel,  
 Mr R. Pekkanen,  
 Mr A.N. Loizou,  
 Mr K. Jungwiert,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 23 May and 31 August 1996,

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

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Notes by the Registrar

1. The case is numbered 39/1995/545/631. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.
2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

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#### PROCEDURE

1. The case was referred to the Court by a Turkish national, Mr Cevat Gaygusuz ("the applicant") on 20 April 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 17371/90) against the Republic of Austria lodged by Mr Gaygusuz with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) on 17 May 1990.

The applicant's application bringing the case before the Court referred to Article 48 of the Convention (art. 48), as amended in respect of Austria by Protocol No. 9 (P9). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 8 of the Convention (art. 6-1, art. 8) and Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1).

2. On 5 September 1995 the Court's Screening Panel decided not to decline consideration of the case and to submit it to the Court (Article 48 para. 2 of the Convention) (art. 48-2).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43

of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 of Rules of Court B). On 29 September 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. The Turkish Government, having been notified by the Registrar of their right to intervene (Article 48 para. 1 (b) of the Convention and Rule 35 para. 3 (b)) (art. 48-1-b), informed him on 4 October 1995 that they wished to take part in the proceedings.

5. On 10 October 1995 the President gave the applicant's lawyer leave to use the German language in both the written and the oral proceedings (Rule 28 para. 3).

6. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government, the Agent of the Turkish Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the memorial of the Austrian Government on 9 February 1996, the memorial of the Turkish Government on 21 February and the applicant's memorial on 22 February.

On 29 January 1996 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. On 9 April 1996 the Turkish Government informed the Registrar that they did not wish to take part in the oral proceedings before the Court.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 May 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Austrian Government

Mr W. Okresek, Head of the International Affairs Division, Constitutional Department, Federal Chancellery,	Agent,
Mr R. Sauer, Federal Ministry of Labour and Social Affairs,	
Mrs E. Bertagnoli, International Law Department, Federal Ministry of Foreign Affairs,	Advisers;

(b) for the Commission

Mr M.P. Pellonpää,	Delegate;
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(c) for the applicant

Mr H. Blum, Rechtsanwalt,	Counsel.
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The Court heard addresses by Mr Pellonpää, Mr Blum and Mr Okresek.

On 5 June 1996 the applicant and the Austrian Government sent

the Registrar their replies to a question asked by the Court. At the Court's request they produced various documents on 26 June, 20 August and 30 August 1996. However, the Court refused to admit to the file, on the ground of their late submission, further observations by the applicant received at the registry on 29 July 1996.

#### AS TO THE FACTS

##### I. Circumstances of the case

9. Mr Cevat Gaygusuz, a Turkish national born in 1950, lived in Hörsching (Upper Austria) from 1973 until September 1987. Since then he has been living in Izmir (Turkey).

10. The applicant worked in Austria, with interruptions, from 1973 until October 1984. From then until 1 July 1986 periods when he was unemployed alternated with periods when he was certified unfit for work for medical reasons, and he was in receipt of the corresponding benefits.

From 1 July 1986 to 15 March 1987 he received an advance on his retirement pension in the form of unemployment benefit. When his entitlement expired he applied to the Linz Employment Agency (Arbeitsamt) on 6 July 1987 for an advance on his pension in the form of emergency assistance (Antrag auf Gewährung eines Pensionsvorschusses in Form der Notstandshilfe).

11. On 8 July 1987 the agency rejected the application on the ground that the applicant did not have Austrian nationality, which was one of the conditions laid down in section 33 (2) (a) of the 1977 Unemployment Insurance Act (Arbeitslosenversicherungsgesetz - see paragraph 20 below) for entitlement to an allowance of that type.

12. Mr Gaygusuz appealed against the above decision to the Upper Austria Regional Employment Agency (Landesarbeitsamt). He argued in particular that the distinction drawn by the section in question between Austrian citizens and foreign nationals was unjustified, unconstitutional and contrary to the European Convention on Human Rights).

13. On 16 September 1987 the Regional Employment Agency found against the applicant and upheld the impugned decision. It emphasised that not only did he not have Austrian nationality, but in addition his case did not fall into any of the categories where exemption from that condition was provided for (see paragraph 20 below).

14. On 2 November 1987 the applicant applied to the Constitutional Court (Verfassungsgerichtshof), alleging a violation of Article 5 of the Basic Law (Staatsgrundgesetz), Articles 6 para. 1 and 8 of the Convention (art. 6-1, art. 8) and Article 1 of Protocol No. 1 (P1-1).

15. On 26 February 1988, after considering the application in camera, the Constitutional Court declined to accept the case for adjudication (Article 144 para. 2 of the Federal Constitution - see paragraph 23 below), giving judgment in the following terms:

"The applicant alleged the breach of rights guaranteed by the Constitution in accordance with Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights, Article 5 of the Basic Law and Article 1 of Protocol No. 1 to the Convention (P1-1), and Article 8 of the Convention (art. 8). Regard being had to the Constitutional Court's established case-law relating to these rights, the application is so unpersuasive

as to the existence of the alleged violations or the infringement of any other right guaranteed by the Constitution or the infringement of another right through the application of an unlawful general provision, that with regard to the alleged violations to be considered by the Constitutional Court it does not have sufficient prospects of success. In addition, the case is not excluded from the jurisdiction of the Administrative Court [Verwaltungsgerichtshof]."

16. The Constitutional Court therefore referred the case to the Administrative Court (Article 144 para. 3 of the Federal Constitution - see paragraph 23 below).

17. On 16 May 1988 the Administrative Court asked Mr Gaygusuz to expand on his application.

18. On 7 July 1988 the applicant did so, complaining of an infringement of his legal right to obtain an advance on his pension in the form of emergency assistance, in accordance with the relevant provisions of the Unemployment Insurance Act. He requested the Administrative Court to set aside the decision of the Upper Austria Regional Employment Agency of 16 September 1987 as unlawful by reason of its content (section 42 (2) (i) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz) - see paragraph 27 below) and to suspend the proceedings and refer the case to the Constitutional Court for consideration of the constitutionality of section 33 (2) (a) of the Unemployment Insurance Act.

19. On 19 September 1989 the Administrative Court, sitting in camera, ruled that it did not have jurisdiction to deal with such an application and rejected it (section 34 (1) of the Administrative Court Act - see paragraph 25 below). It noted that the application, as expanded by Mr Gaygusuz, referred solely to the constitutionality of section 33 (2) (a) of the Unemployment Insurance Act. It further noted that the applicant had asked the Administrative Court to refer the case to the Constitutional Court for consideration of the constitutionality of a statute, but ruled that it was established that such questions came under the jurisdiction of the Constitutional Court (Article 144 para. 1, first paragraph, of the Federal Constitution - see paragraph 23 below), which, moreover, had already ruled on the issue.

II. Relevant domestic law

A. Substantive law

1. At the material time

20. In the 1977 version, which was applicable at the material time, the relevant provisions of the Unemployment Insurance Act (Arbeitslosenversicherungsgesetz) were worded as follows:

Section 23

"(1) Unemployed persons who have applied for an invalidity insurance benefit ... may receive an advance in the form of unemployment benefit or emergency assistance ... provided that, in addition to the capacity to work and availability for work, the other conditions for the award of the benefit concerned are satisfied ..."

Section 33

"(1) Unemployed persons who have exhausted their entitlement to unemployment benefit or maternity leave may be granted emergency assistance, at their request.

(2) For a grant to be made, the unemployed person must

- (a) possess Austrian nationality;
- (b) be fit for work and available for work; and
- (c) be in urgent need.

(3) The requirement of Austrian nationality is not applicable to persons who have been uninterruptedly resident in the present territory of the Republic of Austria since 1 January 1930, or to persons who were born after that date in the present territory of the Republic of Austria and have subsequently been uninterruptedly resident there.

(4) There is urgent need where the unemployed person is unable to provide for his essential needs.

(5) Emergency assistance cannot be granted unless the unemployed person applies for it within three years of exhausting entitlement to unemployment benefit or maternity leave."

#### Section 34

"(1) If long-term labour-market conditions are favourable to specific categories of unemployed persons or in specific regions, the Federal Minister of Social Affairs may, after consulting the organisations representing employers and employees, exclude those categories or regions from entitlement to emergency assistance.

(2) The Federal Minister of Social Affairs may authorise the grant of emergency assistance to unemployed persons who are nationals of another State where that State has a benefit equivalent to Austrian emergency assistance which is payable to Austrian citizens in the same manner as to its own nationals.

(3) The Federal Minister of Social Affairs may, after consulting the organisations representing employers and employees, authorise the grant of emergency assistance to unemployed persons who do not have Austrian nationality and have not been granted assistance under paragraph 2, on condition that during the five years preceding the date of the application for emergency assistance they have been employed in Austria for not less than 156 weeks with compulsory payment of unemployment insurance contributions. In order to calculate this period of five years, no account shall be taken of periods when the person concerned was in receipt of unemployment benefit (or emergency assistance). Authorisation may be given for a specific period and in respect of specific categories of unemployed persons."

21. Emergency assistance is assistance paid to persons who are no longer entitled to unemployment benefit, in order to guarantee them a minimum income. Entitlement to emergency assistance continues for as long as the person concerned is in need, even though payment itself is granted for a maximum period of 39 weeks, which must be renewed. The amount cannot exceed the amount of the unemployment benefit to which the person concerned would otherwise be entitled, nor may it be lower

than 75% of the amount of that benefit.

The amount of unemployment benefit is established in accordance with the recipient's income and it is financed partly from the unemployment insurance contributions every employee has to pay (section 1 of the Unemployment Insurance Act) and partly from various governmental sources.

2. After the material time

22. Since 1992, after amendment of the text and a change of numbering, sections 33 (3) and (4) and 34 (3) and (4) have read as follows:

#### Section 33

"...

(3) There is urgent need where the unemployed person is unable to provide for his essential needs.

(4) Emergency assistance may not be granted unless the unemployed person applies for it within three years of exhausting entitlement to unemployment benefit or maternity leave. To this period shall be added periods of rest within the meaning of section 16 (1) and periods of self-employed work, paid employment not covered by unemployment insurance or training which has occupied a preponderant part of the unemployed person's time."

#### Section 34

"...

(3) The following categories of persons may claim emergency assistance under the same conditions as unemployed persons having Austrian nationality:

1. refugees within the meaning of Article 1 of the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951;
2. stateless persons within the meaning of Article 1 of the Convention relating to the Status of Stateless Persons, signed at New York on 28 September 1954;
3. persons born in the present territory of the Republic of Austria who have subsequently been normally resident there uninterruptedly;
4. persons who have been normally resident in the present territory of the Republic of Austria uninterruptedly since 1 January 1930;
5. foreign nationals, in so far as that is provided for in bilateral agreements or international treaties;
6. holders of exemption certificates or assimilated persons, within the meaning of paragraph 4;
7. displaced persons in possession of an identity document issued by an Austrian authority;

8. resettled persons from South Tyrol and the Val Canale [Südtiroler- und Canaltaler-Umsiedler].

(4) After exhaustion of entitlement to unemployment benefit or maternity leave, the following categories of persons shall be granted emergency assistance, for a period of 52 weeks, or special emergency assistance, for the period laid down in section 39(1):

1. persons who, at the time of their application for emergency assistance, can produce a valid exemption certificate, within the meaning of the Aliens' Employment Act, issued in the version in force at the time of issue;

2. persons who do not have Austrian nationality but who, at the time of their application for emergency assistance, nevertheless satisfy the conditions for an exemption certificate, and to whom such a certificate has not been issued on the sole ground that their occupation is not covered by the Aliens' Employment Act."

#### B. Procedural law

##### 1. Proceedings in the Constitutional Court

23. By Article 144 para. 1 of the Federal Constitution the Constitutional Court, when an application (Beschwerde) is made to it, has to determine whether an administrative decision (Bescheid) has infringed a right guaranteed by the Constitution or has applied regulations (Verordnung) contrary to the law, a law contrary to the Constitution or an international treaty incompatible with Austrian law.

Article 144 para. 2 provides:

"Up to the time of the hearing the Constitutional Court may by means of a decision [Beschluss] decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

Paragraph 3 of Article 144 is worded as follows:

"Where the Constitutional Court considers that the impugned administrative decision has not infringed a right within the meaning of paragraph 1 and the case is not excluded from the jurisdiction of the Administrative Court by Article 133, the Constitutional Court, at the applicant's request, must refer the application to the Administrative Court so that it may determine whether the impugned decision has infringed one of the applicant's other rights."

##### 2. Proceedings in the Administrative Court

24. By Article 130 para. 1 of the Federal Constitution, the Administrative Court has jurisdiction to hear, inter alia, applications alleging that an administrative decision is unlawful.

25. Section 34 (1) of the Administrative Court Act (Verwaltungsgerichtshofsgesetz) provides:

"Applications upon which ... on account of the Administrative Court's manifest lack of jurisdiction, it is not appropriate to adjudicate, or which are manifestly barred as res judicata or for lack of the right to bring proceedings, shall be rejected, without further proceedings, by a decision taken in closed sitting."

26. Section 41 (1) of the Administrative Court Act provides:

"In so far as the Administrative Court does not find any unlawfulness deriving from the respondent authority's lack of jurisdiction or from breaches of procedural rules (section 42 (2) (2) and (3)) ..., it must examine the impugned decision on the basis of the facts found by the respondent authority and with reference to the complaints put forward ... If it considers that reasons which have not yet been notified to one of the parties might be decisive for ruling on [one of these complaints] ..., it must hear the parties on this point and adjourn the proceedings if necessary."

27. Section 42 (1) of the same Act states that, save as otherwise provided, the Administrative Court must either dismiss an application as ill-founded or quash the impugned decision.

By section 42 (2),

"The Administrative Court shall quash the impugned decision if it is unlawful

1. by reason of its content, [or]
2. because the respondent authority lacked jurisdiction, [or]
3. on account of a breach of procedural rules, in that
  - (a) the respondent authority has made findings of fact which are, in an important respect, contradicted by the case file, or
  - (b) the facts require further investigation on an important point, or
  - (c) procedural rules have been disregarded, compliance with which could have led to a different decision by the respondent authority."

28. If the Administrative Court quashes the impugned decision, "the administrative authorities [are] under a duty ... to take immediate steps, using the legal means available to them, to bring about in the specific case the legal situation which corresponds to the Administrative Court's view of the law [Rechtsanschauung]" (section 63 (1)).

#### PROCEEDINGS BEFORE THE COMMISSION

29. Mr Gaygusuz applied to the Commission on 17 May 1990. Relying on Articles 6 para. 1 and 8 of the Convention (art. 6-1, art. 8) and Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1), he complained of infringements of his right to a fair hearing, his right to respect for his private life and his right to peaceful enjoyment of his possessions.

30. The Commission declared the application (no. 17371/90)

admissible on 11 January 1994. In its report of 11 January 1995 it expressed the opinion that there had been no violation of Article 6 para. 1 of the Convention (art. 6-1) (twelve votes to one), that there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1) (unanimously) and that no separate issue arose under Article 8 of the Convention (art. 8) (unanimously). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

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#### FINAL SUBMISSIONS TO THE COURT

31. In their memorial the Austrian Government asked the Court

"1. to declare that Article 6 of the Convention (art. 6) does not apply to the present case;

2. to declare that Article 1 of Protocol No. 1 to the Convention (P1-1) does not apply;

or alternatively

3. to declare that Article 6 of the Convention (art. 6) has not been violated in the proceedings underlying the application;

4. to declare that Article 1 of Protocol No. 1 to the Convention in conjunction with Article 14 of the Convention (art. 14+P1-1) have not been violated".

32. The applicant asked the Court

"(a) to hold that the Linz Employment Agency's refusal ... to grant him emergency assistance under the Unemployment Insurance Act infringed his right ... to a fair hearing in civil proceedings (Article 6 para. 1 of the Convention) (art. 6-1), his right to respect for his private and family life (Article 8 of the Convention) (art. 8) and his right to the peaceful enjoyment of his possessions and non-discriminatory treatment (Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention) (art. 14+P1-1);

and

(b) to award him just satisfaction under Article 50 of the Convention (art. 50)".

#### AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1 (art. 14+P1-1)

33. Mr Gaygusuz complained of the Austrian authorities' refusal to grant him emergency assistance on the ground that he did not have Austrian nationality, which was one of the conditions laid down in

section 33 (2) (a) of the 1977 Unemployment Insurance Act (see paragraph 20 above) for entitlement to an allowance of that type. He claimed to be a victim of discrimination based on national origin, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1), which provide:

Article 14 of the Convention (art. 14)

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... national ... origin ..."

Article 1 of Protocol No. 1 (P1-1)

"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 (P1-1) 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."

34. The Commission and the Turkish Government agreed with this argument, whereas the Austrian Government rejected it.

35. The Court must first rule on the applicability of these two Articles taken in conjunction (art. 14+P1-1).

A. Applicability of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1)

36. According to the Court's established case-law, Article 14 of the Convention (art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (art. 14) does not presuppose a breach of those provisions - and to this extent it is autonomous - there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among other authorities, the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 22).

37. The applicant and the Turkish Government argued that Article 14 of the Convention was applicable in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1). They referred to the reasoning of the Commission, which found that the award of emergency assistance was linked to the payment of contributions to the unemployment insurance fund.

38. The Austrian Government, however, submitted that emergency assistance did not come within the scope of Article 1 of Protocol No. 1 (P1-1). Entitlement thereto did not result automatically from the payment of contributions to the unemployment insurance fund. It was an emergency payment granted by the State to people in need. Consequently, Article 14 of the Convention (art. 14) was not applicable either.

39. The Court notes that at the material time emergency assistance was granted to persons who had exhausted their entitlement to

unemployment benefit and satisfied the other statutory conditions laid down in section 33 of the 1977 Unemployment Insurance Act (see paragraph 20 above).

Entitlement to this social benefit is therefore linked to the payment of contributions to the unemployment insurance fund, which is a precondition for the payment of unemployment benefit (see paragraph 21 above). It follows that there is no entitlement to emergency assistance where such contributions have not been made.

40. In the instant case it has not been argued that the applicant did not satisfy that condition; the refusal to grant him emergency assistance was based exclusively on the finding that he did not have Austrian nationality and did not fall into any of the categories exempted from that condition (see paragraphs 11 and 13 above).

41. The Court considers that the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (P1-1). That provision (P1-1) is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions".

Accordingly, as the applicant was denied emergency assistance on a ground of distinction covered by Article 14 (art. 14), namely his nationality, that provision (art. 14) is also applicable (see, among other authorities, *mutatis mutandis*, the *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 18, para. 40, and the *Darby v. Sweden* judgment of 23 October 1990, Series A no. 187, p. 12, para. 30).

B. Compliance with Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1)

42. According to the Court's case-law, a difference of treatment is discriminatory, for the purposes of Article 14 (art. 14), if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.

43. The applicant maintained that the difference in treatment between Austrians and non-Austrians under section 33 (2) (a) of the 1977 Unemployment Insurance Act as regards entitlement to emergency assistance was not based on any objective and reasonable justification. He had paid contributions to the unemployment insurance fund on the same basis as Austrian employees.

44. The Turkish Government and the Commission agreed in substance with the applicant's argument.

45. The Austrian Government submitted that the statutory provision in question was not discriminatory. They argued that the difference in treatment was based on the idea that the State has special responsibility for its own nationals and must take care of them and provide for their essential needs. Moreover, sections 33 and 34 of the Unemployment Insurance Act laid down certain exceptions to the nationality condition. Lastly, at the material time, Austria was not bound by any contractual obligation to grant emergency assistance to

Turkish nationals.

46. The Court notes in the first place that Mr Gaygusuz was legally resident in Austria and worked there at certain times (see paragraph 10 above), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.

47. It observes that the authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by section 33 (2) (a) of the 1977 Unemployment Insurance Act (see paragraph 20 above).

48. In addition, it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.

49. Admittedly, sections 33 and 34 of the 1977 Unemployment Insurance Act (see paragraph 20 above) lay down certain exceptions to the nationality condition, but the applicant did not fall into any of the relevant categories.

50. The Court therefore finds the arguments put forward by the Austrian Government unpersuasive. It considers, like the Commission, that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification".

51. Even though, at the material time, Austria was not bound by reciprocal agreements with Turkey, it undertook, when ratifying the Convention, to secure "to everyone within [its] jurisdiction" the rights and freedoms defined in section I of the Convention.

52. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1).

#### II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

53. Mr Gaygusuz further complained that he had not had access to a tribunal with full jurisdiction and that he had not had a fair hearing. He relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

54. The Austrian Government and the Commission rejected this argument. The Turkish Government made no observation on the question.

55. The Court, having concluded that there has been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1), does not consider it necessary to examine the case under Article 6 para. 1 (art. 6-1).

#### III. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

56. Mr Gaygusuz also complained of interference with his family life, contrary to Article 8 of the Convention (art. 8), which provides:

"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."

57. Having regard to the conclusion set out in paragraph 52 above, the Court considers, like the Commission, that no separate issue arises under Article 8 of the Convention (art. 8).

#### IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

58. Under Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

##### A. Pecuniary damage

59. For pecuniary damage Mr Gaygusuz claimed 800,000 Austrian schillings (ATS), corresponding to the amount of emergency assistance he had been deprived of from 1987 to 1993.

60. The Turkish Government argued that the applicant should be paid the whole sum claimed, as it was precisely the Austrian authorities' refusal to grant him emergency assistance which had caused him to leave the country.

61. The Austrian Government submitted that this compensation claim was based on nothing more than a hypothesis. As the applicant had left Austria in 1987, it was impossible to know whether he would have been unemployed during the relevant period and whether he would have satisfied the other conditions for the award of the social benefit in question.

62. The Delegate of the Commission considered that the applicant had suffered pecuniary damage as a result of the violation found and left assessment of the amount to the Court's discretion.

63. The Court notes that the applicant applied for emergency assistance on 6 July 1987 and left Austria in September 1987 (see paragraphs 9 and 10 above). Without wishing to speculate about the applicant's situation after that date, the Court must nevertheless take into account the fact that his departure from Austria was due to the non-payment of emergency assistance, which would have amounted to ATS 235 per day. Making an assessment on an equitable basis, it awards him the sum of ATS 200,000.

##### B. Non-pecuniary damage

64. The Turkish Government argued that the applicant should be paid a substantial sum for non-pecuniary damage.

65. As the applicant submitted no claim to that effect, the Court,

like the Commission and the Austrian Government, considers it unnecessary to rule on the question.

#### C. Costs and expenses

66. The applicant also claimed ATS 123,415.40 for costs and expenses, made up of ATS 31,818.67 in the Austrian courts and ATS 91,596.73 before the Convention institutions.

67. The Turkish Government argued that the applicant should be reimbursed in full for the costs and expenses he had incurred.

68. The Austrian Government submitted that only the costs and expenses relating to the application to the Constitutional Court were relevant. For those incurred before the Convention institutions, they considered the sum of ATS 80,000 appropriate.

69. The Delegate of the Commission made no observation on this point.

70. Making an assessment on an equitable basis in the light of the information in its possession and its own case-law on the question, the Court awards Mr Gaygusuz ATS 100,000.

#### D. Default interest

71. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

#### FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1) is applicable in the case;
2. Holds unanimously that there has been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1);
3. Holds unanimously that it is not necessary to consider the case under Article 6 para. 1 of the Convention (art. 6-1);
4. Holds unanimously that no separate issue arises under Article 8 of the Convention (art. 8);
5. Holds by eight votes to one that the respondent State is to pay the applicant, within three months, 200,000 (two hundred thousand) Austrian schillings for pecuniary damage;
6. Holds unanimously that the respondent State is to pay the applicant, within three months, 100,000 (one hundred thousand) Austrian schillings in respect of costs and expenses;
7. Holds unanimously that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
8. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public

hearing in the Human Rights Building, Strasbourg, on 16 September 1996.

Signed: Rolv RYSSDAL  
President

Signed: Herbert PETZOLD  
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the partly dissenting opinion of Mr Matscher is annexed to this judgment.

Initialled: R. R.

Initialled: H. P.

PARTIALLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I do not usually express dissenting opinions with regard to the Court's decisions on Article 50 (art. 50), in view of the fact that the sums which the Court awards under that provision (art. 50) on an equitable basis can always be the subject of disagreement. The reason why I have done so in the present case is that the Court's decision to award the applicant ATS 200,000 for pecuniary damage is clearly unsustainable.

Where the Court finds a violation of the Convention and the violation in question causes the victim pecuniary damage, it has the power under Article 50 (art. 50) to award just satisfaction. Although it is hardly ever possible to assess the amount of such damage precisely - which is not in any case the Court's task - the sum awarded for pecuniary damage must never exceed the amount of damage that the applicant can actually have sustained.

In the present case the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1) (a finding which I am in complete agreement with) on account of the fact that the applicant, because of his nationality, was not entitled to emergency assistance under the legislation in force. But emergency assistance, as the term clearly implies, is not a pension for life, but a temporary social measure for a period when the beneficiary is available for work but unemployed and not (yet) entitled to an invalidity or old-age pension.

As a result of the finding of a violation of the Convention, the applicant is entitled to be compensated on an equitable basis under Article 50 of the Convention (art. 50) for any pecuniary damage he may have sustained.

Under the law in force at the material time, emergency assistance amounted (with varying supplements) to approximately ATS 255 per day. It appears from the file that, however the sums are calculated, and accepting the hypotheses most favourable to the applicant (unrealistic though they are), the maximum amount he could have received in emergency assistance was about ATS 80,000. The sum of ATS 200,000 which the Court has awarded him is more than twice as high as the pecuniary damage he can possibly have sustained; that is manifestly contrary to all the principles governing compensation for pecuniary damage, unless the Court wishes to adopt the practice which exists in American law of awarding "punitive damages". That practice is rightly not provided for in European law.

The calculation and compensation claims put forward by the applicant's lawyer and the Turkish Government are so fantastic that it is superfluous to comment on them.

The background to the whole case is a typical instance of abuse of the Welfare State, a very widespread trend in all our societies and one - I would point out - by no means limited to foreign workers.

It is regrettable that the Court, by awarding disproportionate amounts of compensation, should reinforce this trend.