AUSTRIAN CONSTITUTIONAL COURT JUDGMENT
1 OCTOBER 2001

Reference number

G224/01 et al.

Index

41 Internal Affairs
41/02 Nationality, passports and residence registration law, aliens law

Provisions

Federal Constitution, article 18 (1); Federal Constitution, article 140 (1) (prejudicial effect); Federal Constitution, article 140 (1) (extent of checks); Federal Constitution, article 140 (7), third sentence; Federal Constitution, article 140 (7), second sentence; 1997 Aliens Act, article 53 (3); 1997 Aliens Act, article 103 (3); Commercial Code, article 347 (1); Geneva Convention relating to the Status of Refugees, *Federal Law Gazette* 55/1955; Convention implementing the Schengen Agreement, *Federal Law Gazette* III 90/1997, article 26.

Guiding principle

Insufficient clarity of the aliens law provisions relating to the obligation of (air) carriers to communicate information concerning the identification particulars of an alien conveyed to Austria and/or to reimburse expenses in the event of a breach of the duty to communicate information; discontinuation, owing to the absence of prejudicial effect, of the review proceedings with respect to the obligation of other carriers to communicate information.

Verdict

I. 1. The phrase “an aircraft or” appearing in paragraph (3) of article 53 and the whole of paragraph (3) of article 103 of the Federal Law concerning the Entry, Residence and Settlement of Aliens (1977 Aliens Act - FrG), *Federal Law Gazette* (FLG) I No. 75/1997, shall be deleted as unconstitutional.

Previous statutory provisions shall not re-enter into force.

The deleted provisions shall no longer be applicable.

2. The Federal Chancellor shall be required to make these pronouncements publicly known without delay in *Federal Law Gazette I*.

II. The proceedings shall in all other respects be discontinued.

Findings

Reasons for the decision:

I. Review petitions by one foreign and two domestic airlines filed against a total of 41 administrative decisions of the Security Directorate for the Province of Lower Austria requiring the airlines to effect a flat-rate reimbursement of expenses in accordance with article 103 (3) of the 1997 Aliens Act, FLG I 75, by reason of their failure to fulfil their duty to communicate information, as laid down in article 53 (3) *leg. cit*., which have passed through successive stages of appeal, are pending before the Constitutional Court as cases B544-549/01, B550-582/01, B585/01 and B586/01.

1. The provisions of article 103 (3) and article 53 (3) of the Aliens Act, which govern the orders for the reimbursement of expenses and form the basis of the administrative decisions, are related to the following provisions and worded as set out below.

(a) Under article 2 (1) of the Aliens Act, aliens require a valid passport for entry, residence and exit purposes (passport requirement) unless otherwise provided for under federal laws or international agreements or sanctioned by international practice.

If so required by the public interests, in particular passport or aliens police control and foreign-policy considerations, the Federal Minister of the Interior, in agreement with the Federal Minister for Foreign Affairs, is empowered by ministerial order to designate specific types of passport that are issued by countries other than those for which the Agreement on the Accession of Austria to the Schengen Convention has entered into force as constituting travel documents that may not serve to fulfil the passport requirement (article 2 (2) of the Aliens Act).

In accordance with article 5 of the Aliens Act, aliens who are subject to the passport requirement are, unless otherwise provided for under federal laws or international agreements, subject to the visa requirement for entry into and during residence in the federal territory and they require an entry authorization or a residence authorization. Entry authorizations (visas) are issued in the form of an air transit visa (visa for airport transit, visa A) or a transit visa (visa B) or a travel visa (visa for short stay, visa C) or a residence visa (visa for longer-term stay, visa D) (article 6 (1) of the Aliens Act; in that connection, every visa that is issued by a country for which the Agreement on the Accession of Austria to the Schengen Convention has entered into force and whose scope of application includes Austria is valid as an entry authorization (paragraph (2)). Residence authorizations are issued in the form of residence permits or settlement permits (article 7 (1) of the Aliens Act).

Under article 52 (1) of the Aliens Act, aliens are to be prevented from entering the federal territory at the time of the border control (rejection at the border) if doubts exist concerning their identity, or if they have not complied with the passport or visa requirement, or if it had been stipulated that they must use a different border crossing point. Entry refusal will not take place if so laid down by federal law, international

agreement or international practice. In accordance with article 52 (3) of the Aliens Act, the decision as to whether entry is admissible is to be made, after the alien has been questioned, on the basis of the facts that are substantiated by him or otherwise become known.

Article 53, headed "Measures to guarantee rejection at the border", of the Aliens Act reads as follows (the provision under review is highlighted):

"(1) If an alien who is to be rejected at the border cannot leave the border control area immediately for legal or practical reasons, he may be instructed to remain at a specified place, within that area, for the period of such stay.

(2) Aliens whose entry took place on board of an aircraft, land vehicle or vessel of a carrier may, in order to guarantee the rejection at the border as an expulsion security measure, be forbidden to disembark from the conveyance or be required to board a specific conveyance by which they may leave the federal territory. The party which transported the aliens shall in such cases be obliged at its own expense to ensure that the aliens depart without delay, unless departure is arranged by another carrier at no cost to the Republic of Austria.

(3) Carriers which have conveyed aliens to Austria by an aircraft or vessel or by a motor coach operating regular international services shall be obliged, upon request, to communicate to the border control authority without delay and at no charge the aliens' identification particulars (name, date and place of birth, address and nationality) and details of the documents required for entry purposes (type, period of validity, issuing authority and date of issue). The foregoing shall not apply in the case of aliens who are entitled to visa-exempt entry, provided that the carrier has satisfied itself that such aliens are in the possession of the necessary travel document.

(4) In the case of aliens on whom a measure to guarantee the rejection at the border is to be imposed, article 53c, paragraphs (1) to (5), of the 1991 Administrative Penalties Act (VStG), FLG No. 1991/52, shall apply to their stay at the place specified for such purpose."

In accordance with article 54 of the Aliens Act, aliens who in the course of a border control state that they are transit passengers will be refused permission to remain in the transit area (measures to guarantee transit) if, on the basis of specific facts, the aliens' subsequent exit does not appear guaranteed or if the aliens do not possess the necessary air transit visa. Measures to guarantee transit are executed in conjunction with an order that the aliens depart without delay. If their immediate exit is not possible, the aliens may be instructed to remain at a specified place, within the border control area, for the period up to their departure. Paragraphs (2) and (3) of article 53 *leg. cit*. are applicable.

Article 103 (3) of the Aliens Act, which refers to the article quoted above, provides as follows:

"(3) If the border control authority cannot readily establish an alien's identity or if the alien is not in possession of the documents required for entry purposes and the carrier which conveyed the alien to Austria fails to comply promptly with its

obligation to communicate particulars in accordance with articles 53 and 54, the authority shall in such cases order the carrier to effect a reimbursement of expenses at a flat rate of 20,000 schillings."

In accordance with the last sentence of article 103 (4) of the Aliens Act, there will, however, be no reimbursement of expenses if the carrier arranges at its own expense for the alien's immediate exit.

(b) Under article 6 (1) of the 1997 Aliens Act Implementing Regulations (FrG-DV), the carrier is required "in connection with a measure to guarantee rejection at the border" to communicate specifically:

"1. The name, date and place of birth, address and nationality of the alien;

2. The type, period of validity, issuing authority and date of issue of the travel document;

3. The type, period of validity, issuing authority and date of issue of the visa or residence authorization."

In accordance with article 6 (2) of the Aliens Act Implementing Regulations, these particulars have to be communicated without delay and at the latest within three days of request. They may be communicated by the submission of photocopies of the documents or by the use of a printed form made available to the carrier. Article 7 of these Regulations lays down various obligations to be met by the authorities in this connection.

(c) The aliens law provisions set out under (a) above, which have in fact been valid since 1993 (cf. articles 33, 34 and 79 of the Aliens Act FLG 838/1992, hereinafter referred to as the "1992 Aliens Act"), should now be considered in the light of the Schengen acquis:

In accordance with article 26 of the Convention implementing the Schengen Agreement, FLG III 90/1997 (hereinafter referred to as the "Schengen Convention"), which entered into force for Austria on 1 December 1997 (cf. Proclamation of the Federal Chancellor FLG III 202/1997 and Proclamation of the Federal Minister of the Interior FLG III 205/1997), the contracting States (in addition to Austria: Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden) are required, subject to the obligations arising out of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967:

(1) […] to incorporate the following rules in their national legislation:

> (a) If a third country national is refused entry into the territory of one of the Contracting Parties, the carrier which brought him to the external border by air, sea or land shall be obliged to assume responsibility for him again without delay. At the request of the border surveillance authorities the carrier

must return the third country national to the third State from which he was transported, to the third State which issued the travel document on which he travelled or to any other third State to which he is guaranteed entry;

(b) The carrier shall be obliged to take all necessary measures to ensure that a third country national carried by air or sea is in possession of the travel documents required for entry into the territory of the Contracting Parties.";

and

"(2) […] in accordance with their constitutional law, to impose penalties on carriers which transport third country nationals who do not possess the necessary travel documents by air or sea from a third State to their territories."

Under article 26 (3) of the Schengen Convention, the provisions of paragraphs (1) (b) and (2) also apply to carriers which convey groups of persons by motor coach on international routes, with the exception of border traffic.

With the entry into force of the Treaty of Amsterdam, the Schengen acquis became integrated into the framework of the European Union and, in conformity with Annex A to Council Decision of 20 May 1999 (OJ 1999, L 176, pp. 17 ff.), article 26 of the Schengen Convention was harmonized with the legal basis of article 63 (3) of the Treaty establishing the European Community, with the observation that "it is recognized that the type, modalities and scope of the penalties pursuant to that article are to be fixed by the member States".

2. In the administrative decisions forming the subject of the petitions, the authority proceeded against asserted, in each case, that on a specified day one or more persons of undetermined identity had been conveyed by the airline on a specific flight to Austria from abroad and had sought entry in the form of an application for asylum at the Vienna Schwechat Airport border crossing point and did not hold a valid passport or were not in possession of a visa (article 5 of the Aliens Act) or a flight transit visa (article 5 of the Aliens Act Implementing Regulations). The requests by the authority of first resort (the Schwechat Federal Police Headquarters as the border control authority) that the identification particulars of the alien(s), as laid down in article 6 of the Aliens Act Implementing Regulations, be supplied were either not met at all or were met merely by the provision of details of forged travel documents or passport details which could not be reconciled or did not tally with the particulars supplied by the aliens. The carrier did not arrange the immediate exit of the alien(s).

From the legal standpoint, the authority proceeded against observes that article 103 (3) of the Aliens Act provided for a "flat-rate reimbursement of expenses to be fixed irrespective of fault (strict liability)", which would become payable if the border control authority could not readily establish the alien's identity or if the alien was not in possession of the documents required for entry purposes and the carrier failed to comply with its obligation, as laid down in article 53 (3) of the Aliens Act, to communicate the genuine identification particulars. The last sentence of article 103 (4) of the Aliens Act stipulated that there would be no reimbursement of expenses only if the alien's exit is actually arranged by the carrier. The fact that the

carrier could not effect such return transport because the alien, on filing an application for asylum, was granted provisional right of residence is irrelevant.

II. Having regard to these petitions, the Constitutional Court, by decision of 28 June 2001 pursuant to article 140 (1) of the Federal Constitution, initiated proceedings *ex officio* to review the constitutionality of articles 53 (3) and 103 (3) of the 1997 Aliens Act.

1. (a) In its decision to initiate the proceedings, the Constitutional Court provisionally held that the petitions were admissible, that**,** in reviewing all the contested administrative decisions of the authority proceeded against, it would have to apply article 53 (3) (possibly only the expression "an aircraft or") and article 103 (3) of the Aliens Act, particularly since the administrative decisions were explicitly based on those very provisions, and that the other procedural requirements had been met.

(b) (aa) On the merits of the case, the Constitutional Court doubted primarily whether it was possible to ascertain with the necessary clarity from article 53 (3) in conjunction with article 103 (3) of the Aliens Act what was required of carriers in order to be able to fulfil the duty to communicate information imposed on them within the meaning of the law or in what cases they were obliged to effect a flat-rate reimbursement of expenses arising for the authority, and commented as follows:

"Article 53 (3) of the Aliens Act could be construed to mean that carriers are obliged only to record those identification particulars and details of travel documents (passport, entry and/or residence authorization) that have been supplied to them by their passengers and to communicate such information to agents of the security administration for the purpose of the entry checks to be carried out by them under article 12 of the Border Control Act (GrekoG), with the result that an order for the reimbursement of expenses is to be issued if they do not obtain such details.

However, the wording of article 53 (3) of the Aliens Act clearly also allows the interpretation that additional obligations are imposed on carriers. Such a construction would appear to be supported by the explanatory notes to the government bill enacted as the 1992 Aliens Act (692 Appendix to National Council record, eighteenth legislative period, page 47), which, with reference to article 33 (3), i.e., the predecessor to article 53 (3) of the 1997 Aliens Act, stated the following:

> 'It is not acceptable that transport companies convey to Austria aliens whose identity cannot be established upon their arrival. The applicable penalty for any breach of that duty is laid down in article 79 (3) (i.e., the predecessor to article 103 (3) of the 1997 Aliens Act).';

and, as can be seen from the administrative measures and as the hearing has shown, the authority appeared to adopt such an interpretation also.

If it is thus assumed that carriers are required to do more than simply communicate information concerning the particulars supplied to them, it is possible that the obligations devolving upon them were not laid down with sufficient precision.

The question whether, with such an interpretation of the provision, carriers are responsible for fully checking the reliability of documents and the accuracy of identification particulars supplied or whether simply a plausibility check and a prima facie assessment as to their authenticity are required was just as unclear to the Court, even after the hearing, as the question whether carriers would have to make precautionary arrangements to ensure that the documents presented to them prior to departure are not destroyed or substituted during the flight.

Consideration of article 26 (1) (b) of the Schengen Convention would not appear to afford the necessary clarity either. In accordance with that provision, carriers are required 'to ensure' that an alien 'is in possession of the travel documents required for entry …', which leads to the conclusion that it is not enough to rely solely on the statements of the passengers themselves. However, as provisionally contended by the Court, reference to that provision also fails to clarify what appears to be insufficiently specified by article 53 (3) of the Aliens Act.

(A draft statement concerning a planned Council directive to supplement article 26 of the Schengen Convention, which had been submitted in the oral hearing by the authority proceeded against, provides that the details regarding implementation of the requirement to impose obligations on carriers should be left to the member States. It reads as follows:

> 'For the purpose of applying this Directive, the Council has agreed that using an obvious forgery or obvious usurpation is equivalent to the absence of a travel document.
>
> Each Member State shall determine, in accordance with its procedures, to what extent forgeries or usurpations of travel documents are detectable.').

It is equally difficult to ascertain with sufficient clarity from article 53 (3) of the Aliens Act whether and how carriers are required to take into consideration the obligations arising for Austria under the Geneva Convention relating to the Status of Refugees, to which reference is made in the first sentence of article 26 of the Schengen Convention. There appears to be uncertainty as to whether and what obligations devolve upon carriers with regard to persons who are not in possession of the documents required for entry into Austria but who could invoke the Geneva Convention relating to the Status of Refugees in order to obtain asylum in Austria and what measures are required of carriers in such situations or in situations of doubt.

In summary, the Constitutional Court is thus provisionally of the view that the provision set out in article 53 (3) of the Aliens Act under review is contrary to article 18 (1) of the Federal Constitution since it is not possible to determine with sufficient precision what specific obligations devolve upon carriers to enable them to fulfil their duty to communicate information and which of the aforementioned possible interpretations of the wording of the provisions laying down those requirements is therefore applicable."

(bb) Referring to the meaning which the authority proceeded against clearly ascribes to article 53 (3) of the Aliens Act, namely that this provision requires carriers to ascertain the factually correct identification particulars and also to establish

whether an alien is in possession of the necessary documents (e.g. passport and/or relevant visa) and whether the corresponding documents are genuine or forged, the Court commented as follows:

"If that meaning is attributed to the provision, such a stipulation in the Constitutional Court's provisional view lacks material justification.

The Court does not doubt that the legislator is empowered by virtue of the Constitution to impose obligations to cooperate upon subjects of the law with regard to the discharge of public duties by agents of the State if such obligations are concerned with legal or economic matters (cf., in summary form, Constitutional Court (VfGH), 15 March 2000, case G141/99 et al. - Speculative Gains Tax) but their nature and scope must be reasonable. In that decision the Court deemed the imposition of obligations to cooperate of any type and extent whatsoever to be unjustified, and commented as follows:

> 'Only a stipulation that makes the obligations of third parties to cooperate commensurate with the nature and scope of the relationship existing with the primary obligor would appear to be materially justified.[*] It follows from this that a provision which necessitates considerable expenditure by third parties in order to obtain the details required for the due and proper discharge of tax liability and/or costly precautionary arrangements in order to acquire the means needed to meet such liability can be justified only under special circumstances.'

The same may also apply *mutatis mutandis* in the present case. The fulfilment of the obligations to cooperate devolving upon carriers - if interpreted as broadly as the authority proceeded against has interpreted them - would appear to require such costly arrangements on the part of carriers that this ceases to be materially justifiable.

That may render the provision wholly contrary to the principle of equality, but it is at least doubtful whether it meets the requirements of the Constitution in that carriers are obliged to perform such services 'at no charge' as part of the border control measures. It may in fact constitute the imposition of a special burden which conflicts with the constitutional principle of equality and gives rise to a disproportionate limitation of property rights and hence to a violation of article 1 of Protocol No. 1 to the European Convention on Human Rights (cf., for example, European Court of Human Rights, 21 February 1986, case of James*, Europäische Grundrechte Zeitschrift* (EuGRZ) 1988, 341)."

(cc) The Constitutional Court further contended that the doubts, should they prove to be well founded, as to the constitutionality of article 53 (3) of the Aliens Act also appeared to be valid with regard to the obligation to reimburse expenses, as laid down in article 103 (3) of the Aliens Act for breach of conduct, and that provision would accordingly be rendered unconstitutional also.

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[*] *Translator's note*: It is assumed that the word "*gerechtfertigt*" should appear after "*Sachlich*" and before "*erscheint*".

If that contention should prove to be unfounded, the Constitutional Court had yet other doubts about the constitutionality of article 103 (3) of the Aliens Act.

2. The Federal Government made a statement, in which it first indicated its agreement with the view expressed in the decision to initiate the proceedings with regard to article 53 (3) that only the expression "an aircraft or" might be prejudicial.

On the merits, the Federal Government defended the provisions under review as follows:

"1. With regard to the doubts expressed concerning article 18 of the Federal Constitution:

The Constitutional Court holds that article 53 (3) of the 1997 Aliens Act does not indicate with the necessary clarity what is required of carriers. In the view of the Federal Government, that contention is unfounded.

Quite the contrary, the law clearly stipulates what action carriers are obliged to take. They have to communicate the identification particulars of aliens conveyed by them and details of the documents required for those aliens' entry. This means that, in order to assess whether a carrier has fulfilled its obligation, it is necessary to determine who specifically has been transported and to establish whether the identification particulars and details of the documents required for that person's entry have been communicated. The carrier will have fulfilled its obligation only if that is the case.

An interpretation to the effect that the carrier is required to ascertain the 'absolute truth' in fact goes beyond what a legislator can impose on a carrier, particularly if the party concerned has to provide the service at no charge. It is therefore necessary to ask whether article 53 (3) of the 1997 Aliens Act incorporates a standard of care whereby a carrier, in meeting that standard, cannot be held responsible even if the outcome of the fulfilment of its obligation conflicts with the facts. Such a standard does in fact appear to be present but relates to a service that is to be performed by commercial operators and thus by anyone whose activities in that sphere are subject to commercial law. What is required of carriers is that they discharge their duty with the diligence of a prudent businessman (article 347 (1) of the Commercial Code) and that they fulfil their obligation under article 53 (3) of the 1997 Aliens Act with the same diligence. Such an interpretation of the meaning of this provision thus implies that carriers, in fulfilling that obligation, have to exercise the care that is required of them in all their business dealings in order to establish and record whom they are carrying and what documents are in that person's possession.

Article 53 (3) of the 1997 Aliens Act most definitely cannot be construed to mean that a carrier will have fulfilled its obligation if it records any identity whatsoever that is given to it or any details whatsoever of a travel document. That would ultimately make it possible for the recording of obviously incorrect particulars (a man describing himself as a woman or the production of a driving licence described as a passport) to be sufficient to meet the obligation. Such an interpretation is not supported either by the wording or by the teleology of this provision.

In the opinion of the Federal Government, the further views of the Constitutional Court on the question of the extent of the duty to communicate information give too little consideration to the wording of the provision. The law requires that carriers communicate not simply the details given to them but the actual details. Any views that do not take account of this basic factor thus misconstrue the provision. It is obviously not the responsibility of carriers to check the reliability of documents or the accuracy of identification particulars supplied but they are obliged professionally - as is required of a responsible businessman - to acquaint themselves with the identity and documents of the other party to the contract, i.e., the traveller. They have to discharge this responsibility with the same conscientiousness as they are required to satisfy themselves as to the harmlessness of a meal to be served during the flight or to assess the seriousness of a fuel delivery at another than the home destination. They are obliged in all such cases to exercise the diligence of a prudent businessman and it is not possible to see why it should be otherwise in the case of the fulfilment of the obligation laid down in article 53 (3) of the 1997 Aliens Act.

In the fulfilment of that obligation, a requirement that carriers give consideration to the obligations assumed by Austria under the Geneva Convention relating to the Status of Refugees is equally irrelevant. Whether or not carriers transport persons to whom, in their opinion, the requirements of article 1 of the Geneva Convention apply from their country of origin to a State party to that Convention is a matter for them alone and article 53 (3) of the 1997 Aliens Act places no obligation whatsoever on carriers to take those requirements into consideration. Carriers are not obliged either by that provision or by any other provision to transport anywhere persons who have left their home country owing to a fear of persecution.

It must therefore be concluded that the provision set out in article 53 (3) of the Aliens Act can, in the view of the Federal Government, be attributed a clear meaning, which meets the requirements of article 18 of the Federal Constitution:

A carrier has to communicate with the diligence of a prudent businessman the particulars specified in article 53 (3) of the Aliens Act. That does not make carriers responsible for checking entitlement to enter the country but requires them solely to communicate particulars that a commercial operator can reasonably be expected to ascertain. Thus, a service that can be provided with the diligence of a prudent businessman has to be performed by the party who, in accordance with the causation principle, is generally responsible for the costs arising. The law imposes this obligation not on everyone who transports another but only on commercial operators, i.e., economically active organizations or persons. It applies to all carriers without distinction and irrespective of their competitive position.

2. With regard to the doubts expressed concerning the principle of equality:

The Constitutional Court contends with regard to the enforcement practice apparent from the challenged administrative decisions that there is a contravention of the Constitution because the interpretation on which those decisions was based ascribes to the provision a meaning that lacks material justification.

According to the established precedents of the Constitutional Court, the legislator is prohibited, by reason of the principle of equality which is binding on the

legislator, from making differentiations that are materially unjustified (Constitutional Court case records 6884/1972, 7759/1976 et al.).

As stated by the Constitutional Court in its judgment contained in case record 7759/1976, the imposition of obligations on a specific group does not conflict with the rule of equality if it is necessary in the public interest. The fact that the prevention of the unlawful residence of persons in the federal territory comes within the public interest would not appear to call for any further substantiation. In order that this can be effectively ensured, identification particulars and details of documents required for entry purposes have to be available to officials entrusted with border control duties so that the necessary checks can be carried out.

The provision set out in article 53 (3) of the 1997 Aliens Act imposes a duty on carriers to communicate details which, in the light of the clear public interest referred to above (prevention of the unlawful residence of persons in the federal territory) and given that a starting point for collecting and recording such data is provided by the arranging of the related contract between the passenger and the airline.* It is possible for them to ascertain and record these details abroad. Moreover, in view of the handling operations that are otherwise necessarily connected with passengers from ordering the ticket to preparing for flight departure, it is not possible to argue that this is an unreasonable measure for the carriers involved to perform. The necessary verification work is considerably simplified by such measures and proceeds considerably more swiftly and economically if the agents of the authority are provided with this information and do not have to obtain it themselves.

The Federal Government is not claiming that there are no other legitimate possibilities for transmitting data to the competent Austrian governmental authorities.

However, that would require relevant international treaties and hence obligations on foreign State agencies to gather such data. Without such treaties no lawful possibility would obviously exist for Austrian agencies to undertake such action abroad. Carriers, however, are obliged, by reason of the above-mentioned duty of care to collect the data necessary to establish the identity of persons transported and are therefore able, if required, to pass such information on to the authority. The reduction in administrative outlay is ultimately in the public interest since not least the general public usually has to pay for every administrative expense. In that context, the duty imposed on carriers can, even in the light of the Constitutional Court's quoted judgment of 15 March 2000 (case G141/99), be seen to be in conformity with the constitutional principle of equality.

The provisions under review in the present case do not lay down any comparable obligations. As commented on extensively above, the legislator is referring rather to data which are essentially available to a commercial operator and which are obtainable without any expenditure of labour comparable to the findings of the Constitutional Court in case G141/99. Furthermore, carriers' secure knowledge of their passengers' identity is fully in their interests of safety.

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* *Translator's note*: The remainder of the sentence appears to be missing. The Constitutional Court confirmed that the incomplete sentence has been taken over as such from the Government's statement and could hence not be altered.

That the decision initiating the proceedings should refer in this connection to the 'imposition of a special burden' therefore seems incorrect. In the view of the Federal Government, this is rather an obligation materially connected with the performance of transportation activities which, as the foregoing observations attempt to demonstrate, is proportionate and reasonable (cf., in this connection, Berka, *Lehrbuch Grundrechte*, marginal reference numbers 407 and 410).

On the basis of these arguments, it would in any event appear materially justified to lay down for this particular group a special obligation that, in the light of the actual meaning of the provision set out in article 53 (3) of the 1997 Aliens Act, which is clearly evident from the legislation (see point 1), imposes a duty to cooperate on carriers.

3. With regard to the doubts concerning article 1 of Protocol No. 1 to the European Convention on Human Rights:

As to the Constitutional Court's doubts in connection with the unreasonable restriction of property rights and the consequent violation of article 1 of Protocol No. 1 to the European Convention on Human Rights, reference is once again made to the actual extent of the duty to cooperate and the quoted judgment in case record 7759/1976, in which the Constitutional Court stated that there are no constitutional objections regarding the statutory obligation on a party to take measures at its own expense by reason of a violation of article 5 of the Basic Federal Law or of article 1 of Protocol No. 1 to the European Convention on Human Rights if the obligations are laid down solely from the standpoint of the economic reasonableness of their performance. In this connection, it seems certain, in the light of the observations under point II.1.2, that the obligation set out in article 53 (3) of the 1997 Aliens Act does not involve any disproportionate or economically unreasonable restriction of property rights. The Federal Government therefore considers that the required 'fair balance' is preserved through the 'rule concerning the use of property in accordance with the general interest' (see, for example, European Court of Human Rights, 5 May 1995, Air Canada vs. United Kingdom, No. 36; the assessment given in that judgement is also applicable to the present case)."

The Federal Government also disputes the further doubts as to the constitutionality of article 103 (3) of the 1997 Aliens Act and, in conclusion, requests that a decision be pronounced not to delete the provisions under review as unconstitutional and that, in the event of their deletion, a time limit of one year be fixed for the cessation of their validity so that the necessary legislative arrangements can be made with regard to the Schengen Convention.[*]

III. The Constitutional Court deliberated as follows:

1. On the question of admissibility:

All the petitions forming the subject of the review proceedings are admissible pursuant to article 144 of the Federal Constitution. The need for the Constitutional

[*] Translator's note: It is assumed that the word "*Inkrafttreten*" should be "*Ausserkrafttreten*".

Court to apply articles 53 (3) and 103 (3) of the Aliens Act in its consideration of the petitions did not prove to be in doubt in the proceedings. It should, however, be noted that the cases in question relate without exception to the obligation of air carriers to communicate information and reimburse expenses. While article 103 (3) refers to "carriers" without distinction and this provision would thus have to be applied in its entirety by the Constitutional Court, article 53 (3), which is also under review, cites three groups of carriers. In addition to air carriers, it refers to carriers which have conveyed aliens to Austria by vessel and carriers which have conveyed aliens to Austria by motor coach operating regular international services. Consequently, the text of article 53 (3) is to that extent not prejudicial and the proceedings as far as that provision is concerned—with the exception of the phrase "an aircraft or"—therefore have to be discontinued.

2. On the merits:

(a) The Constitutional Court's doubts as to whether the provisions under review make it possible to ascertain with sufficient clarity what action is required of carriers in order for them to comply with their duty to communicate information and thus not become liable to reimburse expenses are disputed by the Federal Government essentially with the argument that article 53 (3) is to be construed to mean that carriers are obliged to record with the diligence of a prudent businessman the particulars specified in that provision and to communicate them to the authority at its request.

The Federal Government evidently considers that the necessary inquiries to enable the particulars to be communicated require in the first place that the persons to be transported be questioned about the necessary particulars and the carrier be obliged to have the travel documents produced and their details recorded. It maintains that the recording of "obviously incorrect particulars" is not sufficient to meet the obligation. The case of a driving licence being described as a passport is given as an example. In this respect, the Federal Government appears to be of the view that the necessary verification of the details supplied and the documents produced is to be limited to a very rough plausibility check.

Another point in the Federal Government's statement refers to the fact that the law requires carriers to "communicate not simply the details given to them but the actual details." The Federal Government thus considers that checks on a traveller's identity and on the documents produced by him that go beyond the recording of "obviously incorrect particulars" are required of carriers.

The Constitutional Court's doubt related precisely to the lack of clarity as to what specific requirements are being imposed on carriers, i.e., on the one hand, how extensive is the obligation to verify the particulars supplied to them and the documents presented to them and, on the other, whether carriers would have to make precautionary arrangements to ensure that documents produced prior to departure are not destroyed or substituted during the flight. The Federal Government did not comment at all on the last point. As regards the extent of the control obligations laid down, the Federal Government partly contradicts itself when it at one stage refers to the fact that the "actual details" have to be communicated and at another states that it is "obviously not the responsibility of carriers to check the reliability of documents or

the accuracy of identification particulars supplied". The question as to what verification measures are required of carriers is thus just as unclear as the related question as to what precautionary arrangements have to be made by carriers in order to comply with their obligations.

(b) It is unhelpful to state repeatedly, with reference to article 347 (1) of the Commercial Code, that the obligations have to be fulfilled with the diligence of a responsible businessman when there is a lack of clarity as to what obligations devolve upon carriers. Article 347 of the Commercial Code deals not with the legal basis of liability but solely with the question of fault and cannot therefore serve to establish what control obligations are imposed on carriers. It is precisely the question of material fault which, according to the Federal Government's observations on article 103 (3) of the Aliens Act, should not be relevant at all to the matter of reimbursement of expenses, whose payment is required by that provision in the event of non-observance of the obligations imposed on carriers by article 53 (3) *leg. cit*.

(c) The extent of the obligations devolving upon carriers is thus uncertain in several respects. For example, it cannot be determined from the provisions with sufficient clarity whether carriers are obliged to assess the documents produced so as to ascertain whether, in accordance with the provisions of articles 2, 3 and 6 of the Aliens Act in conjunction with the provisions concerning the granting or refusal of entry authorizations and the regulations issued pursuant to the Aliens Act or intergovernmental agreements, they constitute appropriate entry documents and whether they bear the risk of any incorrect assessment in law. It is also unclear whether and, if so, with what precision and with the use of what technical equipment carriers are obliged to examine documents for forgery (in the cases in question there are instances where carriers have been ordered to reimburse expenses because they did not detect forgeries of foreign passports, including passports from the Schengen area). Furthermore, there is a lack of clarity as to whether carriers are required to take measures that will enable them to answer questions as to the identity of specific passengers (allegedly) transported by them if the names stated by the aliens to the border control officials do not tally with the names supplied to the carriers and recorded. It is equally difficult to ascertain from the provisions under review whether carriers must also assume liability in cases where entry into Austria takes place with documents that are not the same as those presented to the carriers prior to departure (and thus whether they are, for example, entitled and required to take charge of those documents prior to departure and retain them until the frontier has been crossed).

(d) The Federal Government has misconstrued the Constitutional Court's doubt concerning the fact that article 53 (3) of the Aliens Act has to be interpreted in the light of article 26 of the Schengen Convention, which relates to community law and which requires member States, subject only to the obligations arising out of the Geneva Convention relating to the Status of Refugees, to issue corresponding rules concerning the obligations applying to carriers. The Court doubted that it was possible to establish with sufficient clarity from the provision under review whether and how carriers have to take into consideration the obligations devolving upon Austria under the Geneva Convention.

When the Federal Government observes in this connection that the consideration of Austria's obligations arising out of the Geneva Convention is

irrelevant as far as carriers are concerned in the fulfilment of their obligations under article 53 (3) *leg. cit.*, it ascribes to the current provision a meaning whose effect could be to prevent carriers from bringing into Austria refugees, as defined in the Geneva Convention, who do not possess adequate entry documents. It goes without saying that such an interpretation of article 53 (3) is unacceptable from the viewpoint of its application in conformity with community law and international law.

How air carriers can or have to give consideration to the Geneva Convention in discharging their obligations under article 53 (3) is totally uncertain and for this reason the provision in that respect violates the constitutional principle of clarity.

(e) It follows from all the foregoing that the provisions of articles 53 (3) and 103 (3) of the Aliens Act under review lack the required clarity within the meaning of article 18 (1) of the Federal Constitution and - to the extent that they are prejudicial (cf. point III.1 above) - are to be deleted as unconstitutional.

With that outcome it was possible not to examine the other doubts as to whether the provisions infringe the constitutional rule of impartiality inherent in the principle of equality if they have the meaning which is ascribed by the Federal Government and which imposes very extensive obligations on carriers.

3. As already announced in the decision to initiate the proceedings, the Constitutional Court, being aware of the very large number of proceedings that are pending or to be expected in the future, considered itself compelled to exercise the power conferred upon it by article 140 (7) of the Federal Constitution and to rule that the deleted statutory provisions are no longer to be applied.

In view of the lack of clarity of the deleted provisions, which does not allow for their enforcement in due and proper form, the Constitutional Court has refrained from setting a time-limit for the cessation of validity of the deleted provisions. Also, the arguments put forward by the Federal Government do not make it possible to justify the fixing of a time-limit since the existing provisions, as can be seen from the above considerations, do not conform to the rules of community law as set out in article 26 of the Schengen Convention.

4. The pronouncement that previous statutory provisions are not to re-enter into force is based on the first sentence of article 140 (6) of the Federal Constitution and the pronouncement requiring the Federal Chancellor to make the deletion and the other rulings publicly known without delay is made pursuant to the first sentence of article 140 (5) of the Federal Constitution and to article 64 (2) of the Constitutional Court Act (VerfGG) in conjunction with article 2 (1) 4 of the Federal Law Gazette Act (BGBlG).

5. It has been possible for the present decision to be rendered without an oral hearing, in accordance with the first sentence of article 19 (4) of the Constitutional Court Act, since the necessary explanation of the factual situation has taken place in the oral hearing held in connection with the cases in question.

Key words

Duty to communicate information; principle of clarity; aliens law; Constitutional Court: fixing of time limits; Constitutional Court: prejudicial effect; Constitutional Court: extent of checks; Constitutional Court: deletion; Constitutional Court: proceedings in question.