AS TO THE ADMISSIBILITY OF

Application No. 40866/98
by Hüseyin, Krymet, Berivan, Cevahir, Canan and Özlem ATAK
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 4 April 1998 by Hüseyin ATAK against Germany and registered on 22 April 1998 under file No. 40866/98;

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 first and second applicant are husband and wife, both born in 1961, and the four other applicants are their children, born in 1981, 1983, 1987 and 1989 respectively. They are Turkish citizens of Kurdish origin and reside at present in Paderborn.

In the proceedings before the Commission they are represented by Mr Hubert Heinhold and partners, a law firm in Munich (München).

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

On 7 November 1990 the applicants arrived in Germany. On 8 November 1990 they applied for political asylum. They submitted that they were persecuted for political reasons by the Turkish State and feared to be killed. The first applicant submitted that in 1975, 1976 he became a supporter of the TKP/ML. He had worked as a messenger for this organisation, had spread the ideas of that group and given assistance to the guerilla fighters. Following an armed dispute between members of the TKP/ML and the Turkish security forces on 31 January 1991 in Nazimiye the Turkish authorities had tried to arrest him.

The second applicant had submitted that she had been continuously oppressed in Turkey, like all the inhabitants of her village. The police forces had been always present in the village. Once she had been taken to the police station. She was told that her husband supported the guerilla fighters. When her house had been searched by the police, her child had been beaten.

On 6 June 1991 the Federal Office for Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge) dismissed the requests for asylum.

The Federal Office found that, although having been to a certain extent politically active, the first applicant had not shown that he had a well-founded fear of political persecution in Turkey justifying to grant him asylum. In particular he had failed to submit

evidence showing that he was a member of the TKP/ML. Had he been an active supporter of this organisation and had he participated in its activities, as he pretended, he would have been able to give specific details concerning this organisation or at least concerning his own activities. However, he provided only information which was generally accessible to everybody.

Furthermore the indictment preferred by the Prosecutor's Office to the Erzincan Security Court, which the applicant had submitted, appeared to be false and, in any event, its contents were in contradiction to the first applicant's oral statements.

As to the first applicant's submission that he had left Turkey with a forged passport, but containing his personal data, the Federal Office found that, had he really been persecuted, it was unlikely that he would have left the country with a passport containing his correct personal data. Moreover, if the security forces had had an interest in prosecuting the first applicant, it was unlikely that they would have allowed him to leave the country.

The Federal Office considered that the applicants' remaining submissions were not substantiated. Having regard to reports on the situation in Turkey with regard to persecution of Kurds and allegations of torture, it found no indication that persons deported from Germany had been subjected to torture or ill-treatment in Turkey.

On 21 January 1992 the Meschede Aliens Office (Ausländerbehörde) ordered the applicants to leave the German territory within one month following the date of the final decision rejecting their request for asylum and ordered their deportation in case they should not leave voluntarily. By a judgment of 14 November 1992 the Arnsberg Administrative Court (Verwaltungsgericht) dismissed the action filed by the applicants against the refusal of asylum. The Administrative Court found that the applicants had failed to show any credible reasons in support of their request for asylum.

On 24 May 1993 the Administrative Court of Appeal of the land of North Rhine-Westphalia (Oberverwaltungsgericht für das Land Nordrhein-Westfalen) dismissed the applicants' request for leave to appeal (Antrag auf Zulassung der Berufung). The Court of Appeal found that the applicants had failed to show that their case raised any question of fundamental importance.

On 16 December 1993 the Federal Constitutional Court (Bundesverfassungsgericht) declined to accept the applicants' constitutional complaint (Verfassungsbeschwerde) for a decision on the ground that it was inadmissible for lack of substantiation.

On 5 January 1994 the applicants renewed their request for asylum (Asylfolgeantrag). They submitted that in the meantime the first applicant had actively taken part in meetings and political events organised by the TPK/ML in Germany. On 30 October 1993 he had himself co-organised a demonstration in Cologne in connection with the massacre by the Turkish security forces in Lice. Moreover, he had participated in a meeting on 18/19 December 1993 celebrating the 100th anniversary of Mao Tse-Tung. At these meetings he had given speeches and had carried flags. It could therefore be assumed that the Turkish secret service and the Turkish representations abroad had observed the first applicant's activities. If he was sent back to Turkey, he would be exposed to the risk of being charged under Article 8 of the Turkish Anti-Terror Law of 12 April 1991 for having made oral propaganda or having held assemblies, demonstrations or manifestations against the indivisible integrity of the Turkish Republic. The members of his family would also be exposed to the risk of political persecution and detention in Turkey .

On 9 February 1994 the Federal Office for Refugees refused to initiate new asylum proceedings on the ground that the first applicant's political activities in Germany did not give rise to a right to political asylum. The Federal Office observed that only persons who had a leading role in activities against the Turkish Government in Germany ran the risk of persecution by the Turkish State. The first applicant's activities in Germany, however, did not attain this level.

On 17 February 1994 the applicants filed an action with the Arnsberg Administrative Court to challenge the decision of 9 February 1994.

On 11 October 1996 the applicants applied for interim judicial protection, i.e. to stay the execution of the decision of 21 January 1992 ordering them to leave Germany. They submitted in particular that a warrant of arrest had been issued by the Turkish authorities against a brother of the first applicant who lived at present in France.

This request was rejected on 6 November 1996 by the Arnsberg Administrative Court. The court pointed out that the applicants could have submitted these reasons in the first set of proceedings since at their first interview on 15 November 1990 their brother had already resided in France. The applicants, who had been represented by counsel, should at least have submitted the allegedly new reasons within the legal time-limit of three months. Furthermore the warrant of arrest submitted by the applicants appeared to be false.

On 11 March 1997 the protestant church community in Lendringsen granted the applicants so-called church asylum (Kirchenasyl), thus giving them shelter and protecting them from being deported by the German authorities.

A further request for interim judicial protection lodged by the applicants was dismissed by the Arnsberg Administrative Court on 24 March 1997.

On 21 April 1997 the applicants filed complementary observations to their action of 17 February 1994 and renewed their request for interim judicial protection submitting new evidence, in particular publications in the media about their case and their opposition to the present Turkish Government.

On 13 May 1997 the Arnsberg Administrative Court dismissed the request for interim judicial protection. The Administrative Court considered that the press articles submitted by the applicants did not describe any specific political activities of the first applicant. The Court concluded that these press articles on the applicants' situation and in particular on the first applicant's situation as asylum seeker did not expose them to any real risk of persecution by the Turkish authorities.

On 3 June 1997 the applicants filed further complementary observations to their pending action of 17 February 1994.

On 21 August 1997 the applicants requested again to be granted interim judicial protection. This request was dismissed on 29 August 1997 by the Arnsberg Administrative Court.

The Court noted that the applicants were obliged to leave Germany according to the decision of 21 January 1992. They had been granted "church asylum". Furthermore, political interventions in favour of the applicants had prevented the Aliens Office from deporting the applicants. The applicants had not shown and there was no reason to suppose that they were going to be expelled in the immediate future. The Court confirmed its refusal to adopt a religious and/or political interpretation of the law. It stressed that its obligation to assess the evidence could not be replaced by the conviction of the applicants' supporters. The Court observed in particular that the applicants had failed to submit new facts which could give rise to a more favourable decision. The reports and articles published in the media concerned the general situation of Kurds in Turkey, but not any specific state hostile activities in particular of the first applicant in his native country. The Court also referred to its previous findings according to which the general reference to submissions made in the first proceedings was not sufficient to grant interim judicial protection. Moreover, the applicants' lawyers had failed to show the pertinence of the requested interrogation of new witnesses for the present case.

In a careful and detailed reasoning the court finally explained why the taking of evidence as offered by the applicants, including the hearing of witnesses, would not serve any useful purpose. Even if true, the alleged facts were not relevant and could therefore not result in a more favourable decision. Thus the proposed evidence, insofar as sufficiently substantiated, was not conclusive.

On 6 October 1997 the applicants lodged a constitutional complaint with the Federal Constitutional Court, invoking Article 1 (human dignity), Article 3 (equality before the law), Article 19 para. 4 (right to access to a court), Article 103 (right to a

hearing in accordance with the law), and Article 16 a (right to asylum) of the Basic Law (Grundgesetz).

On 20 October 1997 the Federal Constitutional Court declined to accept the applicants' constitutional complaint for a decision.

The main proceedings are still pending before the Arnsberg Administrative Court.

COMPLAINTS

1. The applicants complain about their envisaged expulsion to Turkey where they would allegedly be subjected to treatment in breach of Article 3 of the Convention. In particular the first applicant fears reprisals and imprisonment on account of his former political activities in Turkey and his recent political activities in Germany. The applicants submit that Kurds who have been expelled to Turkey have been arrested, tortured or disappeared. Furthermore, criminal proceedings have been brought against these persons in accordance with the Anti-Terror Law. The first applicant points out that he had actively participated in 23 political events in connection with the situation of Kurds in Turkey. He had been the president of two associations in Dortmund representing the interests of the Kurdish people. One of these associations supports the PKK (Kurdish Workers Party). Moreover, at least thirteen articles were published in various newspapers describing the applicants' case. Three times their case was commented upon on television. The Turkish Government are thus aware of the first applicants' political activities as a Turkish citizen of Kurdish origin belonging to the opposition.

The applicants consider that the concentration of facts and circumstances including the general situation in Turkey, seen as a whole, justify the conclusion that there is a real risk of inhuman or degrading treatment, if they return.

2. The applicants also complain that they were not granted a fair hearing in accordance with Article 6 para. 1 of the Convention, as

regards their renewed request for asylum and the dismissal of their requests for interim judicial protection. They complain in particular of the assessment of the evidence by the Arnsberg Administrative Court.

3. The applicants finally complain that the envisaged expulsion to Turkey breaches their right to respect of their family life within the meaning of Article 8 of the Convention as there is a high probability that the first applicant will be sentenced to imprisonment in Turkey and be separated from his family.

THE LAW

1. The applicants complain that, if returned to Turkey, they will be arrested and subjected to a treatment contrary to Article 3 of the Convention, which 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).

However, 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).

The Commission has examined the circumstances of the present case as they have been submitted by the applicants. The Commission attaches importance to the fact that the personal circumstances of the first applicant had been carefully considered by the Arnsberg Administrative Court and notes that the Arnsberg Administrative Court considered the applicants' allegations concerning a risk of treatment contrary to

Article 3 of the Convention as unsubstantiated and in part as being contradictory and not credible.

The Commission thus concludes, on the evidence before it, that the situation of which the applicant complains is not such as to raise an issue under Article 3 of the Convention.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicants also complain that the proceedings concerning their renewed request for asylum and the refusal to grant them interim judicial protection, i.e. to stay the execution of the decision of 21 January 1992 ordering to leave Germany, were not fair.

They allege a violation of Article 6 para. 1 of the Convention which provides, insofar as relevant, as follows:

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

However, the Commission has constantly held that the procedure followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled are of a discretionary, administrative nature, and do not involve the determination of civil rights within the meaning of Article 6 par. 1 of the Convention (cf. No. 13162/87, dec. 9.11.87, D.R. 54, p. 211).

Accordingly the Commission must reject this aspect of the application as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 27 para. 2.

3. The applicants finally complain that their expulsion would amount to a violation of the right to respect for their family life, as guaranteed under Article 8 para. 1 of the Convention. They submit that, if returned to Turkey, the first applicant would be arrested and sentenced to imprisonment and thus separated from his family.

Article 8 provides 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."

However, insofar as the complaints can be regarded as raising the responsibility of the German Government, the Commission is not required to decide whether or not the facts submitted by the applicants disclose any appearance of a violation of Article 8 of the Convention as the applicants failed to raise either in form or in substance in the proceedings before the Federal Constitutional Court the complaint which is now made. The applicants have not, therefore, in accordance with Article 26 of the Convention, complied with the condition as to the
exhaustion of domestic remedies. It follows that this part of 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