AS TO THE ADMISSIBILITY OF

Application No. 30429/96
by Kamal ARTIN and
Vereniging B,RIT SJALOM
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 27 November 1996, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 19 January 1996 by Kamal ARTIN and Vereniging B,RIT SJALOM against the Netherlands and registered on 1 March 1996 under file No. 30429/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant is a Syrian citizen, born in 1964, and at present residing in the Netherlands. The second applicant is an association with its registered seat in the Netherlands, which works for freedom and justice. Before the Commission the applicants are represented by Mr. J.P.E. Baakman, a legal adviser practising in Haaksbergen, the Netherlands.

The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The particular circumstances of the case

The first applicant entered the Netherlands on 18 October 1992 and requested asylum, or alternatively a residence permit for humanitarian reasons, on 27 October 1992. He pointed out that on 2 May 1992 he had been arrested on suspicion of involvement in the "Riyad el Turk", a communist party in Syria, interrogated about his political activities and tortured. Following his release after 15 days, he had been detained a further six times.

On 24 April 1993 the State Secretary for Justice (Staatssecretaris van Justitie) rejected the first applicant's requests. As regards his request for asylum, the State Secretary for Justice considered that it had not been established that the first applicant had substantial grounds to fear persecution in Syria. In this respect it was noted that there is no communist party with the name "Riyad el Turk", which affected the credibility of the first applicant's account seriously. As regards his request for a residence permit, the State Secretary for Justice recalled that pursuant to Article 11 para. 5 of the Aliens Act (Vreemdelingenwet) the granting of a residence permit could be refused on grounds of public interest, since the Dutch authorities in applying Article 11 para. 5 of the Aliens Act follow a restrictive immigration policy in view of the population and employment situation in the Netherlands. The State Secretary for Justice furthermore considered that since the first applicant's presence in the Netherlands did not serve any specific Dutch interest, and since no compelling humanitarian reasons were considered to exist on the basis of which he could be granted a residence permit, the applicant did not fulfil the conditions for obtaining a residence permit.

On 9 June 1993 the first applicant requested the State Secretary for Justice to review this decision. In support of his request, he submitted a copy of a summons. Furthermore, he alleged that in Syria he had been discriminated against since his religious conviction (christian) prevented him from obtaining employment. He moreover submitted that he did not want to serve in the military.

On 18 November 1994 the State Secretary for Justice rejected the first applicant's request for revision. In this respect, account was taken of the fact that the first applicant had declared that he had not been a member or sympathiser of any political party in Syria. It was also, inter alia, noted that research done by the Netherlands Ministry of Foreign Affairs had shown that the summons submitted by the applicant was not authentic. The State Secretary for Justice decided furthermore that the first applicant would not be allowed to remain in the Netherlands pending any appeal proceedings to be instituted by him.

On 7 December 1994 the first applicant filed an appeal with the Aliens' Chamber (Vreemdelingenkamer) of the Regional Court (Arrondissementsrechtbank) of The Hague sitting at Zwolle (nevenzittingsplaats Zwolle). At the same day he requested the President of the Aliens' Chamber to grant an interim measure (voorlopige voorziening) allowing him to await the outcome of the appeal proceedings in the Netherlands.

The President of the Aliens' Chamber rejected the request for an interim measure on 11 October 1995. Insofar as the first applicant had invoked Article 3 of the Convention, the President found no substantial grounds on the basis of which the existence of a real risk of inhuman treatment on his return to Syria had to be assumed. Since the first applicant's account was considered inconsistent, the President expressed doubts as to its veracity. In this respect, the President noted, inter alia, that as regards his military service the first applicant had submitted a copy of a letter from his father in which it was stated that his son had been in the army and had deserted, whereas the first applicant himself had explained during an interview with the Dutch authorities that he had managed to stay out of the army by giving small presents to an officer. According to the Dutch authorities, however, the first applicant was registered in Syria as having served in the army between 1987 and 1989.

Further investigation was not held to be able to contribute to the appeal proceedings. The President, therefore, considered - pursuant to Article 8:86 of the Administrative Law Act - that there were grounds to decide simultaneously on the appeal instituted by the first applicant and declared this appeal ill-founded on the same grounds as

set out above.

B. Relevant domestic law

Article 8:86 (1) of the Administrative Law Act (Algemene wet bestuursrecht) provides as follows:

<Original>

> "Indien het verzoek (om voorlopige voorziening) wordt gedaan indien beroep bij de rechtbank is ingesteld en de president van oordeel is dat na de zitting ... nader onderzoek redelijkerwijs niet kan bijdragen aan de beoordeling van de zaak, kan hij onmiddellijk uitspraak doen in de hoofdzaak."

<Translation>

> "When the request (to grant an interim measure) is made at the time when an appeal has already been filed with the Regional Court and the President considers that following the hearing further investigation cannot reasonably contribute to the determination of the merits of the case, he may simultaneously decide on the appeal instituted."

Article 33e of the Aliens Act (Vreemdelingenwet) provides as follows:

<Original>

> "Artikel 37 van de Wet op de Raad van State is niet van toepassing op de beslissingen van de rechtbank te 's-Gravenhage in beroepen tegen beschikkingen, gegeven op grond van deze wet."

<Translation>

> "Article 37 of the Act on the Council of State is not applicable to decisions of the Regional Court of The Hague concerning appeals against administrative decisions, taken pursuant to this Act."

Article 37 (1) of the Act on the Council of State reads, insofar as relevant, as follows:

<Original>

> "Een belanghebbende en het bestuursorgaan kunnen bij de Afdeling (Bestuursrechtspraak) hoger beroep instellen tegen een uitspraak van de rechtbank als bedoeld in Afdeling 8.2.6 van de Algemene wet bestuursrecht en tegen een uitspraak van de president van de rechtbank als bedoeld in artikel 8:86 van die wet ..."

<Translation>

> "The parties concerned may file an appeal with the (Administrative Law) Division against a decision of the Regional Court as referred to in Section 8.2.6 of the Administrative Law Act and against a decision of the President of the Regional Court as referred to in Article 8:86 of that Act ..."

COMPLAINTS

1. The applicants complain that the first applicant's expulsion would expose him to a real risk of being subjected to a treatment contrary to Article 3 of the Convention.

2. The applicants furthermore complain that the manner in which the first applicant's asylum proceedings before the Aliens' Chamber of the Regional Court were conducted, discloses a violation of Article 6 para. 1 and Article 13 of the Convention.

In this respect the applicants argue that the first applicant has been withheld a fair trial since the President of the Aliens' Chamber, in dealing with the request for an interim measure, decided simultaneously - pursuant to Article 8:86 of the Administrative Law Act - on the appeal. As a consequence, the first applicant was denied a public hearing within the meaning of Article 6 para. 1 as the hearing which took place was only supposed to concern the request for an interim measure.

3. Finally, the applicants complain under Article 14 in conjunction with Article 6 of the Convention of the difference in treatment in administrative proceedings between aliens and other civilians. In this respect they point out that, although Article 8:86 of the Administrative Law Act is applicable to all administrative proceedings, pursuant to Article 33e of the Aliens Act no appeal lies against decisions reached by the Regional Court in cases concerning foreigners.

THE LAW

Concerning the second applicant

The Commission recalls that in order to claim to be a victim of an interference with a right under the Convention, an applicant must be "directly affected" by the measure complained of (see e.g. Eur. Court HR Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, p. 22, para. 44).

The Commission notes that the second applicant has not been subject to any measure in respect of which complaints have been raised in the present application. Furthermore, the applicants have not substantiated how the second applicant is affected by the decisions taken in respect of the first applicant. Consequently, the Commission finds that the second applicant cannot be considered a victim within the meaning of Article 25 (Art. 25) of the Convention.

It follows that, to the extent that the complaints have been brought by the second applicant, they must be rejected as incompatible ratione personae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

Concerning the first applicant

1. The first applicant alleges that his expulsion to Syria will expose him to torture or inhuman and degrading treatment in breach of Article 3 (Art. 3) of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission observes that the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 (Art. 3), to control the entry, residence and expulsion of aliens (cf. Eur. Court HR, Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102). Furthermore it must be noted that the right to political asylum is not contained in either the Convention or its Protocols. However, an expulsion decision may give rise to an issue under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled (ibid.,

p. 34, para. 103). A mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of this provision (ibid., p. 37, para. 111).

The Commission also recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). An assessment of whether such a treatment is in breach of this provision, must be a rigorous one in view of the absolute character of this Article (ibid., p. 36, paras. 107 and 108).

As regards the present case, the Commission notes that in his application the first applicant did not substantiate his complaint under Article 3 (Art. 3) of the Convention.

The Commission further shares the considerable doubts expressed by the President of the Aliens' Chamber as to the credibility of the first applicant's account. The Commission notes, in particular, that since the first applicant stated to the Dutch authorities that he had not been a member or sympathiser of any political party in Syria, it appears unlikely that documents of the communist party would have been found in his house. Moreover, the summons which the first applicant submitted to the State Secretary for Justice in support of his request for a review of the negative decision, was found by the Dutch authorities not to be authentic. As regards his military service, the first applicant's account is very inconsistent and therefore not convincing: in a copy of a letter from his father which he submitted during the domestic proceedings it is stated that he had been in the army and that he had deserted, whereas the first applicant himself had explained during an interview with the Dutch authorities that he had managed to stay out of the army by giving small presents to an officer. On the other hand, according to the Dutch authorities the first applicant is registered in Syria as having served in the army between 1987 and 1989.

The Commission concludes that is has not been established that there are substantial grounds for believing that the first applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if returned to Syria.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The first applicant further complains that the proceedings in respect of his request for asylum or a residence permit did not meet the requirements of Article 6 para. 1 (Art. 6-1) of Convention.

This provision, insofar as relevant, stipulates:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

The Commission recalls however that it has constantly held that the procedures followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled do not involve the determination of civil rights within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (cf. e.g. No. 8118/77, Dec. 19.3.81, D.R. 25 p. 105 and No. 13162/87, Dec. 9.11.87, D.R. 54 p. 211). Accordingly, the Commission must reject this part of the application as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 27 para. 2 (Art. 27-2).

3. The first applicant also invokes Article 13 (Art. 13) of the Convention and contends that under Dutch law he did not have at his disposal an effective remedy to bring his complaint of a violation of

Article 6 (Art. 6) before a domestic authority.

Article 13 (Art. 13) provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that according to the Convention organs' established case-law, this provision has been interpreted as requiring the existence of a remedy before a national authority for anyone who may make an "arguable claim" that his rights under the Convention have been violated (cf. e.g. Eur. Court HR, Boyle and Rice v. United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52). In view of the above conclusion that the complaints raised under Article 6 (Art. 6) of the Convention are incompatible with the provisions of the Convention, it follows that the first applicant has no "arguable claim" (cf. No. 10427/83, Dec. 12.5.86, D.R. 47 p. 85). Consequently, this part of his complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The first applicant finally complains that the difference made in Article 33e of the Aliens Act in conjunction with Article 37 of the Act on the Council of State between procedures concerning the eligibility for asylum or a residence permit on humanitarian grounds and other administrative procedures, amounts to discrimination contrary to Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention, which provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Commission reiterates that according to the Convention organs' established case-law, Article 14 (Art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (Art. 14) does not necessarily presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (cf. Eur. Court HR, Abdulaziz, Cabales and Balkandali v. United Kingdom judgment of 28 May 1985, Series A no. 94, p. 35, para. 71 and Eur. Court HR, Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 22).

Given that the Commission has found that the first applicant's complaint under Article 6 (Art. 6) does not fall within the ambit of this provision, it follows that similarly the complaint under Article 14 is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber