REPUBLIC OF AUSTRIA

SUPREME COURT **JUDGMENT 1 Ob 272/02k**

The Supreme Court, as court of last resort, with Supreme Court Vice-Chairman Dr. Schlosser presiding and Supreme Court Justices Dr. Gerstenecker, Dr. Rohrer, Dr. Zechner and Assoc. Prof. Dr. Bydlinski serving as additional judges, in the case instituted by the plaintiff, the Evangelisches Hilfswerk, situated at Steinergasse 3/12, Vienna 17, Austria, represented by Dr. Friedrich Fromherz, Mag. Dr. Wolfgang Fromherz and Mag. Dr. Bernhard Glawitsch, lawyers of Vienna, against the defendant, the Republic of Austria, represented by the Federal Law Office (*Finanzprokuratur*), situated at 17-19 Singerstrasse, Vienna 1, in respect of the sum of 7,267.28 euros, has reached the verdict set out below following the petition for judicial review filed by the plaintiff against decision GZ 14 R 32/02g-10 issued on 12 July 2002 by the Higher Provincial Court of Vienna, as appeal court, upholding decision GZ 33 Cg 24/01v-6 rendered by the Provincial Civil Court of Vienna on 23 November 2001 following the appeal lodged by the plaintiff:

The review petition is granted.

The rulings of the lower courts are annulled. The case is to be referred back to the court of first resort for completion of the proceedings and the pronouncement of a new verdict.

The costs of the appeal proceedings are to form supplementary expenses relating to the proceedings conducted before the court of first resort.

Reasons for the verdict:

An Afghan, who was an employee of the Afghan Embassy in India, flew from New Delhi via Moscow to Vienna on 16 March 1996 with his wife and three children, born in 1985, 1988 and 1993. Their entry into Austria was possible on the basis of tourist visas. On 18 March 1996, the Afghans submitted an application for the granting of asylum and for the provision of federal care. The latter request was unsuccessful. By decision of the Federal Asylum Senate issued on 23 August 1999, asylum was granted to the father and, by extension, to the other family members.

In its claim filed on 3 August 2001, the plaintiff submitted a demand for S 100,000 (equal to 7,267.28 euros) and contended that the denial of federal care to the Afghans as asylum seekers was in breach of the relevant statutory provisions. While, in accordance with the stipulations of article 1 of the Federal Care Provision Act (BBetrG) — an internally binding regulation — there was no legal entitlement to such care, the Federal Government was nevertheless obliged — if the statutory requirements were met — to provide federal care to asylum seekers. The Afghans had met those requirements. However, federal care had been refused without the asylum seekers' having had any prior opportunity to explain their situation. The Federal Government had been under an obligation to enter into a contract. The pages that had been torn out of the asylum seekers' passports were already missing at the time of

presentation of the passports**********. The Afghan Embassy in India had expressly confirmed the validity of the passports to the Austrian Embassy. The Afghan family, which had obtained the visas to enter Austria solely on the basis of a recommendation by the Afghan Embassy in India, was supplied with board and lodgings on a temporary basis by the plaintiff at its own cost from 5 June 1996 to 6 August 1999. The expenditure in respect thereof amounted — in accordance with the rates laid down in the Federal Care Provision Regulations — to S 1,162,890. Under article 1042 of the Civil Code, the defendant had to reimburse that expenditure. The plaintiff had itself at no time been willing to bear on a definite basis the expenditure incurred, which, under the terms of the law, had to be met by the public authorities. Moreover, the rights of the supported asylum seekers had been transferred to the plaintiff. There was no impediment to the assignment of those rights. The asylum seekers' need for assistance did not cease as a result of the services provided by the plaintiff since the Federal Government, in refusing to perform the services required by law, could otherwise evade its legal obligation whenever assistance was provided by third parties in any existing situation of hardship. Services provided under the Federal Care Provision Act were not subsistence benefits. Therefore, claims made pursuant to that Act were time-barred only after thirty years and not after three years. In any event, a claim pursuant to article 1042 of the Civil Code was time-barred only after thirty years. The Federal Government was also liable for compensatory damages since its public authorities dismissed the asylum seekers' application for admittance to federal care illegally and with guilt. For reasons of procedural caution, only part of the total expenditure was initially being claimed.

The defendant maintained that, in accordance with the stipulations of article 1, paragraph (3), of the Federal Care Provision Act, there was no legal entitlement to federal care. Moreover, the Afghans on whose welfare support the claim was based did not meet the statutory requirements for the provision of federal care. The issue of a tourist visa has been subject to the household head's regular income as an Afghan embassy employee and confirmation of existing sickness insurance. Compliance with those requirements had been verified. As a basis for the granting of federal care, two passports had been presented, from which pages 23 to 26 and 25 and 26 respectively had been torn out. It had not been possible to ascertain the Afghans' identity from those invalid travel documents. The Afghans had made no statements on the reasons for the missing pages or on their contents. Nor did they disclose their financial position or corroborate their need for assistance. There was thus a lack of constructive cooperation on the asylum seekers' part in the determination of their identity and need for assistance. No obligation to contract had existed since the plaintiff had also i.a. offered and provided care services. Federal care is excluded as long as a third party provides services. In the absence of legal entitlement to federal care, the application of article 1042 of the Civil Code is "inconceivable". The plaintiff did not effect its expenditure on behalf of a third party but provided its services free of charge as a charitable organization and not for reward. If the asylum seekers were entitled to services under the Federal Care Provision Act, such services would, in accordance with their legal nature, constitute subsistence benefits. Rights to subsistence benefits are not transferable. Any entitlement to compensatory damages is excluded owing to the "absence of illegality and default". Moreover, the claim is "for the most part time-barred". Care services are, as subsistence benefit payments, due daily. The three-year time-bar period is therefore re-computed on a daily basis. Daily allowance claims from the period prior to 3 August 1998 would thus be time-barred in accordance with

article 1480 of the Civil Code. The same would apply by virtue of article 1489 of the Civil Code if the asylum seekers were entitled to compensatory damages.

The court of first resort dismissed the claim since, in accordance with the stipulations of article 1, paragraph (3), of the Federal Care Provision Act, there is no legal entitlement to federal care. Therefore, the plaintiff could not have expended for the benefit of the Afghans as asylum seekers anything which, under the law, should have been expended by the Federal Government. In its free-of-charge provision of services under the Federal Care Provision Act the Federal Government was not subject to any obligation to enter into a contract. Also, the plaintiff lacked any enforceable right as assignee; the alleged transfer in fact related to a non-existent right.

The appeal court upheld that verdict and ruled that a judicial review was admissible. In its opinion, the Federal Care Provision Act did not give rise to any constitutional objections since, as an internally binding statute, it governed, in accordance with article 17 of the Federal Constitution, only the conduct of federal public authorities in a sphere of private sector administration but could not confer personal rights on third parties. On the basis of the Federal Care Provision Act, the Federal Government provided welfare support services. Since, in accordance with the stipulations of article 1, paragraph (3), of that Act, there was no legal entitlement to federal care, no transferable right existed. In the absence of any claim against the Federal Government in respect of care provision, the plaintiff's right of action pursuant to article 1042 of the Civil Code was also inadmissible. However, local authorities, where acting in the private sector, are required to respect fundamental rights. Their individual autonomy is limited not only by specific statutory provisions but also by the principle of equality, in accordance with article 16 of the Civil Code, through which fundamental rights standards come within the private law regime. If a legal entity of the State issues internally binding laws for purposes of its private sector administration or otherwise establishes by law its conduct as a holder of private rights, it must in so doing give due consideration to fundamental rights. A duty of equal treatment exists in particular with regard to welfare support services and to the granting of subsidies. That gives rise to an obligation to contract at reasonable terms if refusal to conclude a contract lacks material grounds. Violation of the principle of equal treatment can lead both to invalidation and to entitlement to the performance of services or to the payment of compensatory damages in order to create a condition that is consistent with fundamental rights. In the light of such considerations, the Federal Government's duty to provide federal care to an asylum-seeker in need of assistance has to be admitted. However, the claim must be disallowed even though the Afghans had been in need of assistance as asylum seekers. Federal care is "solely a wholly subsidiary form of assistance" and any services provided by third parties must, in accordance with the last sentence of article 2, paragraph (1), of the Federal Care Provision Act, be taken into account in the assessment of the need for assistance. If a charitable organization at its own cost grants board and lodgings to an asylum-seeker, that person is no longer in need of assistance within the meaning of the Federal Care Provision Act. Federal care is intended to guarantee necessary welfare support for asylum seekers in need "but should not form the basis for subsequent disputes instigated years later as to who should have been responsible for such welfare support and care". By reason of the aforementioned subsidiarity, the Afghans did not have any entitlement to federal care during the period in which they received

board and lodgings from the plaintiff as a charitable religious organization. Therefore, in the absence of any illegal or culpable conduct by the public authorities, the Afghans also had no entitlement to compensatory damages. No other right could be transferred to the plaintiff by assignment or pursuant to article 1042 of the Civil Code. A judicial review is admissible since no ruling on the legal situation examined has been pronounced by the highest court.

A review is admissible and is also authorized with respect to the annulment application.

1. Internally binding laws (*Selbstbindungsgesetze*)

Richard Novak (*Grenzen und Möglichkeiten des Legalitätsprinzips*, Austrian Administrative Archives (ÖVA) 1970, 1, 6 et seq.) upholds the view that internally binding laws enacted by local authorities are not supported by any reliable doctrinal basis that can be derived from constitutional law. Also, an individual is concerned not with the internally binding force for a local authority of specific rules applicable to its private sector administration but with personal rights which, if necessary, are enforceable by the courts. Wenger (*Zur Problematik der österreichischen "Selbstbindungsgesetze"*, in F. Korinek Festschrift (FS) 1972, 189, 192 et seq.) regards Novak's critical assessment as flawed in its key doctrinal aspect (loc. cit. 200 et seq.) but has to concede that "the problem regarding legal entitlement to the performance of a service or to the conclusion of a contract" is not to do with the formal substantiation of internally binding laws by means of constitutional law since the essence of a meaningful State aid policy is that only a portion of assistance claims can be granted (*op. cit.* 207 et seq.). Local authorities' internally binding laws, on the basis of article 17 of the Federal Constitution, whose subject-matter is private sector administration may not — in line with the still prevailing doctrine — arbitrarily disregard the general allocation of jurisdictional competence provided for under articles 10 to 15 of the Federal Constitution. Therefore, in a "'transjurisdictional' context", such laws can only have the nature of "internal regulations" and thus be binding solely on the public administration itself but "cannot be externally effective", i.e. cannot establish rights and obligations of persons subject to the law" (K. Korinek/Holoubek, *Grundlagen staatlicher Privatwirtschaftsverwaltung* [1993] 104). As examples of the rationale of internally binding laws, the "democratic quality of laws" and "increased publicity generally associated with that form of law" are cited (K. Korinek/Holoubek, *op. cit.* 106). Such laws accordingly guarantee the "democratic predetermination and necessary predictability (legal certainty) embodied in the binding force of the rule of law of the private sector administration" (K. Korinek/Holoubek, *op. cit.* 107).

The Constitutional Court has accepted the prevailing doctrine regarding the legal status of internally binding laws. It emphasizes their nature as purely "internal regulations". Such laws are binding "solely on the public administration itself" but have no "direct outside effect" and thus do not establish "any rights or obligations of persons subject to the law" (Constitutional Court Case Record 13.973/1994). An internally binding law consequently may not confer any "personal rights" and "through the absence of jurisdiction cannot authorize State execution" (Constitutional Court Case Record 15.430/1999). That assessment has also been followed by the Supreme Court. According to its judicial practice, "such a law is directed solely at

public authorities entrusted with the discharge of non-State administrative functions and, as an act of 'internal legislation', does not establish any legal rights or obligations with respect to individuals" (judgment 9 ObA 122/90, *Juristische Blätter* (JBl) 1989, 127; Compendium of Civil Judgments of the Supreme Court of Austria (SZ) 61/217; Tenancy Law Case Record (MietSlg) 38.602/32). An enforceable legal claim under private law arises only after the conclusion of a legal transaction (judgment 9 ObA 122/90, JBl 1989, 127). That case law reflects the principle that an "'external legal determination' […] can be achieved only in conjunction with private law rules governing relationships vis à-vis third parties" (K. Korinek/Holoubek, *op. cit.* 108). In the doctrine of public law, the boundary of that determination is drawn where "non-State discharge of functions assumes the intensity of direct control" or where, "in the area of benefit administration, fundamental basic needs are at stake". Then, "in the absence of an appropriate jurisdictional basis, a corresponding constitutional determination of private sector administration" is not possible under current constitutional law and the "transjurisdiction" of a local authority's private sector administration is inadmissible (K. Korinek/Holoubek, *op. cit.* 109).

2. Applicability of fundamental rights in private sector activities of the State (*Fiskalgeltung der Grundrechte*)

According to the prevailing opinion, the State, where not performing acts of public sector administration, cannot "in principle" avoid the binding force of fundamental rights that are characteristic for a State acting as public authority (K. Korinek/Holoubek, *op. cit.* 146 *et seq.*, with further evidence). In any event, this binding force of fundamental rights applies in cases where the State's action amounts to the operation of a *de jure* or *de facto* monopoly. In the area of livelihood provision such State power becomes manifest in the form of refusal to perform a service (K. Korinek/Holoubek, *op. cit.* 148). The binding effect of fundamental rights, as examined, therefore has to be ensured by private law safeguards. Such safeguards include, for example, an obligation to contract based on the principle of equal treatment in the sphere of benefit administration or entitlement to compensatory damages or the right of participation in connection with public procurement (K. Korinek/Holoubek, *op. cit.* 150, with further evidence). While contractual liberty based on the principle of individual autonomy in the law of contract is emphasized in the judicial practice of the Supreme Court, an obligation to enter into a contract is nevertheless accepted, as an exception to the principle of freedom to contract, not only in specific cases governed by law but also if, where there is only pro forma parity, one party's superior power in practice allows the "outside control" of the other party. Because of such superior power, monopolists, including public sector enterprises operating as a monopoly, have been subject to an obligation to enter into a contract for the purpose of effecting livelihood provision since the public was dependent on their services. However, even where public sector enterprises do not hold a monopoly position, they are nevertheless required to enter into a contract if refusal to do so would conflict with their equal treatment obligation. It is therefore not possible in any event to refuse to contract on non-material grounds (Supreme Court judgment 1 Ob 135/98d, JBl 1995, 582; SZ 65/166; *Menschenrecht* (MR) 1991, 121; each with further evidence). An enterprise which has publicly promised to perform specific services may not, where no reasonable alternative exists, refuse to provide to an interested party within the category of persons addressed the appropriate service required to meet that individual's need or to enter into a contract as a preliminary step

in the performance of that service without a materially substantiated reason if a "normal" or "emergency" need is involved. The conflict between one party's interest in concluding contracts at its own volition and the other party's interest in not being treated in a discriminatingly unequal way thus has to be resolved in line with good manners (SZ 65/166, SZ 63/190 and SZ 59/130, each with further evidence).

The principle of equal treatment is of particular significance in the Supreme Court's judicial practice in the area of public procurement based on internally binding regulations. Accordingly such regulations contain a whole series of rules of conduct whose promulgation ensures that everyone knows that they have to be observed by the public authorities. A potential or actual bidder can therefore be confident that the awarding authority will comply with internally binding rules as internal instructions. Moreover, the constitutional principle of equality is applicable to the relationship of the public authorities as the holder of private rights to individual subjects of the law. That goes without saying in connection with public bidding (JBl 2000, 519; SZ 67/182; JBl 1990, 520; for an examination of these main concepts, see K. Korinek/Holoubek, *op. cit.* 152 et seq.). Regarding welfare assistance administration also, judicial practice (JBl 1995, 582, SZ 65/166; see also, in this connection, K. Korinek/Holoubek, *op. cit.* 154 et seq.) is increasingly reverting to the principle of equal treatment with a view — particularly through the assumption of a contractual obligation — to opposing discrimination. In accordance with this principle, equal circumstances are to be treated equally. In cases where aid is granted if specific typical requirements are met, an exception is possible only if justified by specific material grounds linked to the purpose of the assistance. In particular, merely invoking the fact that the assistance rules stipulate that no legal entitlement to assistance exists is not sufficient to justify a refusal to perform the service (JBl 1995, 582). Moreover, K. Korinek/Holoubek (*op. cit.* 162 et seq.) stress that the safeguarding effect of fundamental rights in the State's private sector activities is to be assessed primarily according to "whether and to what extent a non-public administration exercises its specific State power". A greater or lesser restriction of the State's scope of action is accordingly required. The "'density' of specifically State accumulation of power — through 'dependence' on government services, through the extent of the outside control to which the private individual is subject by particular i.a. economic circumstances" or "through the coordination of non-public and public organizational resources" — is a decisive factor in "how precisely the legislator should determine and delimit the scope of action of non-public administration" and "how far the legislator may entrust this safeguarding function to enforcement and, here in particular, to the judicial system, on the basis of protective regulations in the form of general clauses".

3. Federal Care Provision Act

3.1. The Federal Care Provision Act is, as described in the explanatory remarks under 1 above, an internally binding law of the Federal Government concerned with the regulation of an area of social assistance falls within a public organizational sphere coming under the jurisdiction of the provincial authorities (Government Bill 158, Appendix to National Council record, 18th legislative period, 5, 7). In line with what in the prevailing opinion is regarded as a fundamental requirement of an internally binding law that is to be consistent with the Constitution, it has been laid down in article 1, paragraph (3), of the Federal Care Provision Act

that asylum seekers do not have any legal entitlement to federal care. That clearly presents a dilemma, as already pointed out by Novak (*op. cit.*), since what is actually important to the individual is not the internally binding force of the law on the legislating authority but his own personal right to a service — and thus to an enforceable claim — yet that very right cannot be granted without an unconstitutional encroachment into an external sphere of jurisdiction. However, according to developments in judicial practice, as referred to in 2 above, rules in internally binding laws that deny individuals a personal right to a service are regarded as no more than the "cover" which, according to the prevailing view, is required to prevent the internally binding law concerned from being seen as infringing the jurisdiction clauses in the Federal Constitution, since the applicability of fundamental rights in activities of the public authorities in the sphere of private law, as examined, has precisely the function of substantiating enforceable claims against the State for the provision of services. The principles of the equal treatment rule and the discrimination prohibition, which are identical in substance, ensure that a particular person requesting a service may not — where the requirements are essentially the same — be denied something that is granted to others. The only alternative left to a legal entity of the State is, by invoking the absence of any legal entitlement to a service, to grant to no-one that which is the subject-matter of the internally binding provisions laid down. However, as soon as a service relating to those provisions is granted, an enforceable claim will thus become available to other persons requesting services under the same conditions. In the light of these considerations, reliance on the rules in an internally binding law that refer to the absence of legal entitlement to a service is not sufficient — contrary to the view of the court of first resort and of the defendant — for the denial of the obligation devolving upon the legal entity of the State to provide services. An enforceable claim does all the more exist against a local authority which is obliged on the basis of an internally binding law to perform a service unless such a claim is excluded by reason of non-compliance with the eligibility requirements stipulated by that law or, in the absence of any such stipulations, because refusal to perform the service does not conflict with the equal treatment rule or with the discrimination prohibition in a particular individual case on specific grounds. If a local authority has undertaken in an internally binding law to grant a service subject to specific requirements, it is thus obliged by virtue of the law to provide that service to anyone who meets those requirements if it has already granted such a service in other individual cases. In those circumstances, an enforceable claim to such a service accordingly exists. Of particular significance in the implementation of the Federal Care Provision Act is the generally applicable viewpoint put forward by K. Korinek/Holoubek (*op. cit.* 162 et seq.) that anyone who in a situation of economic hardship is dependent on the provision of a State service in order to ensure his survival and in that respect is wholly subject to the "outside control" of his fate must have at his disposal the private law mechanisms to enforce the service provision. Therefore, if the Federal Government has refused to perform a service which is due under the Federal Care Provision Act even though the person requesting the service meets the statutory requirements governing entitlement to it, equivalent expenditure effected by a third party on the basis of an expectation of reimbursement — hence without any *animus donandi* or intent to do an act of liberality in favour of the Federal Government (see, in this connection, Apathy in *Schwimann*, Civil Code article 1042, marginal reference 4; Rummel in *Rummel*, Civil Code article 1042, marginal reference 6; each with further evidence) — is thus an expenditure which, pursuant to article 1042 of the Civil Code, should in accordance with the law have been effected

by the Federal Government itself. In summary, the application of article 1042 of the Civil Code is accordingly not excluded by reason of the fact that article 1, paragraph (3), of the Federal Care Provision Act stipulates that there is no legal entitlement to federal care.

3.2 Under the terms of article 3 of the Federal Care Provision Act, federal care terminates "in all cases upon cessation of the need for assistance". In accordance with the last sentence of article 2, paragraph (1), of that Act, services which are provided by third parties have to be taken into account in the assessment of the need for assistance. The appeal court concluded from this that the claim could not succeed because the asylum seekers' need for assistance ceased to exist by reason of the services provided by the plaintiff as a charitable religious organization. If that viewpoint were correct, the Federal Government — contrary to the internally binding force of the law in accordance with article 1, paragraph (1), of the Federal Care Provision Act and in violation of the equal treatment rule and discrimination prohibition — could always gamble initially on asylum seekers' need for assistance being met by third parties in order that it might ultimately plead "cessation of the need for assistance", thereby giving rise to exemption from its liability to provide services after a third party has intervened to avert the asylum-seeker's situation of economic hardship or even a threat to his survival. In the light of all the foregoing considerations, the Federal Government therefore cannot evade the obligation to provide services, as devolving upon it by reason of the internally binding force of the law, by first waiting for third parties to provide services in order to put an end to or alleviate an asylum-seeker's situation of acute economic hardship. Such a meaning cannot be ascribed to the last sentence of article 2, paragraph (1), of the Federal Care Provision Act since any such view of the legal position would presuppose the approval of habitual violation of the obligation to provide services that is based on the internally binding force of the law in observance of the principle of equal treatment. Services provided by third parties in the expectation of reimbursement — such a commitment is to be assumed in the absence of proof to the contrary (Supreme Court judgment 9 ObA 178/02w; SZ 69/40; Apathy *op. cit.*; Rummel *op. cit.*; each with further evidence) — cannot therefore relieve the Federal Government of its liability if those third parties had to intervene in order to overcome an asylum-seeker's situation of acute economic hardship after the Federal Government initially evaded its legal obligation to provide services by arbitrarily denying federal care. In contrast, the defendant deems it "quite ill-considered […] to describe as incorrect the appeal court's legal opinion regarding the subsidiary nature of federal care". In making that assertion, the defendant relies on the parliamentary documents as evidence. However, no observations in support of the defendant's view can — in the light of the foregoing considerations — be derived from those documents (Government Bill 158, Appendix to National Council record, 18th legislative period, 7).

4. Time-bar

The defendant also raised the plea that the claim was time-barred, since federal care, by reason of its nature, constitutes subsistence benefits. Subsistence claims are time-barred after three years. It is clear that this time-bar objection was applied by the defendant solely to entitlement to care or compensatory damages but not to the right of recourse pursuant to article 1042 of the Civil Code. Even if

entitlement to federal care could be equated to entitlement to subsistence benefits, that would in no way alter the time-barring of the right of recourse under article 1042 of the Civil Code after thirty years. In Supreme Court judgment 3 Ob 606/90 (SZ 63/202), the applicability of the long time-bar period to the action for recovery pursuant to article 1042 of the Civil Code, which was examined in that ruling, was emphasized in connection with a subsistence claim. It is otherwise found in established judicial practice — regarded in parts of the legal literature as inapplicable (Apathy *op. cit.*, article 1042, marginal reference 8; M. Bydlinski, Civil Code article 1478, marginal reference 6; Rummel *op. cit.*, article 1042, marginal reference 8; each with further evidence) — that action for recovery pursuant to article 1042 of the Civil Code is subject to the long time-bar period. However, the defendant did not adduce any reasons against the latter either in the proceedings before the court of first resort or in the appeal proceedings and its time-bar plea did not refer to the right of recourse pursuant to article 1042 of the Civil Code. There is accordingly no reason to review the established judicial practice examined.

5. Conclusion

Since the grounds put forward by the lower courts for dismissing the case are not cogent and the recovery action being pursued cannot be disallowed by reason of the time-bar, the success of the claim depends on whether the asylum seekers who were supported by the plaintiff failed — according to the defendant's assertions based on article 2, paragraph (2), of the Federal Care Provision Act — to afford the necessary cooperation in establishing their identity and need for assistance and thus did not communicate without delay facts that could be of importance in the assessment of their need for assistance. If the asylum seekers' conduct had constituted a reason for disqualification as provided for in article 2, paragraph (2), of the Federal Care Provision Act, the Federal Government would have been justified in declining to provide them with federal care. In the absence of any findings on this matter, which is essential for reaching a decision, the annulment of the rulings of the lower courts is unavoidable. In the resumed proceedings, the court of first resort will be required to make determinations along the lines indicated and to render a new decision on the basis of those facts.

6. Costs

The expenditure proviso relating to the costs of the appeal proceedings is based on article 52, paragraph (1), of the Code of Civil Procedure.

Supreme Court
Vienna, 24 February 2003
Dr. Schlosser

For accuracy of drafting:
Head of the Administration Department