



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

COURT (CHAMBER)

CASE OF VIJAYANATHAN AND PUSPARAJAH v. FRANCE

(Application no. 17550/90; 17825/91)

JUDGMENT

STRASBOURG

27 August 1992

In the case of Vijayanathan and Pusparajah v. France*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr J. CREMONA,

Mr Thór VILHJÁLMSSON,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr J. DE MEYER,

Mr J.M. MORENILLA,

Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 February and 26 June 1992,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 September 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in two applications (nos. 17550/90 and 17825/91) against France lodged with the Commission under Article 25 (art. 25) by Mr Ampalam Vijayanathan and Mr Nagalingam Pusparajah, two Sri Lankan citizens, on 10 December 1990 and 10 January 1991. They were referred to by the initials "V." and "P." during the proceedings before the Commission, but subsequently consented to their identity being disclosed.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was

* The case is numbered 75/1991/327/399-400. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 (art. 3).

2. In a letter of 12 September 1991 the Registrar reminded the respondent Government ("the Government") that under Rule 36 para. 2 of the Rules of Court the maintenance of the interim measure indicated by the Commission under Rule 36 of its Rules of Procedure and last renewed on 4 September 1991 (see paragraph 40 below) remained recommended.

3. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

4. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 September 1991, in the presence of the Registrar, Mr Cremona, the Vice-President of the Court, drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr F. Matscher, Mr R. Macdonald, Mr J. De Meyer, Mr J.M. Morenilla and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the organisation of the procedure (Rule 37 para. 1 and Rule 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial and the Government's memorial on 20 December 1991. On 23 January 1992 the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 February 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J.-P. PUISOCHET, Director

of Legal Affairs, Ministry of Foreign Affairs, *Agent,*

Mr B. GAIN, Head

of the Human Rights Section, Department of Legal
Affairs, Ministry of Foreign Affairs,

Mr R. RIERA, Head

of the Litigation and Legal Affairs Section, Department of
Interior, *Counsel;*

Public Freedoms and

- for the Commission

Mr H. DANELIUS,

Delegate;

- for the applicants

Mr G. PIQUOIS, avocat,

Counsel,

Mr M. LAURAIN, avocat,

Adviser.

The Court heard addresses by Mr Puissochet for the Government, Mr Danelius for the Commission and Mr Piquois and Mr Laurain for the applicants, as well as their replies to its question.

7. Before the hearing and on various dates from 20 April to 29 July 1992 the Government and the lawyer for the applicants filed a number of documents, with the leave or at the request of the Court (Rule 37 para. 1, second sub-paragraph).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. Mr Vijayanathan

8. The first applicant, Mr Ampalam Vijayanathan, is a Sri Lankan citizen of Tamil ethnic origin. He left Sri Lanka on 27 November 1989 and entered France clandestinely in December, using a false passport. On 27 February 1990 he submitted to the French Office for the Protection of Refugees and Stateless Persons (Office français de protection des réfugiés et apatrides, "OFPRA") a request for recognition of his refugee status. In accordance with a circular of 17 May 1985 concerning asylum seekers, he obtained provisional leave to reside in France "with a view to dealings with the OFPRA", and this was renewed on several occasions.

On 18 July 1990 the director of the OFPRA refused the request, on the grounds that Mr Vijayanathan's statements were "vague in places" and not "such as to establish the truth of the facts alleged or prove that his personal fears of persecution were well-founded for the purposes of the Geneva Convention" of 28 July 1951 relating to the Status of Refugees ("the 1951 Convention").

9. On 28 August 1990 Mr Vijayanathan appealed against this decision to the Refugee Appeals Board (Commission des recours des réfugiés, "the Appeals Board"), which on 30 November 1990 dismissed the appeal for the following reasons:

"... By virtue of paragraph A, sub-paragraph 2, of Article 1 of the Geneva Convention of 28 July 1951 and the Protocol signed in New York on 31 January 1967, a refugee is considered to be any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country;

... In order to claim the benefit of the above provisions, Mr Vijayanathan, who is of Sri Lankan nationality, maintains that because of his Tamil origin he defended the cause of his people and was arrested on 11 May 1983 for distributing leaflets; that between 1984 and 1988 he was searched for three times and arrested twice, following attacks on Sri Lankan and Indian military camps; that because he had taken part in the election campaign of a candidate of the EROS movement [Eelam Revolutionary Organisation of Students], he was arrested on 12 March 1989 by Indian troops; that following another attack on two members of the EPRLF [Eelam People's Revolutionary Liberation Front] he was under suspicion and decided to leave Sri Lanka; that he fears for his safety and liberty if he has to return to his country;

... However, the documents in the case-file do not make it possible to regard the facts alleged as having been proved or the fears expressed as being well-founded. The appeal can thus not be upheld."

10. On 10 December 1990 the prefecture of Seine-et-Marne directed the first applicant to leave French territory within one month, and informed him that if he failed to comply he would be liable to expulsion (*reconduite à la frontière*) or a prison sentence and fine.

11. Mr Vijayanathan immediately applied to the European Commission of Human Rights.

He has been unlawfully resident in France since 10 January 1991. He claimed that if returned to Sri Lanka he would run the risk of treatment which was not compatible with Article 3 (art. 3) of the Convention. In support of this claim he produced a number of certificates, which are in the Court's file of the case.

B. Mr Pusparajah

12. The second applicant, Mr Nagalingam Pusparajah, who is also a Sri Lankan of Tamil origin, entered France clandestinely in 1989. On 29 December 1989 he submitted a request for recognition of refugee status to the OFPRA. His request was rejected on 15 May 1990 for the following reasons:

"Mr Pusparajah has not adduced even *prima facie* evidence that his personal case is one of those covered by Article 1, paragraph A, sub-paragraph 2, of the Geneva Convention.

The applicant maintains that he was a leading member of the LTTE movement; that during a search for him carried out by the Indian army his father was killed in his place; and that he was eventually found and arrested on 4 May 1989 when on his way to visit his sick mother. On being released a month later, he decided to leave the country. However, his declarations do not provide proof of the facts alleged."

13. He appealed to the Appeals Board on 26 June 1990. His appeal was dismissed on 25 October 1990, on the grounds that:

"... Pusparajah, who is a Sri Lankan national of Tamil origin, maintains that his family is being persecuted in his country and that he himself, a militant member of the

LTTE, saw his home bombed in 1987 and searched in 1988; and that he cannot return without danger to his country, where he was imprisoned for a month in 1989, on account of his militant activities;

... However, neither the documents in the case-file nor the statements made at the public hearing before the Board make it possible to regard the facts alleged as established or the fears expressed as well-founded; and, in particular, the documents produced and submitted such as a medical certificate issued in Paris on 2 October 1990 and the statement by a priest dated 17 May 1990 are not sufficient in this respect ..."

14. In a letter of 8 January 1991 to the director of the OFPRA the second applicant requested that his case be re- examined. He stated that he had arrived in France in May 1990, that his younger brother had lost his life on 17 November 1990 in fighting between the LTTE and the Sri Lankan army, and that his mother had been seriously injured.

15. On 22 January 1991, the Paris Commissioner of Police (préfet de police) directed him to leave French territory before 22 February 1991, failing which an order for his expulsion could be issued.

Mr Pusparajah did not comply.

His case was re-examined, however, in the context of an application for exceptional leave to remain submitted in July 1991. On 10 October the Commissioner of Police dismissed that application on the grounds that Mr Pusparajah's lawful stay had been of very short duration and that he had not shown that he had had stable employment since entering France or that he had sufficient family ties. He again directed him to leave French territory before 10 November 1991, on pain of the penalties provided for in section 19 of Order no. 45-2658 of 2 November 1945 as amended (see paragraph 23 below).

16. Mr Pusparajah claimed that if returned to Sri Lanka he would be exposed to treatment which was not compatible with Article 3 (art. 3) of the Convention. In support of this claim he produced a number of certificates, which are in the Court's file of the case.

II. RELEVANT DOMESTIC LAW

A. Requests for recognition of refugee status

17. In France, recognition of refugee status as defined by the 1951 Convention and attribution of such status are the exclusive responsibility of the OFPRA and the Appeals Board, which were set up by Law no. 52-893 of 25 July 1952.

18. According to a circular from the Prime Minister, dated 17 May 1985 and relating to asylum seekers, the provisional admission to France of aliens who are seeking asylum requires the issue of two documents in turn: a

provisional residence authorisation "with a view to dealings with the OFPRA.", valid for one month, and a receipt bearing the words "Has requested asylum", issued for a period of three months and renewable, and equivalent to a provisional residence and work permit.

If the OFPRA refuses to grant refugee status, it notifies the person concerned of its decision and sends a copy to the relevant prefecture. The decision is regarded as definitive if the alien does not appeal to the Appeals Board within one month from the date when he actually received notification (ministerial circular of 5 August 1987).

19. The Appeals Board is presided over by a judge from the Conseil d'État and consists of a representative of the OFPRA's board of management and the French delegate of the Office of the United Nations High Commissioner for Refugees ("the UNHCR").

A refusal by the Board can be appealed against to the Conseil d'État. The appeal has no suspensive effect, in that it does not provide grounds for extension of the provisional residence documents (Pizarro Cid judgment of 12 March 1990, unreported). Requests to the OFPRA to re-examine the case and appeals against the rejection of such requests are likewise no grounds for the issue or extension of the receipt marked "Has requested asylum" (circular of 5 August 1987).

B. Directions to leave French territory

20. Where a request for recognition of refugee status has been definitively rejected, the circular of 17 May 1985 requires prefects of departments and the Paris Commissioner of Police, when the person concerned attends at the prefecture, to communicate to him a direction to leave French territory within one month, on pain of court proceedings. After fifteen days he must report to the proper authorities and inform them of the arrangements he has made for organising his departure; the time-limit can be extended if the alien puts forward valid reasons and shows that he has made real preparations for departure, in particular a definite date for departure. On expiry of the last provisional residence authorisation, the relevant authorities must refer to the public prosecutor the offence defined in section 19 of the Order of 2 November 1945 as amended (see paragraph 23 below).

If, however, it appears that there are particular circumstances which would expose the person concerned to serious risks if he returned to his country of origin, the authorities must immediately refer the case for a decision to the Minister of the Interior, by sending him a telegram giving precise details of the person concerned and the facts alleged.

21. In this respect a circular of 5 August 1987 of the Minister of the Interior restates the obligation to refer the matter to the central authorities in cases where there is an objection to repatriation based on the situation in the

country of origin and the alien fears that he will be exposed there to serious risks to his safety or liberty. The decision is taken as soon as information has been received from the French delegation of the UNHCR. The person concerned is then granted a provisional residence authorisation, valid for one month and renewable, during which period he must be requested to find a third country which might be prepared to receive him. If there is a risk of flight, the authorities can ask the Minister of the Interior to issue a compulsory residence order (section 28 of the Order of 2 November 1945).

22. A direction to leave French territory is not served on the alien if he submits or manifests the intention of submitting a request for exceptional admission on the grounds of risks to his safety in the event of his return to his country of origin. In such cases the prefect takes the decision. If no such request is made, the alien is informed of the possibility of submitting written observations on his possible expulsion (in accordance with section 8 of the Decree of 28 November 1983 on relations between the authorities and persons dealing with them), and of the possibility of appealing for the case to be reconsidered, appealing to a higher authority or appealing to the court within two months from service of the direction. However, such an appeal does not have suspensive effect and, on expiry of the period granted to him to prepare his departure, the person concerned becomes liable to an administrative measure of expulsion or a fine and imprisonment for unlawful residence (sections 19 and 22 of the Order of 2 November 1945 and circular of 5 June 1990 of the Minister of the Interior).

C. Expulsion (reconduite à la frontière)

23. The Order of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended by Law no. 86-1025 of 9 September 1986, Law no. 89-548 of 2 August 1989 and Law no. 90-34 of 10 January 1990, provides that:

Section 19

"An alien who enters or resides in France without complying with the provisions of sections 5 and 6 shall be punished by imprisonment for at least one month but not more than one year and a fine of at least 2,000 but not more than 20,000 francs.

The court may also prohibit the person convicted from entering or residing on French territory for a period not exceeding three years. The prohibition automatically entails the expulsion of the convicted person, where appropriate after his prison sentence has been served."

Section 22

"The State's representative in a department, or in Paris the Commissioner of Police, may issue a reasoned decision ordering an alien's expulsion in the following cases:

1. If the alien cannot prove that he entered French territory lawfully, unless his position has been regularised subsequent to his entry;
2. If the alien has remained on French territory on expiry of a period of three months from his entry into France without holding a lawfully issued first residence permit;
3. If an alien who has been refused issue or renewal of a temporary residence permit has remained on French territory for more than one month from the date of notification of the refusal;
4. If the alien has been convicted by a final judgment of counterfeiting, forgery, residence under an assumed name or non-possession of residence permit. Once the alien has been served with the expulsion order, he shall immediately be permitted to inform a lawyer, his consulate or a person of his choice."

Section 26 bis

"An order for the deportation of an alien shall be automatically enforceable by the authorities. The same applies to an expulsion order which has not been challenged before the president of the administrative court or his deputy within the period laid down in section 22 bis of the present Order or which has not been set aside at first instance or on appeal under the conditions laid down in that section."

Section 28

"An alien subject to a deportation order or who is to be expelled, who shows that he is unable to leave French territory by proving that he can neither return to his country of origin nor enter any other country, may by derogation from section 35 bis be compelled by an order of the Minister of the Interior to reside in a specified place where he must report periodically to the police or gendarmerie."

Section 35 bis

"An alien who is to be expelled and is unable to leave French territory immediately may be detained, if this is absolutely necessary, in premises other than penal institutions by a reasoned written decision of a prefect for the time strictly necessary to arrange his departure.

The public prosecutor shall be informed of this immediately.

The alien shall immediately be informed of his rights through an interpreter if he does not understand French.

On expiry of a period of twenty-four hours from the detention decision, the case shall be referred to the president of the tribunal de grande instance or a judge designated by him, who shall then give a ruling by means of an order, after hearing the person concerned in the presence of his legal representative, if any, or after having duly informed the said legal representative, on one or more of the surveillance and supervision measures necessary to ensure his departure listed below:

Surrender to the police or gendarmerie of all identity documents, in particular his passport, in exchange for a receipt serving as proof of identity;

A compulsory residence order;

In exceptional cases, extension of detention in the premises mentioned in the first sub-paragraph of this section.

The order extending detention shall run from expiry of the period of twenty-four hours laid down in this sub-paragraph.

Application of these measures shall end not later than the expiry of a period of six days from the issue of the order mentioned above."

24. These various provisions have not been applied, or at least have not yet been applied, in the cases of Mr Vijayanathan and Mr Pusparajah.

25. The circular of the Minister of the Interior dated 5 June 1990 requires the police to serve the prefectural expulsion order on the person concerned.

An order which it has not been possible to enforce is recorded in the list of wanted persons.

Neither the model forms for service of such orders, annexed to the various circulars, nor the circulars themselves require the alien to be notified of the country of destination when he is served with the expulsion order.

D. Appeals against expulsion orders

26. Section 22 bis of the Order of 2 November 1945 (as amended by Law no. 90-34 of 10 January 1990) provides that:

"An alien who is the subject of a prefectural expulsion order may within twenty-four hours from service thereof apply to the president of the administrative court for the order to be set aside.

The president or his deputy shall take a decision within a period of forty-eight hours from such application. He may proceed to the seat of the ordinary court nearest to the place of detention of an alien who is being detained pursuant to section 35 bis of this Order.

I. The alien may ask the president of the court or his deputy for the assistance of an interpreter and to be shown the case-file containing the documents on the basis of which the challenged decision has been taken.

The hearing shall be in public. It shall take place without submissions from the Government Commissioner (commissaire du Gouvernement) and in the presence of the alien, unless the latter has been duly summoned and fails to attend. The alien shall be assisted by his legal representative if he has one. He may ask the president or his deputy for counsel to be appointed for him.

II. The provisions of section 35 bis of this Order may be applied as soon as the expulsion order has been issued.

That order may not be enforced until the expiry of a period of twenty-four hours from its service or, if the case has been referred to the president of the administrative court or his deputy, until he has taken his decision.

III. If the expulsion order is set aside, the surveillance measures provided for in section 35 bis shall be discontinued immediately and the alien shall be issued with a provisional residence authorisation until the prefect has taken a fresh decision on the matter."

27. Proceedings in respect of prefectoral expulsion orders are governed by Decree no. 90-93 of 25 January 1990 inserting additional provisions after Article R.241 of the Code of Administrative Courts and Administrative Courts of Appeal, and providing inter alia:

Article R.241-1

"The following provisions only shall apply to the submission, investigation and adjudication of applications for the setting aside of prefectoral orders for the expulsion of foreign nationals."

Article R.241-2

"Decisions on applications brought against prefectoral orders for the expulsion of aliens shall be taken by the president of the administrative court or a judge appointed by him, without submissions from the Government Commissioner."

Article R.241-3

"The administrative court with territorial jurisdiction shall be the court in whose district is the office of the prefect who has issued the expulsion order."

Article R.241-4

"The application must include the name and address of the applicant and a statement of the facts and the grounds on which setting aside is requested. It shall be presented in a single copy."

Article R.241-5

"The applications mentioned in Article R.241-1 may be submitted without representation by counsel.

Once his application has been lodged, the alien may request counsel to be appointed for him; the president of the administrative court shall immediately give notice thereof to the president of the bar association for the tribunal de grande instance within whose district the hearing is to be held. The president of the bar association shall make the appointment without delay."

Article R.241-6

"The application must be registered with the registry of the administrative court within twenty-four hours from service of the prefectoral expulsion order.

However, if at the time of service of the order the alien is being detained by the administrative authorities, his application may be validly lodged, within the same twenty-four hour period, either with the said administrative authorities or with the registry of the court before which he appears for the extension of his administrative detention."

Article R.241-9

"The period of forty-eight hours within which the president of the administrative court or his deputy must take a decision shall run from the time when the application is registered with the registry of the court."

Article R.241-11

"If an alien who does not speak French sufficiently well so requests, the president shall appoint an interpreter Such a request may be made as soon as the application to the court is lodged."

Article R.241-12

"The parties may submit pleadings or written observations up to the moment when the case is called."

Article R.241-13

"After the report presented by the president of the administrative court or his deputy, the parties may submit oral observations in person or through counsel. They may also produce documents in support of their pleadings. If these documents provide new evidence, the judge shall ask the other party to examine them and submit his observations thereon to him at the hearing."

Article R.241-14

"The decision shall be pronounced at the hearing."

Article R.241-17

"The operative provisions of the decision, together with the enforcement formula provided for in Article R.209, shall be served there and then on the parties present at the hearing, who shall immediately acknowledge receipt thereof.

If it has not been served there and then, the decision shall be served without delay and by any means on the parties, who shall acknowledge receipt thereof. Service shall

include notification of the possibility of appealing and the time-limit within which an appeal can be brought."

Article R.241-19

"The prefect who signed the challenged order and the alien may appeal against the decision to the president of the Judicial Division of the Conseil d'État or a judge of the Conseil d'État appointed by him."

Article R.241-20

"The period for appealing shall be one month. It shall run against any party to the proceedings from the date on which service was made on that party under the conditions laid down in Article R.241-17, second sub- paragraph."

28. It should be noted that an appeal to the Conseil d'État has no suspensive effect, but the appellant may request the president of the Judicial Division to order a stay of execution of the order (Conseil d'État, Engin judgment of 29 June 1990, Recueil Lebon 1990, p. 190). Such a request becomes devoid of purpose, however, if the order has been enforced before the Conseil d'État gives judgment (Conseil d'État, Hablami judgment of 29 June 1990, Recueil Lebon 1990, p. 191).

29. The ministerial circulars of 25 January and 5 June 1990 state that service of a prefectoral expulsion order shall mention the possibility of bringing the appeal provided for in section 22 bis of the Order of 2 November 1945 and the rights which appellants have in the context of such proceedings. Forms of service have been drawn up in several languages, in order to put aliens in a position to exercise their rights effectively.

30. Finally, in its Ouedjedi judgment of 17 December 1990 (Recueil Lebon 1990, p. 362), the Conseil d'État distinguished between the decision to remove an alien from French territory and the decision as to his country of destination:

"... The argument based on the fact that Mr Ouedjedi would be seriously at risk if he had to return to Algeria cannot be validly relied on in support of an appeal against the impugned [expulsion] order which does not specify the country to which the appellant is to be expelled;

...

... In a separate decision, served on Mr Ouedjedi at the same time as that ordering his detention, the Commissioner of Police decided that the country to which he was to be expelled would be Algeria; ... having regard to the arguments in his application, the appellant must be regarded as having also made submissions for the setting aside of that decision, which was separate from the expulsion order; ... the judgment appealed against must be quashed for failure to reply to those submissions, and this aspect of the case must be examined;

... Although Mr Ouedjedi, in asking for that decision to be set aside, maintains without giving any further details that his return to Algeria would place him at serious risk because of his religious beliefs, he has not shown any particular circumstance such as to constitute a legal impediment to his expulsion to his country of origin; ... he is therefore unable to maintain that the decision contained in the record of service of 20 July 1990 was ultra vires and invalid;"

E. The circular of 25 October 1991

31. A ministerial circular of 25 October 1991, specifically intended to take into account the recent case-law of the Conseil d'État and the European Commission of Human Rights and to ensure compliance with Articles 3 and 8 (art. 3, art. 8) of the Convention, strengthened the system for the protection of aliens who were the subject of measures of removal from French territory. Its aim was to improve both the supply of information to them before such measures were taken and also the relevant administrative procedures.

32. A direction to leave French territory, served on an alien after the right of residence has been refused or after his request for granting of refugee status has been definitively rejected, must now inform him that he may leave voluntarily for the country of his choice; if he does not do so, the expulsion measure will normally be enforced by sending him to the country of which he is a national or which has issued him with a currently valid travel document, or to any other country to which he proves that he may lawfully be admitted. In addition, prefects must notify the alien that he has the possibility of submitting, within a period of fifteen days from service, written observations with reference to the risks he would be exposed to if he were to return to his country of origin.

The circular states that the choice of country of destination is a decision which is distinct from the expulsion, and must in no way affect the lawfulness of the expulsion order. It provides that a note of it must be indicated on the record of the order. Such a decision can be the subject of an appeal, made parallel to the application for the order to be set aside; it will be examined under the same conditions and within the same time-limits, and with the benefit of the safeguards which follow from the suspensive nature of the proceedings.

If the administrative court finds that the order is lawful but annuls the decision as to the country of destination, the prefect must immediately refer the matter to the Minister of the Interior, so that the minister can make a compulsory residence order against the person concerned for a period of one month, generally not renewable, under section 28 of the Order of 2 November 1945 (see paragraph 23 above), in order to give him an opportunity of finding a third country which will admit him.

F. Exceptional leave to remain

33. A circular of the Minister of Social Affairs and the Minister of the Interior dated 25 September 1991 lays down the conditions for examination of applications for exceptional leave to remain submitted by unsuccessful asylum seekers, including Sri Lankans of Tamil origin. It instructs prefects to invite the alien to submit to them in writing, in French, the arguments put forward by him alleging that his safety or liberty would be at risk if he returned to his country of origin. These arguments must be precise, detailed and different from those put forward before the OFPRA or the Appeals Board, so as to allow the OFPRA to re-examine the case. Finally, if the alien shows that in the event of return he would risk being subjected to punishment or treatment contrary to Article 3 (art. 3) of the Convention, or if the arguments adduced appear to be serious and to deserve detailed consideration by the central authorities, prefects are to send the Minister of the Interior a highly detailed report on the person in question and the arguments relied on.

The Minister of the Interior then examines the case in conjunction with the Minister of Foreign Affairs (who may in some cases consult the French diplomatic representatives in the country of origin) and, if appropriate, the UNHCR delegate for France. As stated in the circular of 5 August 1987, the reason militating against the return to his country of origin of an asylum seeker whose request has been dismissed may be connected with the general situation in that country - armed conflict, civil war, or state of emergency, bringing about the suspension of air links, etc.

In such circumstances, measures of removal to the country in question may be provisionally suspended.

G. Practice of the French authorities with respect to Sri Lankan asylum seekers

34. According to information provided by the Government, the OFPRA examines the cases of asylum seekers from Sri Lanka on the basis of a number of criteria:

- geographical origin of the asylum seeker, which makes it possible to determine the seriousness of the alleged fears, according to the movement over time of the scene of fighting;
- political commitment of the person concerned, placing him in opposition to those currently in power;
- membership of certain categories, making the authorities suspicious of the asylum seeker.

35. In addition, the OFPRA works together with the Ministry of the Interior and the Ministry of Foreign Affairs in order to assess whether persons in fear of persecution because of rivalries between Tamil separatist

groups run a real risk from the point of view of Article 3 (art. 3) of the Convention. This assessment takes place on the basis of information received not only from Government representatives (the French Embassy in Colombo) but also from outside sources (publications, the media, expert reports, analyses, etc.). The OFPRA is also in contact with non-governmental organisations (Médecins sans frontières) who are present on the ground and in appropriate cases supply invaluable details and testimony on the development of the local situation. To this may be added the experience built up by the French authorities responsible for processing requests for asylum.

36. According to the Government, the OFPRA and the Appeals Board took 4,760 final decisions in 1990 on requests for asylum by Sri Lankan nationals, 2,617 of whom were granted refugee status. The applicants disputed this before the Commission.

The Government also pointed out that an expulsion order could not be made against such an asylum seeker unless the central authorities had first been consulted.

37. In 1990 only 83 of the 2,400 Sri Lankans whose requests for asylum had been unsuccessful had such orders issued against them. Moreover, 46% of persons whose situation had been regularised within the fifteen months to 1 June 1991 in the Paris region were Sri Lankans.

38. The applicants for their part produced a copy of a decision of the Paris Administrative Court of 4 May 1991, dismissing an appeal which had been brought both against an expulsion order and against the prefect's decision to return the appellant to his country of origin. The court found that:

"... neither the content of the case-file nor the evidence adduced at the hearing is such as to show that the decision to repatriate Mr Neil Nimalaraj to Sri Lanka, his country of origin, would contravene the provisions of Article 3 (art. 3) of the European Convention on Human Rights and Articles 31 and 33 of the Geneva Convention of 28 July 1951; further, the argument based on a violation of Article 3 of the New York Convention on the Prevention of Torture is inadmissible, for want of sufficient information to assess the scope of that argument."

PROCEEDINGS BEFORE THE COMMISSION

39. Mr Vijayanathan and Mr Pusparajah applied to the Commission on 10 December 1990 and 10 January 1991 respectively (applications nos. 17550/90 and 17825/91). They alleged that their repatriation to Sri Lanka, which was imminent following the rejection of their requests for the granting of refugee status in France, would expose them to persecution and treatment prohibited by Article 3 (art. 3) of the Convention.

40. On 14 December 1990 and 20 February 1991 the Commission indicated to the French Government, under Rule 36 of the Commission's Rules of Procedure, that it would be desirable in the interest of the parties and to ensure the proper conduct of the proceedings to refrain from deporting the applicants to Sri Lanka before 8 March 1991. This indication was renewed on various occasions until the referral of the case to the Court.

41. On 3 June 1991 the Commission ordered the applications to be joined (Rule 29 of its Rules of Procedure). It declared them admissible on the following day.

In its report of 5 September 1991 (made under Article 31) (art. 31), it expressed the opinion by nine votes to six that there had not been a violation of Article 3 (art. 3). The full text of the Commission's opinion and of the five separate opinions contained in the report is reproduced as an annex to this judgment*.

THE GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

42. In their memorial the Government asked the Court:

"1. As to locus standi: to hold that the applicants are not victims within the meaning of Article 25 (art. 25) of the Convention;

2. As to admissibility: to uphold the objection that domestic remedies have not been exhausted;

3. As to the merits: to hold that Mr Vijayanathan and Mr Pusparajah have not shown substantial grounds for claiming that they run a real risk of being subjected to treatment contrary to Article 3 (art. 3) of the Convention, and consequently that there has not been ... a violation of those provisions."

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 241-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTIONS

43. The Government's principal arguments, as before the Commission, were that Mr Vijayanathan and Mr Pusparajah were not "victims" and had not exhausted domestic remedies.

44. They argued that the applicants could not become victims until the end of a process which had nothing automatic about it, as was shown by the limited number of expulsions of Sri Lankans of Tamil origin (83 in 1990) compared with the number (2,400) of rejections of requests for asylum (see paragraph 37 above). No measure for their removal had been taken and their repatriation, which would be subject to the strict control of the administrative court, was still hypothetical; even if such a measure were to be taken, the circular of 25 October 1991 (see paragraph 31 above), which had been adopted precisely in the light of recent decisions of the Conseil d'État and the European Commission of Human Rights, removed any ambiguity as to the effectiveness of the system for protection of unsuccessful asylum seekers. Finally, the possible return of the applicants to their own country would in the present circumstances not be arbitrary or unreasonable, in view of the assessment of the general situation in Sri Lanka and having regard to the analyses of the individual cases.

45. The Commission considered that the applicants could not be regarded as faced with an imminent decision of removal to Sri Lanka. The risk of such a decision being adopted and irreversibly enforced was diminished by the existence of the appeal with suspensive effect provided for in section 22 bis of the Order of 2 November 1945 as amended (see paragraph 26 above). Such an appeal admittedly had deficiencies - *inter alia* in the event of service of the expulsion order being followed by notification of the country of destination - but there was no reason to believe that the applicants would not be in a position to raise effectively before the administrative court arguments based on the risks of ill-treatment in Sri Lanka.

46. The Court notes to begin with the difference between the present case and the cases of *Soering v. the United Kingdom* and *Vilvarajah and Others v. the United Kingdom* (judgments of 7 July 1989 and 30 October 1991, Series A nos. 161 and 215). In the former the Home Secretary had already signed the warrant for Mr Soering's extradition to the United States; in the latter the deportation of the applicants to Sri Lanka had taken place during the proceedings before the Commission. It should also be noted that despite the direction to leave French territory (see paragraphs 10 and 15 above), not enforceable in itself, and the rejection of the application for exceptional

leave to remain brought by Mr Pusparajah (see paragraph 15 above), no expulsion order has been made with respect to the applicants. If the Commissioner of Police were to decide that they should be removed, the appeal provided for in section 22 bis would be open to them, with all its attendant safeguards; if they were to attempt to bring such an appeal at present, the courts appealed to would probably declare it inadmissible as being premature or devoid of purpose.

In short, the objection is well-founded. Mr Vijayanathan and Mr Pusparajah cannot, as matters stand, claim "to be the victim[s] of a violation" within the meaning of Article 25 para. 1 (art. 25-1) of the Convention.

47. In view of this conclusion, it is not necessary to examine the Government's other submissions.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that it is unable to consider the merits of the case.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 August 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar