AS TO THE ADMISSIBILITY OF

Application No. 41088/98
by Thayaparan AMIRTHALINGAM
against Germany

The European Commission of Human Rights sitting in private on 18 September 1998, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
M.A. NOWICKI
B. CONFORTI
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

Mr M. de SALVIA, 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 2 February 1998 by Thayaparan AMIRTHALINGAM against Germany and registered on 4 May 1998 under file No. 41088/98;

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 applicant is a citizen of Sri Lanka, of Tamil ethnic origin and born in 1975. He resides in Essen.

In the proceedings before the Commission he is represented by Mr Arthur Heppner who resides in Essen-Kettwig.

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

On 22 February 1996 the applicant applied for political asylum in Braunschweig.

When interviewed on 4 March 1996 before the Federal Office for Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge) the applicant stated that he lived in Jaffna. The Sri Lankan army had attacked his district, killing people and destroying property. In August 1995 members of the LTTE (a Tamil separatist group, the Liberation Tigers of Tamil Eelam) contacted him and tried to compel him to join this group. He refused and went with his father to Colombo. In Colombo he was arrested and harassed on several occasions by the security forces. Following a bomb explosion on 20 October 1995, houses and stores were searched by the security forces. He was, however, not personally concerned by these measures, but as a Tamil he was continuously exposed to a risk of Human Rights violations by the security forces, including arbitrary arrest, torture, detention and disappearance. On 11 November 1995 his father arranged for him to leave Colombo by plane. He went to Ukraine via Saudi Arabia and Bulgaria. He stayed for two and a half months in Kiev, before being taken by bus to the German border which he crossed on foot on 20 February 1996.

On 5 March 1996 the Federal Office for Refugees dismissed the applicant's request for political asylum and ordered him to leave Germany.

The action filed by the applicant against this decision was rejected by the Braunschweig Administrative Court (Verwaltungsgericht) on 27 November 1996.

The Court noted that the applicant was able to leave Sri Lanka legally with a regular flight and to travel without problems to Ukraine. According to the Court, the general risks as a consequence of a situation of war or civil war did not constitute persecution justifying political asylum. Moreover, the applicant had failed to show that he had a well-founded fear of persecution in Sri Lanka.

On 9 June 1997 the Federal Office for Refugees dismissed a renewed request for asylum (Asylfolgeantrag) lodged by the applicant.

The applicant filed an action against this decision with the Gelsenkirchen Administrative Court.

On 14 January 1998 the Essen Aliens Office (Ausländerbehörde) ordered that the applicant be returned to Sri Lanka on 4 February 1998.

On 2 February 1998 the applicant filed a request for interim judicial protection, i.e. to stay the execution of the expulsion order. In support of this request he submitted a letter of the Forum for Human Dignity in Colombo of 3 November 1997 which contained new information on the general situation of Tamils in Sri Lanka. The applicant submitted that, if returned to Sri Lanka, his life would be in danger and he would be arrested at the airport in Colombo, as all young people of Tamil origin were arrested in that country without any reason and their whereabouts were not known.

At an unknown date the Gelsenkirchen Administrative Court dismissed this request for interim judicial protection.

The main proceedings concerning his renewed request for asylum are still pending before the Gelsenkirchen Administrative Court.

COMPLAINTS

Without invoking any specific provision of the Convention, the applicant complains about his envisaged expulsion to Sri Lanka where he fears reprisals and arbitrary detention on account of his ethnic origin. According to him, the legal provisions of the German asylum legislation are applied too strictly and humanitarian considerations should be taken into account to a greater extent.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 February 1998. On 5 February 1998 the President of the Commission decided not to apply Rule 36 of the Commission's Rules of Procedure. The application was registered on 4 May 1998.

THE LAW

The applicant complains about the refusal of political asylum and his envisaged expulsion to Sri Lanka.

Article 3 of the Convention states:

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

The Commission recalls that Contracting States have the right, as a matter of well-established international law and subject to their obligations under international treaties including the Convention, to control the entry, residence and expulsion of aliens. Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols (see Eur. Court HR, Vilvarajah and others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, para. 102). However, expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of the State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see Eur. Court HR, Ahmed v. Austria judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, No. 26, p. 2206, paras. 38 and 39; No. 21803/93, Dec. 8.9.93, D.R. 75, p. 264).

The Commission further recalls that the mere possibility of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 of the Convention (see the above-mentioned Vilvarajah and others v. United Kingdom judgment of 30 October 1991, Series A no. 215, p. 37, para. 111).

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

The Commission notes that the applicant failed to lodge a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht) against the decision of the Gelsenkirchen Administrative Court refusing to grant him interim judicial protection against the execution of the

expulsion order of the Essen Aliens Office of 14 January 1998. The Commission further notes that the main proceedings concerning the applicant's renewed request for asylum are still pending before the Gelsenkirchen Administrative Court.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and that the application must be rejected under Article 27 para. 3 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission