AS TO THE ADMISSIBILITY OF

Application No. 26998/95
by Adeyemi ADEGBIE
against Austria

The European Commission of Human Rights sitting in private on 9 April 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
P. LORENZEN
K. HERNDL

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 27 December 1994 by Adeyemi ADEGBIE against Austria and registered on 7 April 1995 under file No. 26998/95;

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

Having regard to the observations submitted by the respondent Government on 23 June 1995 and the observations in reply submitted by the applicant on 23 August 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1964, is a national of Nigeria. He was detained with a view to his expulsion on 10 December 1994 and is currently held at the Franz Josef Hospital in Vienna. Before the Commission he is represented by Mr. R. Kohlhofer, a lawyer practising in Vienna.

The facts of the case, as they have been submitted by the

parties, may be summarised as follows.

The applicant left Nigeria following a failed coup d'état in 1985, which had allegedly been planned by his uncle. He submits that his uncle and his supporters were executed and that he himself was wanted by the Nigerian authorities. He returned once to Nigeria in 1989. Upon being warned by his mother that he was still not safe there, he left again.

In September 1986 the applicant went to Austria. He did not apply for asylum. In 1990 he married an Austrian national, who is a civil servant by profession.

In 1993 the Vienna Federal Police Authority (Bundespolizei-direktion) informed the applicant that it planned to impose a residence prohibition on him. The applicant submits that as a consequence he suffered a serious mental disturbance and that he had to spend some months in a psychiatric hospital. He also requested the Federal Police Authority to refrain from issuing a residence prohibition against him on the ground of his illness.

On 25 November 1993 the Vienna Federal Police Authority imposed a ten years' residence prohibition on the applicant.

On 10 February 1994 the Vienna Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal.

The Authority referred to S. 18 para. 1 and para. 2 (1) and (2) of the Aliens Act, which provide that a residence prohibition has to be issued against an alien, inter alia, if he has been convicted more than once for similar offences by a domestic court, or if a fine has been imposed on him more than once for an offence under the Aliens Act by an administrative authority. The Public Security Authority found that the Vienna District Criminal Court (Strafbezirksgericht), on 7 June 1988, had convicted the applicant of assault and had imposed a fine. Further, on 15 February 1991 and on 23 February 1993 the same Court had convicted him of possession of drugs and had imposed fines. Moreover, in 1989 and 1993, the Vienna Federal Police Authority had imposed fines for illegal residence on him. Thus, the requirements of S. 18 of the Aliens Act were met.

Further, the Vienna Public Security Authority, referring to the applicant's marriage with an Austrian national, found that the residence prohibition constituted an interference with the applicant's right to respect for his private and family life. However, it was necessary for the aims set out in Article 8 para. 2 of the Convention, namely for the prevention of disorder and the protection of health. Given that the applicant had been convicted twice under the Drug Offences Act (Suchtgiftgesetz) and had, moreover, been fined twice for illegal residence, the public interest in issuing the residence prohibition outweighed his interest in staying in Austria.

On 13 June 1994 the Constitutional Court (Verfassungsgerichtshof) dismissed the applicant's complaint as lacking sufficient prospects of success.

Subsequently, the applicant lodged a complaint with the Administrative Court (Verwaltungsgerichtshof). He requested that the decisions relating to the residence prohibition against him be quashed for errors of law and for defects in the proceedings.

As regards errors of law, he submitted that the contested decisions violated his right to respect for his private and family life. In particular, he complained that the competent authorities had failed to duly weigh his interest in staying in Austria against the public interest of issuing a residence prohibition against him. Although he had been convicted once for assault and twice for

possession of drugs, the amounts of the fines imposed, AS 3,000, 12,000 and 18,000 respectively, showed that all three convictions had concerned minor offences. Moreover, his wife, who was an Austrian civil servant, could not be expected to follow him to Nigeria.

As regards defects in the proceedings, the applicant submitted that the competent authorities had not heard his wife despite his requests, which were inter alia aimed at showing that his wife could not be expected to follow him to Nigeria, and that he was well integrated in his wife's family. Thus, they had failed to establish the relevant facts and had not been in a position to carry out a true assessment of his family situation.

On 3 November 1994 the Administrative Court dismissed the applicant's complaint. It found that the contested residence prohibition served aims set out in Article 8 para. 2 of the Convention, namely the prevention of disorder and crime and the protection of health. Further, the Public Security Authority had duly weighed the interests involved. Given the particular dangerousness of drug offences, the public interest weighed more heavity than the private interest, even in cases where an alien was completely integrated. Thus, the authority did not have to take evidence as requested by the applicant.

On 10 December 1994 the applicant was arrested and detained with a view to his expulsion. The applicant submits that he informed the competent authority of his mental illness and stated that the detention would endanger his life. A week after his arrest the applicant started a hunger strike. He submits that he was thereupon put in solitary confinement in a dark cell and that his medicine, which he needed in the context of his mental illness, was not handed out to him, on the ground that it could not be taken without food. On 12 January 1995 he attempted to commit suicide. He was taken to hospital but later returned to the detention centre. On 2 February 1995 he made a further attempt to commit suicide. Since then he has been detained at the Franz Josef Hospital in Vienna.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the residence prohibition against him violates his right to respect for his family life.

2. The applicant complains under Article 3 of the Convention that his expulsion to Nigeria would expose him to a risk of being tortured or of being subjected to inhuman or degrading treatment.

3. Further, the applicant submits that the conditions of his detention, prior to his transfer to hospital, constituted inhuman treatment within the meaning of Article 3 of the Convention. He submits in particular that he was held in solitary confinement in a dark cell after he started his hunger strike, that he was refused the medicine he needed as treatment for his mental illness and that the suicide risk of his case was not taken seriously.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 December 1994 and registered on 7 April 1994.

On 13 April 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 23 June 1995. The applicant replied on 23 August 1995.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the Convention that the residence prohibition against him violates his right to respect for his family life.

Article 8 (Art. 8) of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government submit that the residence prohibition imposed on the applicant did not interfere with his right to respect for his family life. Article 8 (Art. 8) of the Convention did not confer on married couples a right of choice of the place of their residence. Therefore, the applicant's wife could be expected to follow him to Nigeria. But even assuming that there was an interference with the applicant's right to respect for his family life, such interference was justified under paragraph 2 of Article 8 (Art. 8-2). The residence prohibition imposed on the applicant was in accordance with the law and pursued a legitimate aim, namely the maintenance of public safety and the prevention of disorder and crime. The applicant had twice been convicted of possession of drugs and drug crimes posed a particular threat to public safety. The residence prohibition was also necessary in a democratic society, as the Austrian authorities could reasonably conclude that the applicant's further stay in Austria would run counter to the above-mentioned public interest. The interference thus did not exceed the margin of appreciation afforded to the Contracting States.

This is contested by the applicant. He submits that his wife, an Austrian civil servant, could not be expected to follow him to Nigeria if he were expelled, since in this case she would have to change radically her social environment and to give up her employment as a civil servant. Furthermore, the residence prohibition was not necessary in a democratic society. The competent authorities did not duly take his interest in staying in Austria into account in their view in case of particularly dangerous crimes like drug offences the private interest of the alien was regularly outweighed by the public interest. However, he had only been convicted of using drugs and the Austrian authorities should therefore have made a distinction between petty offences like the mere consumption of drugs and serious offences like selling drugs.

The Commission finds that this complaint raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This aspect of the case cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

2. The applicant complains under Article 3 (Art. 3) of the Convention that his expulsion to Nigeria would expose him to a risk of being tortured or of being subjected to inhuman or degrading treatment.

Article 3 (Art. 3) of the Convention reads as follows:

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

The Commission recalls that the expulsion by a Contracting State of an individual may give rise to an issue under Article 3 (Art. 3) of the Convention and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment prohibited by the said Article 3 (Art. 3) in the country to which he or she is to be expelled (see No. 12122/86, Dec. 16.10.86, D.R. 50, p. 268; Eur. Court H.R., Cruz Varas judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70; Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). A mere possibility of ill-treatment is not in itself sufficient (Vilvarajah and Others judgment, loc. cit., p. 37, para. 111).

However, having regard to the applicant's submissions and on the basis of the material in the file, the Commission finds that the applicant has failed to show that his expulsion to Nigeria would expose him to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Lastly, the applicant complains under Article 3 (Art. 3) that the conditions of his detention, prior to his transfer to hospital, were inhuman.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 3 (Art. 3) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Commission recalls that with regard to the allegation of treatment contrary to Article 3 (Art. 3) of the Convention, a complaint to the Independent Administrative Panel (Unabhängiger Verwaltungssenat) concerning the exercise of direct administrative authority and coercion constitutes a sufficient and effective remedy for the purpose of Article 26 (Art. 26) of the Convention (see No. 18896/91, Dec. 20.10.93, unpublished; No. 23829/94, Dec. 17.5.95, unpublished).

The Commission notes, however, that the applicant did not lodge a complaint with the Independent Administrative Panel or made use of any other existing domestic remedy.

It follows that in this respect the applicant did not comply with the requirement of exhaustion of domestic remedies stipulated by Article 26 (Art. 26) of the Convention.

This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission,

by a majority,
DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint that the residence prohibition against him violates his right to respect for his family life;

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)