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

FIRST SECTION

CASE OF JURISIC AND COLLEGIUM MEHRERAU v. AUSTRIA

(Application no. 62539/00)

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 Jurisic and Collegium Mehrerau 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 that date:

PROCEDURE

1. The case originated in an application (no. 62539/00) 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 a national of Bosnia and Herzegovina, Mr Ivan Jurisic (the "first applicant") and the Collegium Mehrerau, a monastery situated in Austria, (the "second applicant") on 7 August 2000.

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. The first applicant complained in particular that he had been denied access to a court as he was not a party to the proceedings concerning the issuing of an employment permit to the second applicant. Both applicants complained that there was no oral hearing before the Administrative Court in the proceedings. They relied on Article 6 of the Convention.

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 HANS WINKLER, Ambassador, *Agent*,
Mrs INGRID Nowotny, Ministry of Economics and Labour, *Adviser*
Mrs JOHANNA HÖLLER, Chancellery/Constitutional Service, *Adviser*;

(b) *for the applicants*
MrWILFRIED WEH,
MrRONY KOLB, *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 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. The second applicant wished to employ the first applicant as a farm hand.

12. On 6 February 1998 the applicants lodged a request with the Bregenz Labour Market Service (*Arbeitsmarktservice*) for the grant of an employment permit to the second applicant. They submitted that the first applicant, a national of Bosnia and Herzegovina, and his wife had been resident in Austria since November 1992. Both he and his wife had been granted residence permits (*Aufenthaltsbewilligung*) that were valid until December 1998. The applicants claimed that the first applicant had a right to take up employment in Austria. They referred in that connection to the Geneva Refugee Convention and the Association Agreement between the European Union and Turkey and submitted that those treaties had to be applied by analogy to their case.

13. On 19 March 1998 the Labour Market Service refused the request in accordance with s. 4(6) of the Employment of Aliens Act (*Ausländer-beschäftigungsgesetz*). It found that the maximum quota fixed for the employment of foreign workers in Vorarlberg had been exceeded and none of the conditions for making an exception under s. 4 (6) of the Act were met.

14. On 6 April 1998 the applicants appealed. They reiterated the arguments they had submitted before the Bregenz Labour Market Service.

15. On 25 May 1998 the Vorarlberg Labour Market Service rejected the first applicant's appeal as inadmissible. It noted that only the second applicant as the proposed employer, not the first 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 first applicant was not a party to the proceedings.

16. The Vorarlberg Labour Market Service further 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. The first applicant did not fall into any of those categories. The Association Agreement between the European Union and Turkey was not applicable in the present case as the first applicant was not a Turkish national.

17. The Vorarlberg Labour Market Service went on to dismiss the second applicant's appeal. It observed that the Bregenz Labour Market Service had proposed a replacement for the first applicant within the meaning of s. 4(2) and (3) of the Employment of Aliens Act, but he had not been taken on. In a telephone conversation the Labour Market Service had been informed by a representative of the second applicant that the proposed replacement had not been employed because the relevant post had already been filled. In further submissions the second applicant stated that the replacement had not complied with the requirements of the post.

18. The Vorarlberg Labour Market Service concluded that the second applicant had no further interest in employing the first applicant. It observed in particular that the second applicant had not given sufficient reasons as to why the proposed replacement could not work as a farm hand, a post which did not require any special qualification. It concluded that the second applicant was not interested in employing a replacement and dismissed the request for an employment permit under s. 4(1) of the Employment Act. It further noted that, in any event, the conditions for granting an employment permit had not been satisfied as the maximum quota fixed for the employment of foreign workers in Vorarlberg had been exceeded and none of the conditions for an exception under s. 4(6) of the above Act applied.

19. On 7 July 1998 the applicants filed a complaint with the Administrative Court and requested an oral hearing. They submitted that the Labour Market Service had not carried out sufficient investigations before

reaching its findings. In particular, it had not heard evidence from the second applicant. They further denied that the second applicant had informed the Labour Market Service that the relevant post had been filled, and contested the maximum quota.

20. Referring to Article 17 of the Geneva Refugee Convention, the Association Agreement between the European Union and Turkey, Article 23 of the Universal Declaration of Human Rights, the European Social Charter and Article 6 of the International Covenant for Economic, Social and Cultural Rights, the applicants submitted that the first applicant had a right to take up employment in Austria and had standing to join the proceedings. They also relied on Article 6 and Article 8 of the Convention and Article 1 of Protocol No. 1.

21. They submitted that the first applicant had come to Austria as a Bosnian refugee, had resided there with his wife since 1992 and was in possession of a residence permit that was valid until December 1998.

22. On 15 December 1999 the Administrative Court rejected the first applicant's complaint and dismissed the second applicant's complaint. It found that none of the first applicant's rights had been violated, as the refusal to grant the employment permit was not based on reasons related to the first applicant's personal circumstances under s. 21 of the Employment of Aliens Act.

23. As to the second applicant's complaint, it found that the Labour Market Service's decision was coherent and conclusive. The Labour Market Service had based its decision essentially on the statements of the second applicant. There had, therefore, been no further need to hear representations from the second applicant. The Administrative Court concluded that the Labour Market Service had rightly refused to issue an employment permit under s. 4 (1) of the Employment of Aliens Act. It also decided that it was unnecessary to examine the second applicant's further submissions questioning whether the maximum quota had been attained.

24. The Administrative Court further noted that the second applicant had never alleged that the first applicant was a refugee within the meaning of the Geneva Refugee Convention. As regards the reference to the European Social Charter and the International Covenant for Economic, Social and Cultural Rights, it noted that those treaties were not directly applicable and so could not create any subjective rights. At most, they might be of assistance in interpreting the domestic legislation. However, having regard to the clear wording of s. 21 of the Employment of Aliens Act and the fact that there was no prospect of that provision being successfully challenged in the Constitutional Court (*Verfassungsgerichtshof*), as that court had already ruled that proceedings concerning a request for an employment permit under the Employment of Aliens Act did not concern a "civil right or obligation" within the meaning of Article 6 of the Convention, the Administrative Court said that even the above mentioned interpretation would not lead to

recognition of the first applicant's legal standing in the proceedings concerning the grant of an employment permit.

25. It went on to note that the Association Agreement between the European Union and Turkey was not applicable as the first applicant was not Turkish.

26. 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 further found that the proceedings did not concern a "civil right" within the meaning of Article 6 of the Convention. The decision was served on the applicants' counsel on 7 February 2000.

27. The second applicant was subsequently granted a permit to employ the first applicant from 14 July 2000 until 13 July 2001 and from 14 July 2001 until 13 July 2002.

28. In February 2002 the applicant's wife became an Austrian citizen. Consequently, the Employment of Aliens Act is no longer applicable to the first applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The Employment of Aliens Act (*Ausländerbeschäftigungsgesetz*) regulates an alien's access to the Austrian labour market. The relevant parts of the Act at the material time were as follows:

30. Section 1 stated that the Act 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.

31. 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).

32. 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.

33. 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)).

34. 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.

35. 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.

36. 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 (*Arbeits-losenversicherung*) (s. 4(b)(2) and (3)).

37. 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.

38. 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.

39. 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.

40. 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).

41. 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).

42. 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

43. Both applicants complained that there had been no oral hearing before the Administrative Court in the proceedings. The first applicant further complained that he had been denied access to a court as he had not been a party to the proceedings concerning the issue of an employment permit to the second applicant. 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

44. The applicants submitted that the first 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 first applicant had lived in Austria since 1992 with an indefinite settlement permit and that his wife, who also lived in Austria had become an Austrian national in 2002. The first applicant had already worked for the second applicant for six months in 1993. 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 Act. The applicants argued that the first 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.

45. 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 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.

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

2. The Government

47. The Government submitted that Article 6 was not applicable to the proceedings at issue. In respect of the first 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 alien'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.

48. The Government also argued that the proceedings did not involve the determination of a "civil" right of either the first 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 a foreign worker'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.

49. The Government further argued that the second applicant had been offered a replacement worker and 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.

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

51. As regards the second applicant's complaint, they argued that there had been no breach of its 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 did not expressly dispute the Labour Market Service's findings that the relevant post had been filled, or substantiate their complaint relating to the maximum quota and 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.

B. The Court's assessment

1. Applicability of Article 6 § 1 of the Convention

52. 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).

53. Turning to the circumstances of the present case, the Court finds that the applicants' situations must be examined separately. It will begin by examining the second applicant's situation.

1. The second applicant

54. The Court notes at the outset that the Government did not deny that, following the Labour Market Service's refusal to grant an employment permit to the second applicant, a dispute arose between the second applicant and that authority. The dispute, in which the second applicant *inter alia* argued that the Vorarlberg Labour Market Service had not made sufficient investigations to obtain evidence in support of its findings and had relied on inaccurate figures, was genuine and serious. It remains to be determined whether the dispute related to a civil right of the second applicant.

55. 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 second applicant as the proposed employer could, at least on arguable grounds, claim the right to an employment permit.

56. 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 second applicant's relations under the civil law; it thus concerned its "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).

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

2. The first applicant

58. The Court notes that as the proposed foreign employee the first applicant had no *locus standi* in the proceedings concerning the issue of an employment permit. The Court will examine whether this restriction delimited the substantive content properly speaking of the first 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).

59. The Court observes that the applicants agreed on the first applicant's employment by the second applicant 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.

60. Thus, the present case does not concern the first applicant's right to employment as such, but rather his right to the necessary public approval of his concrete employment plans with the second applicant. Considering that the second applicant could and actually did claim a right to the issue of an employment permit, the Court finds that the first applicant must be taken to have also had a right, derived from the second applicant'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 § 39above).

61. Having regard to its findings above (see §§ 55 and 56 above), the Court further considers that the first applicant's right to conclude a valid employment contract was arguable, and that the dispute he wished to bring before the domestic tribunals was both directly decisive for this "civil" right and genuine and serious.

62. It follows that Article 6 of the Convention also applies in respect of the first applicant.

2. *Compliance with Article 6 § 1 of the Convention*

1. The second applicant

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

64. The Court notes that the second applicant'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 second applicant 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).

65. The second applicant 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).

66. 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.

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

2. The first applicant

68. The first 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.

69. 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).

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

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

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

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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

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

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

B. Costs and expenses

77. The applicants claimed a total of 3,551.39 euros (EUR) including VAT for the costs they had incurred before the Bregenz Labour Market Service, the Vorarlberg Labour Market Service and the Administrative Court. They further claimed EUR 10,314.38 including VAT for the costs incurred in the proceedings before the Court.

78. The Government argued that these claims were excessive. They noted in particular that the bill of costs submitted by the applicants' representative included a fee of EUR 180 which had not actually incurred before the Administrative Court.

79. 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).

80. As to the costs claim concerning the domestic proceedings, the Court considers that only the costs of the appeal proceedings before the Vorarlberg Market Service and the Administrative Court may be regarded as incurred to prevent or redress the breaches of Article 6 of the Convention complained of by the applicants. The applicants put these costs at 2,621.24 EUR. The Court, however, agrees with the Government that this claim appears excessive insofar as it also includes costs which had not actually incurred in the proceedings before the Administrative Court. The Court, therefore, having deducted these costs from the sum claimed, awards 2,441.24 EUR in this respect. This sum includes any taxes chargeable on this amount.

81. As regards the Convention proceedings, the Court notes the applicants, who did not have the benefit of legal aid, were represented before the Court. Making an assessment on an overall basis and taking into account the fact that the application was brought by the same lawyer and is similar to the application in the *Coorplan-Jenni GmbH and Hascic v. Austria* case, the Court awards EUR 7,000 on this account. This sum includes any taxes chargeable on this amount.

82. Thus, a total of EUR 9,441.24 is awarded in respect of costs and expenses.

C. Default interest

83. 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 at issue in respect of the second applicant;

2. *Holds* by five votes to two that Article 6 § 1 of the Convention is applicable to the proceedings at issue in respect of the first 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 second applicant'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 first applicant's right of access to a court;

5. *Holds* unanimously that it is unnecessary to examine the first 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 9,441.24 (nine thousand four hundred and forty-one euros and twenty-four 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 at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *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
Registrar

Christos ROZAKIS
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 first 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 first 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 in the case *Coorplan-Jenni and Hascic v. Austria* (no. 10523/02, 24 February 2005) which concerned the same issue, 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 first 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 first 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 first 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 (§§ 58, 60). 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 applicant has never even alleged to fall under, a foreigner may be party to the proceedings (see § 39 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 first 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 second applicant. However, I cannot agree with the finding that there was also a violation of Article 6 in respect of the second applicant'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 (§ 26).

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 (§ 66). 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 these findings 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.