

THE FACTS

Whereas the facts presented by the Applicant may be summarised as follows:

the Applicants are Austrian national born respectively in 1924 and 1965 and at present resident in Innsbruck, the first Applicant being the father of the second.

The first Applicant registered the birth of his child and applied for the issue of a birth certificate but refused to inform the Registrar as to the religion of the parents of the second Applicant. The Registrar, by a decision of .. July, 1965, refused to issue the certificate since the provisions of the Registration Act (Personenstandsgesetz) require that the birth certificate should contain a statement as to the religion of the parents.

The first Applicant appealed to the District Court (Bezirksgericht) in Innsbruck which was at the same time seized of application by the Supervising Authority of the Registrar (Aufsichtsbehörde des Standesamtes) that the entry in the Register be corrected to show the religion of the parents as Roman Catholic and a corresponding birth certificate issued.

This religion appears both from the marriage certificate of the parents and also from the statement of the first Applicant in his application to the Court. The Court gave judgment in accordance with the application of the Supervising Authority on .. December, 1965.

This decision was confirmed on appeal by the Regional Court (Landesgericht) in Innsbruck on .. January, 1966, and again by the Supreme Court (Oberster Gerichtshof) on .. March, 1966. The Supreme Court also declined the Applicant's request that it should place the question of the constitutionality of Article 21 of the Registration Act before the Constitutional Court. The Applicants then brought proceedings before the Constitutional Court complaining of the Registrar's decision of .. July, 1965, which were rejected on .. September, 1966, as being out of time.

The Applicants maintain that the refusal to issue a birth certificate which does not indicate the religion of the parents of the second Applicant constitutes a violation of the following Articles of the Convention and the First Protocol:

Article 5: Because under various provisions, e.g. the Vagrancy Act (Landstreichergesetz) persons who cannot produce an identity card can be arrested and an identity card cannot be delivered without the production of a birth certificate. The right to freedom and security of the person is thus restricted.

Article 8: The respect for private life is violated by being forced to declare one's religion.

Article 9: Because the right to religious freedom and the right to change one's religion must include the right not to reveal one's religion.

Article 10: Because the right of freedom of expression must include the right not to publish one's personal opinion in matters relating to religion and belief.

Article 11: Because the right of association implies the possession of an identity card (Lichtbildausweis) which is only delivered on the presentation of a birth certificate.

Article 12: Because the right to marry is dependent on the production

of a birth certificate.

Article 14: Because the issue of a birth certificate was refused on the ground that the religion of the parents was not known thus constituting a discrimination on religious grounds. Further the Applicant states that the mention of the religion of a person's parents on his birth certificate is likely to lead to his or his parents being subjected to discriminatory treatment in Austria, the United States of America and communist countries.

Protocol Article 1: Because the first Applicant is not able to claim tax reduction on the birth of his son whose existence he can only prove by producing a birth certificate.

Protocol Article 2: Because the second Applicant is deprived of his right to education as he cannot be accepted in any school or kindergarten without producing a birth certificate.

Protocol Article 3: Because without producing a birth certificate the second Applicant is unable to take part in elections.

The Applicants request the Commission to declare that the refusal to issue a birth certificate without indication of the parents' religion constitutes a violation of the above mentioned articles of the Convention and also to require the Austrian authorities to issue a birth certificate which does not mention the parents' religion.

Proceedings before the Commission

Whereas, the proceedings before the Commission may be summarised as follows:

The Application was lodged with the Secretariat of the Commission on 9th May, 1966, and entered in the special register provided for by Rule 13 of the Commission's Rules of Procedure on 25th July, 1966.

On 10th May, 1967, the case was submitted to a group of three members for a preliminary examination in accordance with Rule 34 of the Rules of Procedure. On 2nd June, 1967, the Commission examined the Application and declared inadmissible the Applicant's complaints alleging violations of Articles 5, 11, 12 and 14 of the Convention and Articles 1, 2 and 3 of the First Protocol. At the same time it decided to give notice to the Austrian Government in accordance with Rule 45, paragraph (3) (b) of its Rules of Procedure of the Applicants' complaints relating to Articles 8, 9 and 10 of the Convention and to invite it to submit its observations on the question of admissibility.

The Austrian Government submitted its observations on 7th August, 1967, and the Applicant submitted his observations in reply on 12th September, 1967.

Submissions of the parties

The submissions of the parties may be summarised as follows:

On the question of the exhaustion of the available domestic remedies in accordance with Article 26 of the Convention

The Respondent Government submits: the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date when the final decision was taken.

This rule, in the light of the Commission's consistent practice, is to be interpreted to the effect that an Applicant must make use of all domestic remedies accessible to him. The Applicant, indeed, appealed against the Registrar's decision to the ordinary courts in accordance

with Article 45 of the Registration Act. He also appealed to the Constitutional Court alleging a violation of his constitutional rights. This remedy was clearly available to him and it therefore constituted an essential step in exhausting the domestic remedies since only the Constitutional Court can decide whether there has been a violation of the fundamental rights in question. This appeal was, however, rejected by the Constitutional Court in its decision of .. December, 1966, as being out of time since the Applicant had not complied with the six weeks' time limit laid down in Article 82, paragraph (1) of the Constitutional Court Act.

The Applicant has thus forfeited his right to appeal to the Commission since, according to its standing jurisprudence, Article 26 requires an Applicant to make use of the domestic remedies within the periods prescribed by the national law.

The appeal to the Constitutional Court would certainly have been an effective remedy and the Applicant's statement in his letter to the Commission of 21st July 1966, that an appeal to the Constitutional Court was "useless" is incomprehensible and irrelevant. The fact that the Supreme Court refused the Applicant's request to institute proceedings with the Constitutional Court with a view to deciding whether Article 45 of the Registration Act is compatible with the Constitution can in no way be considered as a precedent with respect to a future decision of the Constitutional Court.

The Respondent Government also submitted that the Applicant had failed to make use of a further available remedy by way of appeal to the Administrative Court.

In reply the Applicants submit that the Respondent Government in its observations has emphasised that the Constitutional Court found that the appeals lodged by the Applicants were not administrative appeals but were before the ordinary courts, with the result that, by virtue of Article 82 of the Constitutional Court Act, the Constitutional Court was not competent in the matter as there had been no administrative decision of last instance. In fact no administrative appeals were available to the Applicants on account of the provisions of Article 45 of the Registration Act. The Respondent Government admits that only the Constitutional Court can decide whether there is a violation of the fundamental rights in question. It is therefore not clear why the point is taken that the Applicants failed to apply to the Administrative Court. In this connection it should be mentioned that according to Article 131 of the Constitution, application can only be made to the Administrative Court when all other available remedies have been exhausted. Neither in the Constitution nor in the Administrative Court Act is there any indication whether these remedies should be before administrative authorities or before the courts. Since Article 45 of the Registration Act imperatively prescribes a further remedy, that is to say to the District Court, it may be presumed in view of the clear terms of Article 131 of the Constitution that an application to the Administrative Court would be an arbitrary and senseless act, since until an application has been made to the District Court the legally prescribed remedy has not been exhausted.

The Respondent Government, moreover, takes exception to the Applicants' failure to apply directly to the Constitutional Court against the decision of the Registration Officer. As the Government itself admits, the Constitutional Court rejected the application which was made at a later stage with the comment that the matter concerned a remedy before the ordinary courts. As already mentioned, Article 82 of the Constitutional Court Act imperatively prescribes that application can only be made not the Constitutional Court against administrative decisions of last instance. Article 45 of the Registration Act also imperatively prescribes a remedy before the ordinary courts. The Applicants made enquiries at the Registration Office and the Provincial Administration and were informed that an attempt to exhaust the

administrative remedies by applying to the Provincial Administration and the Ministry of the Interior would have been fruitless since the Provincial Administration would have refused to deal with the matter on the ground that it was not competent in view of the provisions of Article 45 of the Registration Act. Since, therefore, all administrative remedies were blocked and the only remedy prescribed by the Act was before the ordinary courts and, furthermore, the Constitutional Court was only accessible after the administrative remedies had been exhausted, a direct application to the Constitutional Court was not possible. It must be emphasised that under the Registration Act there are no administrative remedies at all against the decisions of the Registration Officer and thus no direct access to the Constitutional Court. Once the matter has been dealt with in the first place by the authority, no further administrative authority is competent to deal with the matter but, as a matter of imperative law, the ordinary courts (against whose decision no application to the Constitutional Court is possible) are exclusively competent.

Nevertheless, in order to exhaust all available remedies the Applicant chose an indirect course and, when appealing to the Supreme Court, requested that Court to lay appeal before the Constitutional Court. This procedure is in accordance with the constant jurisprudence of the Commission of Human Rights which has in a number of cases decided that the Supreme Court must be considered as the court of law instance since under Austrian law there is no appeal to the Constitutional Court from the decisions of the ordinary courts. Since this application was refused by the Supreme Court the Applicants have, according to the standing jurisprudence of the Commission, exhausted all domestic remedies before the ordinary courts, which according to Article 45 of the Registration Act, are the only remedies available.

The same reasoning demonstrates that the Supreme Court, which can of its own motion place purely juridical (not administrative) matters before the Constitutional Court, denied the Applicants access to the Constitutional Court. The Applicants are therefore of the opinion that their right to apply to the Constitutional Court in an administrative matter has also been violated. This arises from the fact that Article 45 of the Registration Act prescribes an appeal to the ordinary courts as a remedy in an administrative matter, with the result that following the transfer of the matter to the ordinary courts, the access to the Constitutional Court is barred.

Under Article 45 of the Registration Act an appeal to the District Court is imperatively prescribed and further appeals can be directed only to the higher courts. The exhaustion of the proper remedies is, however, an imperative precondition for an application to the Constitutional Court or the Administrative Court. The subsequent application to the Constitutional Court was, therefore, bound to fail but was nevertheless undertaken in order to demonstrate that no available remedy had been neglected and also with the object of obtaining a finding that in the opinion of Constitutional Court in the present case the only available remedy was by means of an appeal to the ordinary courts.

The Parties also made submissions concerning the alleged breaches of Articles 3, 9 and 10 of the Convention.

THE LAW

Whereas, the Applicant alleges violations of Articles 8, 9 and 10 (Art. 8, 9, 10) of the Convention arising from the refusal by the authorities of the town of Innsbruck to issue a birth certificate in respect of the second Applicant, which did not state the religion of the first Applicant and his wife as parents of the second Applicant; whereas it is to be observed that, under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of

international law; and whereas the Applicants failed to appeal in due time directly to the Constitutional Court against the decision of the town authorities of Innsbruck dated .. July, 1965; whereas in this connection the Commission refers to the judgment of the Constitutional Court of .. September, 1966, which states: "The decision of the town authorities of Innsbruck dated .. July, 1965 was not challenged within the period of six weeks prescribed by Article 82 paragraph (1) of the Constitutional Court Act, 1953, by an appeal based on Article 144 of the Federal Constitution"; whereas, therefore, he had not exhausted the remedies available to him under Austrian law; whereas, moreover, an examination of the case as it has been submitted, including an examination made ex officio, does not disclose the existence of any special circumstances which might have absolved the Applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal; whereas, in particular, the Commission observes that the Applicant appealed against the decision of the town authorities to the ordinary courts and eventually to the Supreme Court in accordance with the express provisions of Article 45 of the Registration Act and thereby exhausted the remedies available before the ordinary courts; whereas, however, this does not absolve him from pursuing the remedy available for an alleged breach of his human and constitutional rights by means of a direct appeal to the Constitutional Court within the time prescribed; whereas, therefore, the condition as to the exhaustion of domestic remedies laid down in Articles 26 and 27, paragraph (3) (Art. 26, 27-3) of the Convention has not been complied with by the Applicant;

Whereas, the parties have also made submissions concerning the breaches of Articles 8, 9 and 10 (Art. 8, 9, 10) of the Convention alleged by the Applicants;

Whereas, however, the Commission's decision on the Applicant's failure to exhaust the domestic remedies as required by Article 26 (Art. 26) of the Convention is conclusive on the question of the admissibility of the Application; whereas, therefore, it is not necessary further to examine the violations of the Convention alleged by the Applicants;

Now therefore the Commission declares this application inadmissible.