

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Implementation of a Residence Prohibition on the ground of criminal behaviour

Austrian Constitutional Court
Judgement of June 12th, 2007 (B 2126/06)

The Circumstances of the Case

The applicant, who was born in 1975, is a Polish citizen. At the age of 4, he moved to Austria with his parents, where he received his schooling (elementary and grammar school) as well as his professional education. He completed a University degree in Applied Sciences (*Fachhochschule*). At the date of the judgment the applicant has lived in Austria for more than 27 years, just like his mother and his siblings who are also Austrian citizens.

On 21st of December, 2004 the applicant was found guilty by the Vienna Regional Criminal Court (*Landesgericht für Strafsachen Wien*) for having committed the criminal offence of robbery according to Article 142 of the Austrian Criminal Code (*Strafgesetzbuch, StGB*) and was sentenced to four years of imprisonment. As a consequence of the conviction, the magistrate (the magistrate [*Magistrat*] being the district administrative authority [*Bezirksverwaltungsbehörde*] in towns, with a legal charter) of Krems (which is a city in Lower Austria) imposed a residence prohibition on the applicant for an unlimited period according to Article 60 of the 2005 Aliens' Police Act (*Fremdenpolizeigesetz 2005, FPG 2005*).

The applicant appealed the ruling of the magistrate of Krems, whereupon the Independent Administrative Tribunal of Lower Austria (*Unabhängiger Verwaltungssenat des Landes Niederösterreich*) decided to limit the residence prohibition to ten years. (Note: In general the Security Directorates [*Sicherheitsdirektionen*] decide appeals of decisions under the Aliens' Police Act 2005. The jurisdiction in the present case is due to the applicant's citizenship of the European Economic Area [EEA] and results from Article 9, para (1), no 1 of the Aliens' Police Act 2005, which has the rank of a federal constitutional law.)

Eventually, the claimant filed a complaint against the administrative decision of the Independent Administrative Tribunal with the Austrian Constitutional Court. He primarily alleged an infringement on "his right to respect for private and family life" as guaranteed by Article 8 of the European Convention on Human Rights (ECHR) and applied for repealing the ruling.

Relevant Austrian Law

- Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (Aliens' Police Act – Fremdenpolizeigesetz 2005, FPG)
Federal Law Gazette (FLG)¹ I No. 100/2005 as Amended by FLG I No. 157/2005
(Note: The 2005 Aliens' Police Act 2005 entered into force on the 1st of January, 2006.)

Section 3

Residence Prohibition and Prohibition to Return Requirements for Imposing a Residence Prohibition

Article 60. (1) A residence Prohibition may be imposed on an alien if, on the basis of certain facts, the assumption is justified that his residence

1. constitutes a threat to public order and security or
2. is in conflict with other public interests as stated in art. 8 para (2) of the ECHR.

(2) Certain facts within the meaning of para (1) above shall be deemed to include, in particular, cases where an alien

1. has been sentenced, by a final judgement of an Austrian court, to unconditional imprisonment of more than three months, partially suspended imprisonment, suspended imprisonment of more than six months, or on more than one occasion for criminal offences based on the same malicious inclination;
2. – 14.

(3) – (5)

(6) Art 66 shall apply.

Section 4

Common Procedural Provisions Protection of Privacy and Family life

Article 66. (1) If expulsion were to invade the alien's privacy or family life, it shall be admissible where it is urgently required to achieve the objectives specified in art. 8 para (2) of the ECHR.

(2) In any case, an expulsion order under art. 54 para (1), (3) and (4) may not be imposed where its effects on the life of the alien and his family would outweigh the adverse consequences of refraining from its imposition. In such process, due consideration shall be given, in particular, to the following factors:

1. duration of residence and extent of integration of the alien or his family members;
2. intensity of family or other ties.

1 The Austrian Legal Information System (RIS, www.ris.bka.gv.at) comprises all issues of the Federal Law Gazette published from 1945.

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
Federal Law Gazette (FLG) No. 210/1958 as Amended by FLG III No. 30/1998
The ECHR was adopted at the rank of constitutional law and is directly applicable.

Article 8 provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court's Assessment

The Austrian Constitutional Court assessed at the outset that by enacting the residence permission, the Independent Administrative Authority of Lower Austria interferes with the applicant's "right to respect for his private and family life" in terms of Article 8 of the ECHR. The administrative ruling, therefore, constitutes an interference with a constitutionally guaranteed right.

Still, not every interference with the said provision is to be regarded as a violation. (Note: According to its second para, the rights arising from Article 8 of the ECHR are subject to a limitation clause [*Eingriffsvorbehalt*], which means that they may be restricted by law or on the basis of law.)

It requires further examination to determine whether such interference can be justified.

According to the standing jurisdiction of the Austrian Constitutional Court (see e.g. VfSlg. 11.638/1988, 15.051/1997) a decision of an authority violates the fundamental right concerned if:

- there is no law that the ruling could be based on,
- the ruling is based on law that contradicts article 8 of ECHR,
- the authority gives the law an interpretation that does not conform to Article 8 of the ECHR, or
- the authority applies a law – that actually complies with the Austrian Constitution – in an inconceivable way (*denk unmögliche Gesetzesanwendung*)

(Note: This demands an error, which is of such a severity, that "it borders on lawlessness").

The contested interference has a basis in domestic law, namely in Article 60 of the Aliens' Police Act 2005. This norm refers to Article 66 of the 2005 Aliens' Police Act, which explicitly defers to Article 8, para (2) of the ECHR. The Austrian Constitutional Court observes that the constitutionality of the provision concerned is undisputed.

Regarding the purpose of interference, the authority invokes the legitimate aim of public safety laid down in Article 60, para (1), no 1 of the 2005 Aliens' Police Act and also described in Article 8, para (2) of the ECHR.

Furthermore, for an interference with Article 8 of the ECHR to be justified, the interference has to be *urgently required* to achieve the objectives specified in Article 8, para (2) of the ECHR. This requirement demands the competent authority to strike a proper balance (*Interessenabwägung*) between the competing public and private interests.

As in the present case the expulsion of the applicant interferes with his rights guaranteed by Article 8 of the ECHR, the Independent Administrative Tribunal had the duty to consider the criteria that the European Court of Human Rights has developed in its well-established case law and to give reason for its decision. (Note: Such criteria are for instance: the nature and gravity of the offences committed by the applicant, the length of his/her stay in the host country or the period which elapsed between the commission of the offences and the impugned measure and the applicant's conduct during that period; see ECHR, judgment of 2nd August 2001, *Boultif*, Appl. 54.273/00 and ECHR, judgment of 18th October 2006, *Üner*, Appl. 46.410/99).

However, the Constitutional Court held that the Independent Administrative Tribunal failed to balance between the public interest in imposing the residence prohibition on the applicant and the applicant's individual interest in staying in Austria.

The Authority did not consider the applicants' exclusive family ties in Austria; instead the Authority only observed that the claimant entered Austria at a very young age and has received his schooling in Austria.

In the Court's view, the Independent Administrative Tribunal of Lower Austria failed to conduct a fair balance of interests under the terms of Article 8 of ECHR. The Authority's decision, therefore, violates the applicant's right to respect for his private and family life and eventually had to be repealed.

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