AS TO THE ADMISSIBILITY OF

Application No. 20809/92
by C.M.
against Sweden

The European Commission of Human Rights sitting in private on 15 February 1993, the following members being present:

MM. J.A. FROWEIN, Acting President
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

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 21 September 1992 by C.M. against Sweden and registered on 13 October 1992 under file No. 20809/92;

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 27 November 1992 and the observations in reply submitted by the applicant on 22 December 1992 as well as to the submissions of the parties at the hearing held on 15 February 1993;

Having deliberated;

Decides as follows:

THE FACTS

Particular circumstances of the case

The applicant is a Peruvian citizen, born in 1966. He is at present in Sweden.

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

The applicant left Lima on 7 September 1990 and arrived in Stockholm on 9 September 1990. Upon his arrival he applied for political asylum in Sweden.

Before the police and the National Immigration Board (statens invandrarverk, hereinafter "the Board") he stated the following.

His father had a good position in a private enterprise and two of his uncles had held important positions within the Peruvian administration. He began studies at the Philosophical and Humanist Department at the Catholic University of Peru in 1985. There, he was influenced by the extreme poverty of his people and engaged in anarchist and communist groups.

In 1989 he joined a section of the "civil" branch of the organisation "Sendero Luminoso", the "Frente", which was active at the university. After an initial learning period he was entrusted with the task of spreading propaganda and of enrolling and teaching new members and also of providing various forms of humanitarian relief to the poor and to the members of the organisation who were in prison. On 1 November 1989 he was arrested by the police when participating in a protest march organised by "Sendero Luminoso" which ended in a violent confrontation with the police in the course of which several persons were killed. During his detention, which lasted 15 days (the maximum allowed under the law before the prisoner had to be presented to a court), he was subjected to several interrogations with torture in order to force him to confess his belonging to the prohibited organisation and to have him reveal information as to his engagement in the organisation and the names of those of its members whom he knew. The torture consisted of beating and bruising, mock executions and drowning exercises.

In connection with a propaganda action in June 1990 (distribution of leaflets) aimed at convincing the local population to boycott the presidential elections, two of his collaborators were arrested and disappeared. Fearing that they would give him up under torture he went into hiding. There he learnt that the police had searched his parents' home claiming that their son was a terrorist and also that the organisation was looking for him as he was suspected of being a traitor. His situation in Peru appearing hopeless he decided to flee the country which he managed to do with the assistance of his family.

On 9 September 1991 the Board decided to refrain from taking any decision itself and to hand the matter over to the Government for decision in accordance with the provisions of Chapter 7, Section 11 of the Aliens Act (utlänningslagen 1989:259). In its accompanying opinion the Board stated inter alia:

> "It has been known for a long time that "Sendero Luminoso" is responsible for extremely violent crimes in Peru. The organisation may even be held responsible for having systematically killed individual persons. Its activities have for a long time been directed against democratically elected governments. Membership and/or activity in the organisation should therefore not - notwithstanding the political purposes which may be ascribed to the movement - in themselves entitle someone to be allowed to stay in Sweden on the basis of the provisions laid down in Chapter 3, Section 1, nos. 1 (refugee) or 3 (de facto refugee) of the 1989 Aliens Act.
>
> In view of the above the Board does not consider that [the applicant] is entitled to asylum."

In his observations in reply, dated 6 November 1991, the applicant stated that it was not only "Sendero Luminoso" who were responsible for violent acts in Peru - the same was true of the Government as appeared, inter alia, from Amnesty International Reports. He also stated that he had matured politically while in Sweden and that he did no longer support the ideology of the organisation. He added that he had received information from his brother in Peru that the police was looking for him and had, inter alia, interrogated the brother in the course of their searches.

In further observations submitted on 20 May 1992, the applicant stressed the deterioration of the political situation in Peru with its ensuing increase in the number of terrorist acts, on the side both of "Sendero Luminoso" and of the Peruvian Government. He also stressed the critical situation which had arisen as a result of certain statements made by "Sendero Luminoso" leaders in Belgium to the effect that their organisation planned to take control of the country by 1994. As a result of this situation membership of "Sendero Luminoso" was now sanctioned by imprisonment for life and any opponent to the Government, even if not a member of the organisation, risked up to 20 years' imprisonment.

On 8 July 1992 the Government rejected the application and decided to expel (avvisa) the applicant and to forbid him to return to Sweden before 1 August 1994.

The Government's decision stated:

> "The circumstances invoked by [the applicant] are not such as to convince the Government that he risks persecution in his home country. He is not a refugee within the meaning of Chapter 3, Section 1, no. 1 of the Aliens Act.
>
> [The applicant] has worked for an organisation which, according to what is known, is responsible for several grave acts of cruelty in Peru. Even if the [applicant] has not participated in any such activities, he has still worked for an organisation whose methods must be considered to fall within the scope of Article 1 F of the 1951 Convention relating to the Status of Refugees which deals with cases where the Convention's protection does not apply. Whether or not [the applicant] would have had such reasons against returning to his home country as are envisaged in Chapter 3, Section 1, no. 3 (de facto refugee) of the Aliens Act there would accordingly exist special reasons for refusing him political asylum.
>
> [The applicant] shall accordingly be expelled (avvisas) in accordance with Chapter 4, Section 1, first sub-section, no. 2 of the Aliens Act and be forbidden to return to the country in accordance with Chapter 4, Section 14 of the same Act."

On 18 August 1992 the applicant filed a new application to the Board requesting a stay of execution of the expulsion decision and a residence permit. In addition to the reasons invoked in the earlier proceedings, the applicant submitted a letter from Amnesty International to the Minister competent for expulsion cases and several newspaper articles to testify to the risks regarding his personal safety which he would face if returned to Peru. He pointed in particular to the fact that several Peruvian newspapers had made public the fact that he and 18 other Peruvians alleged to have connections with "Sendero Luminoso" had been ordered to be expelled from Sweden. As his expulsion was publicly known he stated that he was convinced that he would be persecuted if returned to Peru.

The Board rejected this last request. Under Swedish law there is no obstacle to the expulsion of the applicant at any time.

Relevant domestic law

The relevant provisions of the 1989 Aliens Act read:

Chapter 3; Asylum.

Section 1: "The term asylum as used in this Act refers to a residence permit awarded to an alien because

1. he is a refugee,

...

3. without being a refugee, he is unwilling to return to his country of origin on account of the political situation there and is able to invoke very strong grounds in support of this."

Section 2: "The term refugee in the present Act refers to any foreigner who is staying outside the country of which he is a citizen because he feels a well-founded fear of being persecuted in that country because of his race, nationality, belonging to a special group in society or his religious or political convictions and who cannot or who does not wish to avail himself of his home country's protection ..."

Section 4: "An alien as referred to in Section 1 is entitled to asylum.

Asylum may, however, be refused if,

in the case of an alien falling under Section 1 ... (3), there are special grounds for not granting asylum,

..."

Chapter 4; Refusal of entry and expulsion.

Section 1: "An alien may be refused entry

...

2. if he does not possess a visa, residence permit or other document required for entry, residence or employment in Sweden,

..."

Section 12: "When a question concerning refusal of entry or of expulsion is examined, it is to be considered whether the alien, pursuant to the provisions of Chapter 8, Sections 1 - 4, cannot be sent to a particular country or whether there are other special obstacles to the decision being enforced.

Decisions made by the Government or the ... Board are to include such directions with regard to enforcement as this examination may call for."

Chapter 7; Appeals etc ...

Section 5: "The Government may, when deciding to refuse entry or to expel an alien, also decide that the alien shall be forbidden to return to Sweden for a certain period of time ... ."

Section 11: The National Immigration Board may refer a case to the Government for decision if the Board considers such a procedure called for on account of special reasons. ... "

Chapter 8; Enforcement.

Section 1: "An alien who has been refused entry or who is to be expelled may never be conveyed to a country where there is firm reason to believe that he would be in danger of suffering capital or corporal punishment or of being subjected to torture, nor to a country where he is not protected from being sent to a country where he would be in such

danger."

Section 2: "When a refusal-of-entry or expulsion order is to be put into effect, the alien may not be sent to a country where he would risk being persecuted, nor to a country where he would not be protected from being sent on to a country where he would risk being persecuted.

An alien may, however, be sent to a country as referred to in paragraph 1 if he cannot be sent to any other country and if he has shown, by committing a particular offence, that public order and safety would be seriously endangered by his being allowed to remain in Sweden. This does not apply if the persecution threatening him in the other country implies danger to his life or is otherwise of a particularly grave nature.

Similarly, the alien may be sent to a country referred to in paragraph 1 if he has conducted activities endangering the national security of Sweden and if there is reason to suppose that he would continue to engage in such activities here and he cannot be sent to any other country."

Section 5: "If enforcement is not subject to any obstacles under Sections 1 - 4, an alien who has been refused entry or who is to be expelled is to be sent to his country of origin or, if possible, to the country from which he came to Sweden.

If the decision cannot be put into effect in the manner indicated in paragraph 1 or there are other special grounds for doing so, the alien may be sent to some other country instead."

Section 13: "If the enforcing authority finds that enforcement cannot be carried out or that further information is needed, the authority is to notify the ... Board accordingly. In such a case, the ... Board may decide on the question of enforcement or take such other measures as are necessary."

COMPLAINTS

The applicant maintains that his expulsion to Peru would violate Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 September 1992 and registered on 13 October 1992.

On 2 October 1992 the Acting President of the Commission decided, pursuant to Rule 36 of the Commission's Rules of Procedure, that it was desirable in the interest of the parties and the proper conduct of the proceedings not to return the applicant to Peru until the Commission had had an opportunity to examine the application.

On 23 October 1992 the Commission decided that notice of the application should be given to the respondent Government and that the parties should be invited to submit written observations on its admissibility and merits. The Commission also decided to prolong the indication given under Rule 36 until 11 December 1992.

The Government's observations were submitted on 27 November 1992 and the applicant's observations in reply on 21 December 1992.

In the meantime, on 11 December 1992, the Commission decided to prolong the indication given under Rule 36 until 16 January 1993.

On 15 January 1993 the Commission decided to hold a hearing on the admissibility and merits of the application.

The hearing took place on 15 February 1993. The parties were represented as follows.

The Government:

Mr. Carl Henrik Ehrenkrona	Assistant Under-Secretary for Legal Affairs, Ministry for Foreign Affairs, agent
Mr. Erik Lempert	Permanent Under-Secretary, Ministry of Culture and Immigration, adviser
Mrs. Katrin Nyman-Metcalf	First Secretary, Ministry of Culture and Immigration, adviser

The applicant:

Mr. Ingemar Strandberg	Counsel
Mr. Sten De Geer	Assistant Counsel

THE LAW

The applicant complains that he will be subjected to ill-treatment contrary to Article 3 (art. 3) of the Convention and possibly killed if expelled to Peru. Article 3 (art. 3) provides:

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

The Government point out that an asylum seeker has the right under Swedish law to request a re-examination of the question of asylum. Such a request must be examined by the authorities, provided that there are new circumstances which could call for a different decision. Consequently, this possibility is also open to the applicant, which means, in the Government's opinion, that the question of exhaustion of domestic remedies might arise.

The applicant considers that in order to exhaust domestic remedies he could not be required to file new requests for asylum over and over again.

The Commission notes that the applicant has invoked before the Commission essentially the same arguments as were considered by the Government and the National Immigration Board in their decisions. As there was no appeal against these decisions, it follows that the applicant must be considered to have exhausted the domestic remedies.

The Government state that there are at present some 900 Peruvians in Sweden who have applied for political asylum. The Government decided 19 of these applications on 8 July 1992 (including the applicant's) in order to provide some guidance for the handling of the remaining cases. Only one application was granted and this for humanitarian reasons. The Government emphasise that some Peruvians whose requests were rejected have already returned to Peru voluntarily and that the Government have received no information to the effect that any of them have been arrested or subjected to ill-treatment upon their return to Peru.

The Government emphasise that their examination of a request for asylum under the Aliens Act takes into account the same factors as are relevant for the application of Article 3 (art. 3) of the Convention

and that they have given the present case careful consideration. In addition they stress that, having received a total number of approximately 1,300 asylum requests from Peruvians in 1991-92, the Swedish authorities have gained a good knowledge of the situation prevailing in Peru. Out of 314 cases decided in 1992, residence permits were granted in 216 cases, many on humanitarian grounds.

As regards the present case, the Government point out that the applicant's activities in Peru only caused him to be detained for 15 days in 1989. They also point to the fact that this detention was not the result of any particular interest in the applicant personally but only the result of his taking part in a demonstration which turned violent. Even if it were true that he was tortured on this occasion, something which has not been proven, he was still released and could continue with his activities until he left for Sweden. The Government note that he could leave Peru using a passport issued in his own name after 16 August 1990. They also state that available information does not indicate that the applicant is suspected of any crime committed in Peru nor that he has taken part in any activity that would be a reason for the police authorities in Peru to arrest him again. No attempts were made to prevent him from leaving Peru. The Government thus find it unlikely that the Peruvian police would still have an interest in arresting and interrogating the applicant.

As regards the situation in general in Peru, the Government point out that according to information obtained by the Swedish Embassy in Lima there have been no indications of treatment contrary to Article 3 (art. 3) of the Convention in the criminal proceedings instituted in 1992 against the leader of Sendero Luminoso, Mr. Abigael Guzmán, and the other persons arrested together with him. The general opinion among people interested in human rights in Peru appears to be that the special police force responsible for arresting Sendero Luminoso activists suspected of having committed criminal offences is anxious to avoid being accused of having ill-treated those activists.

The Government further refer to a new Peruvian Act on Repenters (Ley de Arrepentimiento) which entered into force in May 1992. According to this Act members of Sendero Luminoso suspected of having taken part in terrorist acts who have surrendered themselves to the Peruvian authorities may have their sentence cut by half in mitigation, and may also receive assistance in returning to an ordinary life in society in the form of a new identity, a new place to live and new employment. The Government state that they have been informed that some 1,400 persons have surrendered under this legislation.

The Government finally submit that the applicant may leave Sweden whenever he wishes, thereby avoiding his expulsion to Peru. Should the expulsion order be enforced the Swedish Embassy in Peru will be instructed to monitor the applicant's return and report any incidents of relevance to his right to asylum.

The applicant disagrees with the Government as regards the Peruvian authorities' interest in his person. He maintains that the Peruvian police are informed, at least via local newspapers, about his connections with Sendero Luminoso and his intended expulsion to Peru. The applicant also invokes the reports of Amnesty International and Americas Watch according to which many suspected terrorists have been arrested, interrogated and maltreated and killed. Thus between January 1983 and June 1992 Amnesty International is said to have documented 4,200 cases of persons who have "disappeared" after arrest by the Peruvian security forces. He maintains that the situation has deteriorated after President Fujimori's "coup" in April 1992 and that people are even more frequently reported "disappeared" or found killed.

The applicant also submits that the fact that the Peruvian Government have found it necessary to issue the "Ley de Arrepentimiento" indicates their interest in combating subversive

groups and suspected persons. This is also borne out by the relaxation of the legal requirements for being considered a terrorist and by the introduction of the vaguely defined crime "apology of terrorism" in Peruvian law in the autumn of 1992. He maintains that since he has been publicly referred to as a terrorist in Peruvian newspapers, he does not face a mere possibility of ill-treatment, but a real risk of such treatment and that, accordingly, his expulsion would violate Article 3 (art. 3).

The applicant finally states that he does not understand how the Government can state that he may leave Sweden at any time: the Swedish police has taken away his passport and, furthermore, pursuant to the Aliens Act his expulsion should be carried out to Peru.

As regards the last point the Government state that although it is true that the applicant's passport has been taken by the police, it is clear that he will get it back upon simple request if he decides to leave Sweden voluntarily.

The Commission recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. The right to political asylum is not protected in either the Convention or its Protocols (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

However, expulsion of an asylum seeker may give rise to an issue under Article 3 (art. 3) of the Convention, and hence engage the responsibility of a Contracting 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 torture or to inhuman or degrading treatment or punishment in the country to which he is to be expelled (ibid., p. 34, para. 103). A mere possibility of ill-treatment is not in itself sufficient in this context (ibid., p. 37, para. 111).

The Commission considers that the evidence before it concerning the applicant's background and the general situation in Peru does not establish that there are substantial grounds for believing that the 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 Peru. In reaching this conclusion the Commission notes the following.

No evidence such as a warrant of arrest or a summons to appear before authorities in Peru has been submitted by the applicant. Nor does it appear from the material of the case file that the applicant would be of special interest to the Peruvian authorities. Thus, the allegation that the applicant is wanted has remained unsubstantiated. The evidence before the Commission concerning the applicant's background and the general situation in Peru does furthermore not establish that his personal situation is any worse than that of those Peruvians who have returned voluntarily to their home country following the Government's refusal of asylum (ibid., p. 37, para. 111).

The Commission also attaches importance to the fact that the Swedish authorities appear to have gained a considerable experience in evaluating claims of the present nature by virtue of the large number of Peruvian asylum seekers in Sweden. It notes that residence permits have in fact been granted in numerous cases. Moreover, it should be noted that the authorities are obliged to consider basically the same factors as are relevant to the Convention organs' assessment under Article 3 (art. 3) of the Convention. The Government's decision of 8 July 1992 was furthermore made after careful examination of the applicant's case (cf. Eur. Court H.R., Cruz Varas and Others judgment of 20 March 1991, Series A no. 201, p. 31, para. 81).

The Commission in particular observes that Chapter 8, Section 1

of the Aliens Act imposes an absolute obligation also on the enforcing authority in Sweden to refrain from expelling an alien, should the evolution of the human rights situation in the receiving country constitute firm reason to believe that he would be in danger of being subjected to capital or corporal punishment or torture in that country.

In these circumstances the Commission cannot find that substantiated grounds have been established for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 (art. 3) of the Convention on his return to Peru.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (C.A. FROWEIN)