AS TO THE ADMISSIBILITY OF

Application No. 25894/94
by Shammsuddin BAHADDAR
against the Netherlands

The European Commission of Human Rights sitting in private on 22 May 1995, the following members being present:

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

Mr. M. de SALVIA, Deputy 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 December 1994 by Shammsuddin BAHADDAR against the Netherlands and registered on 9 December 1994 under file No. 25894/94;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 17 February 1995 and the observations in reply submitted by the applicant on 7 and 10 April 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Bangladeshi citizen, born in 1966, and currently residing in the Netherlands. Before the Commission he is represented by Mrs. R. Niemer, a lawyer practising in Amsterdam.

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

A. The particular circumstances of the case

The applicant is a Buddhist and belongs to the Chakma tribe in the Chittagong Hill Tracts region of Bangladesh, which is the most sparsely populated area of that country and originally inhabited by tribal groups of which the Chakma is the largest. Subsequent Bangladeshi Governments have encouraged large numbers of Bangladeshi to settle in the area, causing the original population to fear a loss of identity. Bangladeshi Governments have also tried forcefully to relocate the tribal population to so-called "protected villages" near bases of the security forces, since this was deemed to be in the interest of the social and economical development of the area but formed part of the Governments' policy against armed resistance at the same time.

The applicant's parents were killed by the army when he was eight years old and he was then adopted by a Muslim family. From an early age he was involved with the illegal organisation "Shanti Bahini", the armed wing of the People's Solidarity Association which strives for regional autonomy of the Chittagong Hill Tracts. His activities for the Shanti Bahini consisted of informing them of military movements of Government forces, mapping army routes, and the collection of funds, in particular through the extortion of an immigrant from 1984 until 1990. He was able to indulge in these activities undetected since it was generally unknown that his foster parents were not his real parents and he was therefore considered a Muslim. To cover up his illegal activities even further, he joined the legal Bangladeshi National Party (BNP) in 1987.

In April 1990 the applicant took part in a demonstration organised by the BNP. Following the dispersal of the demonstration by police, the applicant went to a friend's house from where he telephoned his father who informed him that the police, acting upon a complaint that the applicant had damaged goods and wounded people in the course of the demonstration, had searched the house and had come upon papers, which the applicant had drawn up for the Shanti Bahini, containing information about movements of Government forces. The applicant suspects that one of his neighbours, a so-called counsellor who performs supervisory duties in the district, had recognised him during the demonstration and reported him to the police.

The applicant prepared to leave his country when he learned, after a few days, that charges had been brought against him and that he was accused of carrying out activities for an illegal organisation.

The applicant applied for asylum and a residence permit for humanitarian reasons in the Netherlands on 13 July 1990. He was interviewed by an official of the Ministry of Justice (Ministerie van Justitie) on 22 May 1991. His requests were refused on 16 July 1991 by the Deputy Minister of Justice (Staatssecretaris van Justitie), who also denied suspensive effect to the applicant's subsequent request for a review (herziening) of his decision. In order to obtain an injunction on his expulsion pending the review proceedings, the applicant instigated summary proceedings (kort geding) before the President of the Regional Court (Arrondissementsrechtbank) of The Hague presiding at the Regional Court of 's-Hertogenbosch.

On 14 November 1991 the President granted the injunction requested. The President found the applicant's story consistent and credible and considered that an investigation was called for into the authenticity of untranslated documents submitted by the applicant which might support his allegations. The President also took into account a letter from Amnesty International of 24 October 1991, which states that, if it is true that the applicant provided the Shanti Bahini with

information about military operations and the military are aware of this, he risks detention and torture upon his return to Bangladesh.

The applicant was heard by the Advisory Committee on Alien Affairs (Adviescommissie voor Vreemdelingenzaken) on 21 December 1992. In accordance with this Committee's advice, the Deputy Minister of Justice rejected the request for a review on 26 March 1993. The Deputy Minister held, inter alia, that it appeared from an investigation carried out by the Netherlands Ministry of Foreign Affairs that the declaration submitted by the applicant and purportedly issued by the Shanti Bahini was not authentic, and that the criminal charge against him was brought by a private person and concerned only the civil offence of extortion.

On 31 March 1993 the applicant filed an appeal against the Deputy Minister's decision of 26 March 1993 with the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State), mentioning that the grounds for the appeal would be submitted as soon as possible. As this appeal was denied suspensive effect, the applicant instigated summary proceedings before the President of the Regional Court of The Hague presiding at the Regional Court of Amsterdam.

In these summary proceedings the applicant argued, inter alia, that the declaration of the Shanti Bahini, submitted by him in support of his request for asylum, was authentic but had been issued by a regional branch of this organisation, which may not have been known to the Netherlands Ministry of Foreign Affairs when it examined the authenticity of the document.

Following a hearing on 22 October 1993, the President on 11 November 1993 granted the applicant an injunction on his expulsion pending the proceedings before the Judicial Division. The President in his decision had regard, inter alia, to a second declaration issued by the Shanti Bahini and a certified copy of a complaint filed with the Court of the Upazila Magistrate against the applicant in which he is accused of having collected funds for the Shanti Bahini through extortion of the person making the complaint and of taking part in the struggle of the Shanti Bahini against the State of Bangladesh. The President considered that, even though the complaint against the applicant was filed by a private person, given that the authenticity of these documents had not been disputed it must be assumed that the interests of the Bangladeshi authorities in the applicant have been aroused. Taking into account further the letter of Amnesty International of 24 October 1991, the President concluded that in all reasonableness the possibility that the applicant had a well-grounded fear of persecution could not be excluded.

In the meantime, the applicant's lawyer was informed by the Judicial Division on 28 June 1993 that she had not so far submitted the grounds for the appeal with the Judicial Division and she was given the opportunity to comply with this requirement before 29 July 1993. The applicant's lawyer submitted grounds for the appeal on 20 October 1993, without providing an explanation for the delay.

On 7 March 1994, the President of the Judicial Division in simplified proceedings (vereenvoudigde procedure) declared the applicant's appeal inadmissible for not having complied with a formal requirement. The applicant filed an objection (verzet) against this decision with the Judicial Division on 11 March 1994.

In the hearing on the applicant's objection, which took place on 22 September 1994, the applicant argued that it had not been possible to submit grounds for the appeal before 20 October 1993 since it had been necessary, given that the Deputy Minister of Justice had disputed the authenticity of documents submitted by him, to try and obtain further proof of his allegations from Bangladesh and that this had taken a long time.

The Judicial Division rejected the applicant's objection on 29 September 1994, holding that he had been given ample opportunity to submit grounds for his appeal, that he had been informed of the possible consequences in case of non-compliance with the requirement that appeals should be motivated and that he had not requested an extension of the time limit for the submission of the grounds.

Neither the Judicial Division nor its President in his decision of 7 March 1994 examined the merits of the applicant's appeal.

On 5 December 1994, the applicant filed new requests for asylum and a residence permit, arguing that the second declaration issued by the Shanti Bahini and the certified copy of the complaint filed against him, as well as information provided by his lawyer in Bangladesh, constituted new facts which the Deputy Minister of Justice had not been able to take into account when deciding on the applicant's first requests for asylum and a residence permit.

The Deputy Minister of Justice declared the applicant's new requests inadmissible on 12 January 1995 in accordance with Section 15b para. 1 (b) of the Dutch Aliens Act (Vreemdelingenwet), as he was of the opinion that no relevant new facts had been presented.

Appeal proceedings against the decision of 12 January 1995 are currently still pending but have no suspensive effect.

In support of his application the applicant has further submitted copies of letters to his Dutch lawyer from his lawyer in Bangladesh, Mr J.B. Chakma, from which it appears that there is a case pending against the applicant in the sub-district Court of Rangamati under Section 384 of the Bangladesh Penal Code and that the applicant may be sentenced to three years' imprisonment for extortion. Mr Chakma further mentions that there is also an allegation of the applicant's involvement in the insurgent activities of the Shanti Bahini. If this allegation is found to be well-founded, the applicant may be imprisoned for life under Section 121 of the Bangladesh Penal Code for waging war against the State of Bangladesh.

Mr Chakma also explains that pursuant to Section 332 of the Bengal Records Manual 1943, of which he encloses a copy, he cannot obtain a copy of the warrant for the applicant's arrest, but he insists that the life of the applicant is not safe in Bangladesh.

B. Relevant domestic law and practice

According to established case-law in the Netherlands, which has also been incorporated in the Dutch Aliens Act, the President of a Regional Court, when deciding on a request for an injunction on expulsion pending appeal proceedings, has to decide whether there can be no doubt between reasonably thinking people that the asylum seeker is not a refugee ("dat er tussen redelijk denkende mensen geen twijfel bestaat dat de betrokkene geen vluchteling is", Supreme Court, Mosa judgment of 22 June 1984, NJ 1985, 82).

Section 72 para. 1 of the Act on the Council of State (Wet op de Raad van State) requires that applications to the Judicial Division be reasoned. In case of non-compliance with this provision, the President of the Judicial Division sets a time limit for the rectification of this omission pursuant to Section 74 para. 1 of the Act on the Council of State. Para. 2 of Section 74 provides that the application of an appellant who has not complied with the requirements of Section 72 para. 1 within the time limit fixed for this purpose may be declared inadmissible.

When the President of the Judicial Division is of the opinion that a case is manifestly ill-founded (kennelijk ongegrond) or when a

further examination does not appear to him to be necessary, he may give an immediate decision in simplified proceedings pursuant to Section 105 para. 1 of the Act on the Council of State.

Section 106 of the Act on the Council of State provides for interested parties to file an objection with the Judicial Division against a decision taken by the President in simplified proceedings. Upon the appellant's request, the Judicial Division has to grant a public hearing. If the Judicial Division considers the objection well-founded, the President's decision is annulled and the case will be dealt with in ordinary proceedings.

Section 15b para. 1 (b) of the Aliens Act provides that a request for asylum may be rejected as inadmissible when the applicant has requested residence in the Netherlands before on similar grounds and this request has been rejected in a final decision.

COMPLAINTS

The applicant complains that the Netherlands authorities, by expelling him to Bangladesh, would expose him to a serious risk of being killed or ill-treated since a warrant for his arrest has been issued and the Bangladeshi authorities are aware of his activities for the illegal organisation Shanti Bahini. The applicant invokes Articles 2 and 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 December 1994 and registered on 9 December 1994.

The Commission decided on 9 December 1994 to apply Rule 36 of the Commission's Rules of Procedure until the end of its next session and the application was subsequently communicated to the Government, inviting them to submit their observations on the admissibility and merits of the application.

The application of Rule 36 was subsequently prolonged on 19 January, 2 March and 12 April 1995.

The Government's observations were submitted on 17 February 1995 and the applicant's observations in reply were submitted on 7 and 10 April 1995.

THE LAW

The applicant complains that his expulsion to Bangladesh amounts to inhuman or degrading treatment contrary to Article 3 (Art. 3) of the Convention, which reads:

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

He also invokes Article 2 para. 1 (Art. 2-1) of the Convention, which provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

1. The Government argue that the applicant has not complied with the requirement of exhaustion of domestic remedies imposed by Article 26 (Art. 26) of the Convention, since he has omitted to substantiate his appeal before the Judicial Division of the Council of State in time. They further allege that his requests of 5 December 1994 for asylum and a residence permit did not contain any relevant new facts and that

these proceedings have therefore no bearing on the present complaint.

The applicant maintains that he has exhausted domestic remedies. He refers to the appeal before the Judicial Division, which was instigated within the time limit set for this purpose, and claims that the allegation of the Deputy Minister of Justice that documents submitted by the applicant were not authentic, could only be refuted after having obtained further information from Bangladesh which was not immediately available. The applicant further states that his complaints before the Commission are also directed against the rejection by the Dutch authorities of his second request for asylum.

The Commission notes in the first place that the applicant's objection against the decision of the President of the Judicial Division to declare his appeal inadmissible on the basis that the grounds for the appeal had been submitted out of time, was rejected by the Judicial Division.

The Commission recalls that it has previously held that, where failure to respect procedural rules constitutes the reason for the refusal of a remedy, the requirement as to the exhaustion of domestic remedies cannot be considered to have been satisfied, unless special circumstances exist which absolve the applicant from exhausting the remedies at his disposal according to the correct procedures (cf. No. 10107/82, Dec. 12.7.84, D.R. 38 p. 90; No. 10636/83, Dec. 1.7.85, D.R. 43 p. 171).

The Commission must, therefore, proceed to examine whether in the present case such special circumstances exist.

In this respect the Commission observes that the authenticity of a document submitted by the applicant in support of his claims for asylum and allegedly issued by the Shanti Bahini was disputed between the parties. The applicant subsequently obtained a second declaration and some further documentary evidence, the authenticity of which does not appear to be in dispute.

The Commission notes that the applicant's request for asylum has not been examined by any Dutch authority in the light of the new documentary evidence submitted by the applicant. The Judicial Division and its President held that, as the applicant had failed to submit grounds for his appeal in time, they could not consider the appeal on its merits. Furthermore, the applicant's second request for asylum and a residence permit was also refused without an examination of the merits since it was held not to contain any relevant new facts.

It appears, however, that the President of the Hague Regional Court, in his decision of 11 November 1993 on the applicant's request for an interim measure, attached relevance to the new documentary evidence when he held that the possibility that the applicant had a well-grounded fear of persecution could not be excluded.

The Commission accepts, for the sake of efficiency and in order to avoid abuse of administrative or judicial proceedings, the necessity of legal provisions which entitle decision-making bodies to declare a request or an appeal inadmissible when procedural rules have not been complied with or when a second request is filed on the same grounds as an earlier request which has already been decided on.

The Commission concludes, however, that the application should not be declared inadmissible for non-exhaustion of domestic remedies, since special circumstances exist which absolve the applicant from exhausting these remedies according to the correct procedures.

2. As to the merits of the application, the Government contend that the applicant has failed to demonstrate that the legal proceedings instituted against him on the grounds of extortion were politically

motivated. They further allege that the applicant's activities for the Shanti Bahini have never occasioned the authorities' interest in him and that the applicant has made conflicting statements at various stages of the procedure with regard to his membership of the Shanti Bahini.

The applicant submits that in the legal proceedings instituted against him he is accused of extortion for the benefit of the Shanti Bahini, as was accepted by the President of the Regional Court in his judgment of 11 November 1993. He further disputes that he has made conflicting statements at any stage and refers to the judgment of 14 November 1991 of the President of the Regional Court, where his story was found to be credible and consistent.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Deputy Secretary to the Commission — President of the Commission

(M. de SALVIA) — (C.A. NØRGAARD)