CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF COORPLAN-JENNI GMBH AND HASCIC v. AUSTRIA

(Application no. 10523/02)

JUDGMENT

STRASBOURG

27 July 2006

FINAL

11/12/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Coorplan-Jenni GmbH and Hascic v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 6 July 2006,

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

PROCEDURE

1. The case originated in an application (no. 10523/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Coorplan-Jenni GmbH ("the applicant company") and a national of Bosnia and Herzegovina Mr Elvir Hascic ("the second applicant") on 7 August 2001.

2. The applicants were represented by Mr W.L. Weh, a lawyer practising in Bregenz. The Austrian Government ("the Government") were represented first by their Agent, Mr Hans Winkler and subsequently by their Agent Mr Ferdinand Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. Both applicants complained under Article 6 of the Convention that there had been no oral hearing before the Administrative Court in the proceedings concerning the applicant company's request for an employment permit. The second applicant further complained under Article 6 of the Convention that he had been denied access to a court as he was not a party to the proceedings.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). The Government of Bosnia-Herzegovina did not wish to intervene under Article 36 of the Convention.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 24 February 2005 (Rule 54 § 3).

7. There appeared before the Court:

(a) *for the Government*
Mr H.WINKLER, Ambassador, *Agent*,
Mrs I. NOWOTNY, Ministry of Economics and Labour,
Mrs J. HÖLLER, Chancellery/Constitutional Service, *Advisers*;

(b) *for the applicants*
Mr W. WEH, a lawyer,
Mr R. KOLB, a lawyer, Counsel.

8. The Court heard addresses by Mr Winkler for the Government and Mr Weh for the applicants.

9. By a decision of 24 February 2005 following the hearing the Court declared the application partly admissible.

10. The applicants but not the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. In April 1991 the second applicant entered Austria on a tourist visa. He made two unsuccessful requests for a residence permit (*Aufenthaltserlaubnis*) in February 1992 and April 1994 respectively. In May 1996 he made a new request for a residence permit, which was granted in July 1996 for a period of two years for the purpose of family reunification with his wife and baby daughter, both of whom lived in Austria. His leave to remain was subsequently extended for successive two-year periods.

12. From 1991 onwards the second applicant worked for the applicant company.

13. After the Labour Market Service had advised that an employment permit was required for the second applicant, the applicants lodged a request with the Feldkirch Labour Market Service (*Arbeitsmarktservice)* on 23 April 1998 for the grant of an employment permit to the applicant company.

14. On 4 June 1998 the Labour Market Service refused the request in accordance with s. 4(6) of the Employment of Aliens Act (*Ausländerbeschäftigungsgesetz*). It found that the maximum quota fixed for

the employment of foreign workers that year in Vorarlberg had been exceeded and none of the exceptional conditions of s. 4(6) of the above Act were met.

15. On 18 June 1998 the applicants appealed. They submitted that the second applicant had been living in Austria since 1991 and was a shareholder in the Jenni Montagen OEG company. They claimed that the second applicant had a right to employment in Austria and referred in that connection to the Geneva Refugee Convention, the European Social Charter and the International Covenant on Economic, Social and Cultural Rights. They further referred to the Association Agreement between the European Union and Turkey and submitted that that treaty had to be applied by analogy to their case.

16. On 22 July 1998 the Vorarlberg Labour Market Service dismissed the applicant company's complaint and rejected the second applicant's complaint. It noted that only the applicant company as the proposed employer, not the second applicant, had the right to lodge a request for the grant of an employment permit. According to s. 21 of the Employment of Aliens Act an alien only became a party to proceedings concerning the issue of a work permit if his personal circumstances were relevant to the decision or if there was no employer. In the present case, however, neither of these conditions applied. In particular, the Bregenz Labour Market Service had based its decision exclusively on the situation of the labour market, and in particular the fact that the maximum quota for the employment of foreign workers had been exceeded. For that reason, the second applicant was not a party to the proceedings.

17. As regards the applicant company's complaint, it noted that only certain refugees – namely, those who had indefinite leave to remain, were married to an Austrian national or had a child of Austrian nationality – were exempted from the regulations of the Employment of Aliens Act. However, throughout the proceedings it had been common ground that the second applicant was not a refugee. The Association Agreement between the European Union and Turkey was not applicable in the present case as the second applicant was not a Turkish national.

18. On 3 September 1998 the applicants filed a complaint with the Administrative Court and requested an oral hearing. They contested the lawfulness of the fixed maximum quota system and the accuracy of the official statistics according to which the maximum quota had been exceeded. They submitted in that connection that, in view of the number of foreign workers in employment that had been given in the official statistics some months before, the number that was now being quoted could not be correct. They further complained that the Labour Market Service had failed to establish objectively in adversarial proceedings that the maximum quota for Vorarlberg had been exceeded.

19. They further submitted that the second applicant had a right to take up employment in Austria and had standing to join the proceedings. The applicant had been living with his wife in Austria since 1991 and they had a daughter who was born in 1995. The applicant was in possession of a settlement permit (*Niederlassungsbewilligung*) limited in time while his wife and his daughter had been granted indefinite residence permits (*Aufenthaltsbewilligung*). The applicants referred to Article 17 of the Geneva Refugee Convention and submitted that it should be applied by analogy to nationals of Bosnia and Herzegovina who had come to Austria before the civil war. They further referred to Article 23 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. They also relied on Article 6 and Article 8 of the Convention and Article 1 of Protocol No. 1.

20. On 12 October 1998 the Vorarlberg Labour Market Service submitted its comments.

21. On 19 December 2000 the Administrative Court dismissed the applicant company's complaint and rejected the second applicant's complaint.

22. As regards the second applicant it found that none of his rights had been violated, as it was in principle for the employer to request the issue of an employment permit. It further referred to the case-law of the Constitutional Court according to which a decision whether or not to issue an employment permit did not concern a "civil right" within the meaning of Article 6 of the Convention.

23. As regards the applicant company's complaint, the Administrative Court noted that the official statistics showing that the maximum quota had been exceeded constituted documentary evidence which it had been open to the company to contest by adducing proof to the contrary. The company had, however, failed to make any valid objection to the Labour Market Service to the statistical evidence that the maximum quota had been exceeded. The complaint now made before the Administrative Court that the Labour Market Service had failed to establish objectively in adversarial proceedings that the maximum quota for Vorarlberg had been exceeded was unsubstantiated and, in any event, inadmissible, as it had not previously been raised before the Labour Market Service.

24. As regards the reference to the Geneva Refugee Convention and the Association Agreement between the European Union and Turkey the Administrative Court noted that those treaties were not applicable to the present case as the second applicant had never claimed to be a refugee within the meaning of the Geneva Refugee Convention and was not Turkish. It further noted that no right for the second applicant to take up employment could be deduced from the Universal Declaration of Human

Rights or the International Covenant for Economic, Social and Cultural Rights.

25. In accordance with s. 39(2) of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), the Administrative Court dismissed the applicants' request for a hearing as it found that an oral hearing was not likely to contribute to the clarification of the case. Referring to its case-law it found that the proceedings did not concern a "civil right" within the meaning of Article 6 of the Convention. This decision was served on the applicants' counsel on 7 February 2001.

26. Meanwhile, on 23 October 2000, the second applicant's wife acquired Austrian citizenship. Consequently, the Employment of Aliens Act is no longer applicable to the second applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. The Employment of Aliens Act (*Ausländerbeschäftigungsgesetz*) regulates foreign workers' access to the Austrian labour market. The relevant parts of the Act at the material time were as follows:

28. Section 1 of the Act stated that it was not applicable *inter alia* to:

- certain refugees who had indefinite leave to remain in Austria, who were married to an Austrian national or who had a child of Austrian nationality (s. 1(2)(a));

- aliens married to an Austrian national if they were in possession of a residence document (*Aufenthaltstitel*) within the meaning of the Act (s.1(2)(1)); under the Aliens Act (*Fremdengesetz*) there are two types of residence document: residence permits (*Aufenthaltsbewilligung*) and settlement permits (*Niederlassungsbewilligung*). The relevant provisions of the Aliens Act make it easier for aliens married to an Austrian national to obtain a settlement permit.

Under s. 3(8) of the Employment of Aliens Act the competent Regional Labour Office had to certify that the alien concerned fulfilled the requirements of s. 1(2) (l) before he could take up employment.

29. S. 3(1) and (2) of the Act laid down the principle that a proposed employer required an employment permit (*Beschäftigungsbewilligung*) if he wished to take on a foreign employee. Without such a permit the contract of employment between the employer and the foreign employee was null and void. However, while he was actually employed an alien hired without an employment permit had the same rights against his employer as he would have had if the contract of employment had been valid. If the lack of an employment permit was due to the employer's negligence, the foreign employee further enjoyed all the rights to which he would have been entitled upon the termination of a valid employment relationship (s. 29).

30. S. 15 of the Act provided that a request could be made for an "exemption certificate" (*Befreiungsschein*) in respect of aliens who had

been continuously legally employed within the meaning of the Act in Austria for at least five years during the previous eight, and for aliens who had been married to an Austrian national for at least five years and had their residence (*Wohnsitz*) in Austria. The exemption certificate subsequently relieved the alien or potential employer from the obligation to apply for an employment permit. S. 19 provided that the alien concerned could apply for an exemption certificate to the competent Regional Labour Market Service.

31. If an alien had been continuously legally employed within the meaning of the Act for at least 52 weeks in the previous 14 months, he was entitled to request a personal work permit (*Arbeitserlaubnis*) which was normally valid for one region only and could be restricted to certain kinds of employment (s. 14(a)).

32. S. 19 provided that in order to obtain an employment permit the employer had to submit details of the proposed employment of the individual employee to the Regional Labour Market Service concerned. The application could be made by the alien only if there was no employer.

33. According to s. 4(1) an employment permit could only be granted if the situation and evolution of the labour market so allowed and important public or economic interests would not be harmed. Furthermore, specific conditions listed in s. 4(3) had to be fulfilled.

34. S. 4(b)(1) laid down that the situation and evolution of the labour market only allowed an employment permit to be granted in respect of a proposed foreign employee if there were no prior-ranking foreign job applicants. Prior-ranking foreign job applicants included aliens who were in possession of an exemption certificate within the meaning of s. 15 of the Act or who were in receipt of unemployment insurance payments (*Arbeitslosenversicherung*) (s. 4(b)(2) and (3)).

35. S. 4(c) provided that an employment permit had to be issued *ex officio* in respect of Turkish nationals falling within the relevant provisions of the Association Agreement between the European Union and Turkey.

36. Under s. 13(a) the Minister for Labour and Social Affairs could fix maximum quotas for the employment of aliens in a specific region (*Landeshöchstzahl*) for the following year. S. 4(6) provided that once the maximum quota had been exhausted, no further employment permits could be issued unless there were certain exceptional circumstances.

37. S. 21 provided that, in principle, the foreign job applicant was not a party to the proceedings concerning the issue of the employment permit. Exceptions were made where the personal circumstances of the alien were relevant to the decision or where there was no employer.

38. According to the settled case-law of the Constitutional Court and the Administrative Court a refusal to issue an employment permit under S. 4(1) and (6) of the Employment of Aliens Act could not violate a proposed foreign employee's rights because he had no legal entitlement to

the grant under that Act (see VfSlg 14.347/1995, VfSlg 13617/1993; and the Administrative Court's decision of 16 November 1995, 94/09/0330).

39. The Constitutional Court and the Administrative Court have further held that the refusal of an employment permit to a proposed employer is not a decision concerning the employer's "civil rights" (see, for example, VfSlg 13617/1993 and Administrative Court's decision of 29 October 1997, 95/09/0254 with further references).

40. According to s. 39(1) of the Administrative Court Act, the Administrative Court must hold a hearing after its preliminary investigation of the case if a complainant so requests within the time-limit. S. 39(2) and (6) provides, however, that, notwithstanding such a request, the Administrative Court may decide not to hold a hearing if it is apparent from the written pleadings of the parties and the files relating to the previous proceedings that an oral hearing is unlikely to help clarify the case and that the lack of a hearing will not violate Article 6 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

41. Both applicants complained that there had been no oral hearing before the Administrative Court in the proceedings concerning the issue of an employment permit. The second applicant further complained that he had been denied access to a court as he was not a party to the proceedings. The applicants relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

A. The parties' submissions

1. The applicants

42. The applicants submitted that the second applicant was integrated in Austria and had a right to an employment permit under Article 8 of the Convention. They submitted in this regard that the second applicant had been legally residing in Austria since 1991 and had a wife and a daughter in Austria who, in the interim, had become Austrian nationals. He had already worked for the applicant company for seven years. The applicants submitted that a claim to work by a foreign worker permanently established with his

family in the host country was, at the very least, an arguable right. The right of a foreign employee to an employment permit was furthermore indirectly recognised by the case-law of the Constitutional Court according to which an alien was not to be discriminated against by another alien. Further, the competent authorities did not have an unfettered discretion to decide whether or not an employment permit should be granted but were bound by the conditions laid down in the Employment of Aliens Act. The applicants argued that the second applicant's right to employment in Austria could be deduced from the Geneva Refugee Convention, the International Covenant on Economic, Social and Cultural Rights, the Association Agreement between Austria and Turkey and the European Social Charter.

43. The applicants submitted that an employment permit was a condition precedent to the validity of the contract of employment between the employer and the foreign employee and was therefore a decisive factor in a civil-law relationship. Even if a foreign worker employed under an invalid employment contract had the same rights to a salary from his employer as he would have had under a valid employment contract, he did not have protection against dismissal, health insurance, pension rights or a right to representation by the Workers' Committee. Moreover, a worker who was illegally employed risked being prohibited from residing in Austria. The proceedings at issue were comparable to administrative proceedings concerning the approval of a transaction under the Real Property Transactions Act to which the Court had found that Article 6 was applicable (*Ringeisen v. Austria*, judgment of 16 July 1971 Series A no. 13, and *Sramek v. Austria*, judgment of 22 October 1984, Series A, no. 84), or to proceedings concerning a guardianship court's approval of a contract concerning a minor. The applicants further pointed out that the Labour Market Service could not change a civil employment contract but could refuse to grant a permit if the salary did not correspond to the minimum wage set out in the relevant collective bargaining agreement.

44. They maintained that the lack of an oral hearing before the Administrative Court and the fact that the second applicant had been denied access to a court constituted violations of Article 6 of the Convention.

2. The Government

45. The Government submitted that Article 6 was not applicable to the proceedings at issue. In respect of the second applicant they argued that he could not claim a right within the meaning of Article 6 as under domestic law he had neither a right to apply for an employment permit nor a right to the issue of such a permit. They referred in that connection to the decision of *B. v. the Netherlands* (no. 12074/86, Commission decision of 14 July 1988, unreported), in which the Commission found that, in the absence of an independent right of an alien to apply for a work permit under

Dutch law, Article 6 was not applicable to the proceedings relating to such an application. The Government further stressed that the refusal to issue an employment permit affected the foreign worker's legal position only to a limited extent as, in the absence of an employment permit a foreign worker who was actually employed had the same rights against his employer as if the contract of employment was valid. Furthermore, if the lack of an employment permit was due to the employer's negligence, the foreign employee enjoyed all the rights to which he would have been entitled upon the termination of a valid employment relationship.

46. The Government also argued that the proceedings did not involve the determination of a "civil" right of either the applicant company or the second applicant. They argued in this respect that the requirement of an employment permit for foreign workers served to regulate the Austrian labour market and social policy. Although a decision concerning such a permit had certain effects on relationships under the civil law, its primary purpose was public. In the present case, the refusal to grant an employment permit was exclusively based on considerations concerning the public interest. The Employment of Aliens Act provided for the gradual integration of foreign workers into the Austrian labour market. The decision concerning the alien's initial entry into the Austrian labour market, namely the issue of an employment permit, was exclusively based on public interests and the alien concerned therefore had no right to such a permit. As the alien became further integrated into the labour market, however, public interests became less decisive and he acquired a legal right to a work permit and, subsequently, to an exemption certificate granting him full access to the Austrian labour market.

47. The Government further argued that the applicant company had been free to employ someone else. There had not, therefore, been any restriction on the manner in which it exercised its economic activities and property rights or in the scope of those activities and rights.

48. The Government submitted that, even if the Court were to find that Article 6 was applicable, there had been no violation of the applicant company's right to an oral hearing before a tribunal as the special features of the proceedings constituted "exceptional circumstances" which justified the absence of a hearing. The Government noted in that connection that in their submissions to the Administrative Court the applicants had not substantiated their complaint relating to the maximum quota or their request for an oral hearing. The Administrative Court had, therefore, been in a position in which it could decide the case on the basis of the case-file.

49. The Government admitted that, if the Court found that Article 6 was applicable to the proceedings at issue, the second applicant's right of access to a court had been violated.

B. The Court's assessment

1. Applicability of Article 6 § 1 of the Convention

50. The Court reiterates that, according to the principles laid down in its case-law, it must first ascertain whether there was a "dispute" ("*contestation*") over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question. Lastly, the right must be a "civil" right (see, amongst many other authorities, *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X, with further references).

51. Turning to the circumstances of the present case, the Court finds that the applicants' situations must be examined separately.

1. The applicant company

52. The Court notes at the outset that the Government did not deny that, following the Labour Market's Services' refusal to grant an employment permit, a dispute had arisen between the applicant company and that authority. The dispute, in which the applicant company *inter alia* argued that the Vorarlberg Labour Market Service had relied on inaccurate figures, was genuine and serious. It remains to be determined whether the dispute related to a civil right of the applicant company.

53. In this regard, the Court notes that under the Employment of Aliens Act an employment permit for a specific foreign employee is granted to the employer upon request, provided that specified conditions are met, important public or economic interests are not harmed and the situation and evolution of the labour market allow. It follows that the applicant company as the proposed employer could, at least on arguable grounds, claim the right to an employment permit.

54. The Court finally notes that the validity of an employment contract concluded between an employer and a foreign employee is in principle dependent on the grant of an employment permit. Therefore, the outcome of the proceedings at issue has to be considered directly decisive for the applicant company's relations in civil law and thus concerned the applicant company's "civil" rights (see *mutatis mutandis Ringeisen v. Austria,* cited above; *Fehr and Others v. Austria*, no. 28866/95, Commission decision of 2 July 1997, unreported).

55. It follows that Article 6 of the Convention applies to the proceedings concerning the applicant company's request for an employment permit.

2. The second applicant

56. The Court notes that as the proposed foreign employee the second applicant had no *locus standi* in the proceedings concerning the employment permit. The Court will examine whether this restriction delimited the substantive content properly speaking of the second applicant's right (so that the guarantees of Article 6 § 1 do not apply) or amounted to a procedural bar preventing the bringing of a potential claim to court, to which Article 6 could have some application (see *mutatis mutandis Roche v. the United Kingdom* [GC], no. 32555/96, §§ 118,119, 19 October 2005).

57. The Court observes that the applicants agreed on the second applicant's employment by the applicant company and jointly applied for an employment permit. In this important aspect the present case differs from the case of *B. v. the Netherlands (*cited above), in which the employer refused to join the applicant in his application for a work permit and the Commission found that, in the absence of an independent right to such a permit by the applicant, Article 6 did not apply.

58. Thus, the present case does not concern the second applicant's right to employment as such, but rather his right to the necessary public approval of his concrete employment plans with the applicant company. Considering that the applicant company could and actually did claim a right to the issue of an employment permit, the Court finds that the second applicant must be taken to have also had a right, derived from the applicant company's right, to adjudication on his request for an employment permit. The fact that the domestic legislation precluded him from making the request for an employment permit to the domestic authorities personally does not affect the existence of that right but is only a procedural bar. The Court is comforted in this view by the fact that the relevant domestic legislation does not unconditionally prevent a foreign employee from applying for an employment permit but provides exceptional circumstances in which a foreign worker can institute such proceedings personally (see § 37 above).

59. Having regard to its findings above (see §§ 53, 54), the Court further considers that the second applicant's right to conclude a valid employment contract was arguable, and that the dispute he wished to bring before the domestic tribunals was directly decisive for this "civil" right and genuine and serious.

60. It follows that Article 6 § of the Convention also applies in respect of the second applicant.

2. Compliance with Article 6 § 1 of the Convention

1. The applicant company

61 The applicant company complained under Article 6 § 1 of the Convention that there had been no oral hearing before the Administrative Court.

62. The Court notes that the applicant company's case was considered by the Bregenz Labour Market Service and the Vorarlberg Labour Market Service, both purely administrative authorities, and subsequently by the Administrative Court. The applicant company did not contest that the Administrative Court qualified as a tribunal, and there is no indication in the file that the Administrative Court's scope of review was insufficient in the circumstances of the case. Thus, the Administrative Court was the first and only tribunal to examine the applicant's case (see *mutatis mutandis Schelling v. Austria*, no. 55193/00, § 29, 10 November 2005).

63. The applicant company was thus in principle entitled to a public oral hearing before the first and only tribunal to examine its case, unless there were exceptional circumstances which justified dispensing with such a hearing. The Court has accepted such exceptional circumstances in cases where proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, p. 19-20, § 58; *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002; *Speil v. Austria* (dec.) no. 42057/98, 5 September 2002).

64. However, the Court does not consider that the subject matter of the proceedings before the Administrative Court in the present case was of such a highly technical or exclusively legal nature as to justify dispensing with the obligation to hold a hearing.

65. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. The second applicant

66. The second applicant complained under Article 6 § 1 of the Convention that he had been denied access to a court as he was not a party to the proceedings concerning the issue of an employment permit. He further complained under Article 6 § 1 of the Convention that there had been no oral hearing before the Administrative Court.

67. The Court reiterates that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. While this right may be subject to limitations; it must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a

legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 174).

68. In the present case, the Employment of Aliens Act prevented the second applicant from bringing his claim for an employment permit before the domestic authorities.

69. The Government admitted that if the Court found that Article 6 was applicable to the proceedings at issue the second applicant's right of access to a court had been violated.

70. In the light of the foregoing and its conclusion that Article 6 of the Convention is applicable to the second applicant's case, the Court finds that there has been a violation of the second applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

71. In view of this finding, the Court does not find it necessary to examine the second applicant's complaint about the lack of an oral hearing before the Administrative Court.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

73. The applicants claimed reimbursement of their costs in the domestic proceedings and before the Court under the head of pecuniary damage.

74. The Court will examine these claims under the head of costs and expenses.

B. Costs and expenses

75. The applicants claimed a total of 2,175.36 euros (EUR) including VAT for the costs they had incurred before the domestic authorities, namely before the Vorarlberg Labour Market Service and the Administrative Court. They further claimed EUR 11,744.78 including VAT for the costs incurred in the proceedings before the Court.

76. The Government argued that these claims were excessive.

77. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicants only in so

far as they have been actually and necessarily incurred and are reasonable as to quantum (see *inter alia*, *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49, and *Craxi v. Italy*, no. 34896/97, § 115, 5 December 2002).

78. As to the costs claim concerning the domestic proceedings, the Court considers that the applicants' claims meet the above-mentioned conditions. It therefore awards the full sum claimed, namely EUR 2,175.36. This sum includes any taxes chargeable on this amount.

79. As regards the Convention proceedings, the Court notes the applicants, who did not have the benefit of legal aid, were represented before the Court. However, the application was only partly successful and was brought by the same lawyer and is similar to the application brought in the case of *Jurisic and Collegium Mehrerau v. Austria*. Making its assessment on an overall basis, the Court awards EUR 7,000 under this head. This sum includes any taxes chargeable on this amount.

80. Thus, a total of EUR 9,175.36 is awarded in respect of cost and expenses.

C. Default interest

81. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that Article 6 § 1 of the Convention is applicable to the proceedings in respect of the applicant company;

2. *Holds* by five votes to two that Article 6 § 1 of the Convention is applicable to the proceedings in respect of the second applicant;

3. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant company's right to a public oral hearing before the Administrative Court;

4. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention in respect of the second applicant's right of access to a court;

5. Holds unanimously that it is unnecessary to examine the second applicant's further complaint about the lack of an oral hearing under Article 6 § 1 of the Convention;

6. *Holds* by six votes to one
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,175.36 (nine thousand one hundred and seventy-five euros and thirty-six cents) in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:
(a) Partly dissenting opinion of Mrs Steiner joined by Mrs Vajić;
(b) Partly dissenting opinion of Mrs Vajić.

C.L.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGE STEINER JOINED BY JUDGE VAJIĆ

I do not agree with the majority that Article 6 of the Convention is applicable in respect of the second applicant for the following reasons.

It has been the Court's consistent case-law that Article 6 applies only to disputes over "rights" which can be said, at least on arguable grounds, to be recognised under domestic law (see, amongst many other authorities, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, *Z and Others*, at § 81 and the authorities cited therein together with *McElhinney v. Ireland* [GC], no. 31253/96, § 23, ECHR 2001-XI (extracts))

It was the applicants' contention that the second applicant had a right recognised under Austrian law for an employment permit. They did not claim that such a right could be derived from the provisions of the Employment Act but rather argued that such a right can be based on other provisions which are part of Austrian law.

I will take these provisions in turn. The first argument is that he can rely on Article 8 of the Convention. I would, however, point out that in the admissibility decision of this very case, the Court found that the facts complained of did not fall within the ambit of Article 8 of the Convention. The applicants next argue that the second applicant can rely on the Constitutional Court's case-law prohibiting all kinds of discrimination including discrimination between foreigners. However, this case-law merely refers to an equal enjoyment of legal positions guaranteed by law and cannot guarantee a substantive right to employment itself. Next the applicants suggest that a right to an employment permit might be inferred from the Geneva Refugee Convention. However, it has not been submitted that the second applicant has been recognised as a refugee or that any such application had been made before the domestic authorities. Further, the applicants refer to the International Covenant on Economic, Social and Cultural rights and the European Social Charta. However, these international instruments are not self executing at the domestic level and for this reason cannot confer any subjective right at the domestic level on the applicants. I would only add that the wording of the relevant provisions does not give the impression that they actually give an unconditional right of employment to foreigners. Lastly the applicants propose that the Association Agreement concluded between the European Union and the Republic of Turkey be extended to them. I do not think this is possible. By concluding such an agreement the parties have consented to enter into a special relation and it cannot be claimed that they had had the intention to extend this special treatment to thirds who are not party to that agreement.

I will now turn to the majority's finding that the fact that the second applicant had no *locus standi* in the proceedings concerning the issuing of an employment permit did not delimit the substantive content properly speaking of his right, but amounted merely to a procedural bar and that Article 6 of the Convention was therefore applicable (§§ 56, 58). They cite the case *Roche v. the United Kingdom.* This case refers in fact to previous case-law concerning otherwise well-founded claims in domestic law subsequently prevented from being entertained before a domestic court because subsequently issued legal acts or the grant of State immunity. In these cases Article 6 was held applicable (see *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI; *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI and *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI (extracts)).

However, I cannot find that the present case is in any aspect comparable to these cases. Looking at the relevant provisions of the domestic legislation, the Employment of Aliens Act, and its interpretation by the domestic courts, I cannot discern any provision granting a foreigner the right to an employment permit and, consequently, general *locus standi* in such proceedings. Only in very exceptional situations, which the applicants have never even alleged to exist in their case, a foreigner may be party to the proceedings (see § 37 above).

I finally note that in the very case *Roche v. United Kingdom* the Court stressed that, in assessing whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to an impugned restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see § 120) and, having carefully examined these elements, considered that Mr Roche had no (civil) "right" recognised under domestic law which would attract the application of Article 6 § 1 of the Convention (§ 124)

I regret that the majority disregarded these principles in the present case. Thereby, the Court distorted the domestic legislation and its accepted interpretation by substituting them by its own understanding.

PARTLY DISSENTING OPINION OF JUDGE VAJIĆ

1. I regret that I am unable to agree with the majority's finding that Article 6 of the Convention is applicable to the second applicant. On that point I join the dissenting opinion of Judge Steiner.

2. I have voted with the majority as to the applicability of Article 6 in respect of the first applicant. However, I cannot agree with the finding that there was also a violation of Article 6 in respect of the applicant company's rights to an oral hearing in the present case. In rejecting the request for an oral hearing the Administrative Court based itself, *inter alia*, on section 39(2) of the Administrative Court Act according to which it may decide not to hold a hearing if such a hearing is unlikely to help clarify the case (§ 25).

The dispute between the parties in the instant case related basically to the maximum quota fixed for the employment of foreign workers in Vorarlberg as the applicant contested the accuracy of the official statistics due to which the quota had been exceeded.

The majority has concluded, without any further explanation and following a somewhat mechanical approach, that the subject matter of the proceedings before the Administrative Court in the present case was not of such a "highly technical or exclusively legal nature" as to justify dispensing with the obligation to hold a hearing (§ 64). With due respect, I do not share that opinion.

In my opinion the applicant's submissions to the Administrative Court were not of a kind to raise issues of fact or law which were of such a nature as to require an oral hearing for their disposition (see among others *Pitkänen v. Sweden (dec.), no. 52793/99, 26 August 2003; Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *Varela Assalino v. Portugal* (dec.), no. 64336/01,25 April 2002; *Döry v. Sweden,* judgment of 12 November 2002, § 44*; Strömblad v. Sweden* (dec.), no. 45935/99, 11 February 2003; *Allan Jacobsson v. Sweden* (No. 2), judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 49). Having regard to the facts of the case, the main question the Administrative Court had to determine related to the finding of the Labour Market Services that the maximum quota has been exceeded and the application of the quota to the applicant, thus leaving no discretionary powers to the court to decide. In my opinion that question could have been adequately resolved on the basis of the case file and the written submissions and did not require a debate. I therefore fail to see why

written submissions challenging the findings on the maximum quota and containing information and possible data trying to prove the contrary would not have sufficed. The applicant has not submitted any elements of a nature to convince me that only an oral hearing subsequent to the written submissions would have assured the fair character of the proceedings.

Moreover, it is understandable that in this sphere relating to employment quotas for foreign workers the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in such cases (see *mutatis mutandis Speil v. Austria* (dec.), no. 42057/98, 5 September 2002; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 58).

For these reasons I am of the opinion that there were circumstances which justified dispensing with an oral hearing before the Administrative Court in the present case.

Finally, I am of the opinion that the Court should have a more flexible approach, than the one adopted by the majority in the instant case, when evaluating whether decisions of domestic authorities not to hold an oral hearing in civil cases amounted to a violation of Article 6 § 1 of the Convention. In other words, it should examine the need for the hearing (i.e., whether it would serve any purpose and/or bring new elements to the courts' reasoning) on the particular facts of each case and also having special regard to the reasoning of the domestic courts. The Court should, of course, always emphasize the need for an oral hearing in really important cases, but at the same time it should avoid unnecessarily burdening domestic courts from whom we repeatedly demand particular diligence, especially in the kind of cases as the present one.