AS TO THE ADMISSIBILITY OF

Application No. 20547/92
by D. and Others
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 19 August 1992 by D. and Others against Sweden and registered on 26 August 1992 under file No. 20547/92;

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 17 September 1992 and 27 November 1992 and the observations in reply submitted by the applicants on 5 October and 17 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

The applicants are husband, wife and daughter. The husband and the wife were born in 1965 and their daughter in 1991. They are presently in hiding in Sweden. Before the Commission they are represented by Mr. Sten De Geer, a lawyer practising in Stockholm.

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

Particular circumstances of the case

The first and the second applicant arrived in Sweden on 30 March 1990. On 6 April 1990 they requested asylum, stating that if they were to be returned to Peru the first applicant would be subjected

to persecution and ill-treatment.

The first applicant is the son of a well-known Peruvian dissident, Mr. A., who demanded social justice for the farmers in books and newspaper interviews.

The first applicant's stepmother was imprisoned from 1982 to 1989 and allegedly tortured, suspected of being one of the leaders of a guerilla faction. She never received a trial.

While unsuccessfully searching for his father the authorities in 1982 arrested the first applicant and kept him in detention for six months without a trial. The police tried to make him reveal information pertaining to his father's political activities, allegedly by torturing him with electric shocks, by keeping his head in cold water, by beating him with sticks and whips and by forcing him to listen to his step-mother being tortured. As a result he allegedly still suffers from insomnia, kidney problems and headache and has scars on his back.

In 1983 the first applicant's father was imprisoned in the prison of El Sexto, Lima, and accused by the Government of being one of the leaders of Sendero Luminoso (the Shining Path). Although he was acquitted of those charges he remained imprisoned in very bad conditions.

Following complaints by the first applicant to the Red Cross its representatives demanded that his father's conditions be improved. Following a riot in the prison in 1984 he was moved to the prison of Lurigancho. During a peaceful demonstration by prisoners in October 1985 Government troops effected a raid. The first applicant's father received serious burns and several of his ribs were broken. Following the authorities' refusal to give him medical care the first applicant complained to the Government and the Red Cross. The Red Cross was then allowed to enter the prison and give adequate care. The first applicant's father publicly accused the Government of preparing a massacre of political prisoners. In June 1986, following another riot against prison conditions, over 300 prisoners were shot, including the first applicant's father.

During a memorial service for the prisoners killed in the riot the first applicant was arrested and detained for fifteen days and allegedly tortured, again without receiving a trial. He was accused of being a member of Sendero Luminoso.

In November 1989 the first applicant was detained for fourteen days and allegedly tortured during interrogations regarding his stepmother's activities.

In between his arrests the first applicant received by telephone death threats from the paramilitary right-wing group Rodrigo Franco, which the applicants allege is supported by the Government.

Following the first applicant's release from the second arrest he and his wife moved around in Peru in fear of being persecuted. They both claim to have been active members of the Committee of Relatives of Political Prisoners and Disappeared Persons, an organisation prohibited by the Peruvian authorities. Other members of the Committee have disappeared. In particular, the first applicant has criticised, in interviews for newspapers and television companies as well as in letters to international organisations, the authorities' lack of respect for the rule of law and the treatment of arrested and imprisoned persons.

The first and second applicants allegedly managed to obtain passports and leave Peru after they had bribed certain officials.

On 6 August 1991 the National Board of Immigration (Statens

invandrarverk) refrained from deciding on the asylum requests and referred the matter to the Government in accordance with Chapter 7, Section 11 of the 1989 Aliens Act (utlänningslag 1989:529).

On 27 October 1991 a daughter was born to the first and the second applicant.

On 7 July 1992 the National Board of Immigration also referred the daughter's case to the Government.

On 8 July 1992 the Government rejected the applicants' request for asylum. The decision was based on opinions obtained from the Swedish Embassy in Peru and the Swedish Security Police, both confidential. The Government stated:

(translation from Swedish)

"In view of the circumstances of the case and, inter alia, the fact that [the first and the second applicant] left their country lawfully, the Government consider that they no longer run a risk of persecution in their home country. Thus, they are not to be regarded as refugees under Chapter 3, Section 1, no. 1 of the Aliens Act ...

It appears from the investigation that [the first applicant] has been working for an organisation which, according to what is known, has committed heinous offences (Swe. grova övergrepp) in Peru. Even if [he] himself has not participated in such activities he has been working for an organisation whose methods can be regarded as comprising activities falling within the scope of Article 1 F of the 1951 Convention relating to the Status of Refugees according to which refugee status is excluded. Thus, regardless of whether [he] has put forward such reasons against a return to his home country as mentioned under Chapter 3, Section 1, no. 3 of the Aliens Act there would exist particular reasons for not granting him asylum in Sweden. Nor is there any reason to grant [the second applicant] asylum under that provision. ...

[The applicants] shall therefore be expelled (avvisas) in accordance with Chapter 4, Section 1, subsection 1, no. 2 of the Aliens Act and, in accordance with Chapter 4, Section 14, be prohibited from returning [before 1 August 1994]."

On 8 July 1992 the first applicant's stepmother and her daughter were granted residence permits in Sweden on humanitarian grounds.

On 23 October 1992 the applicants submitted a psychiatric report of 15 October 1992 established by Dr. Eliana Arellano, a Spanish-speaking psychiatrist at the County Administrative Council (landstinget) of Stockholm. The psychiatric report reads:

(translation from Swedish)

"The report is based on notes taken during [the first applicant's] visits to our clinic between 26 April 1990 and 3 August 1992 and subsequent conversations, the latest on 9 October 1992.

[The first applicant] is a 27 year-old Peruvian man who came to Sweden in April 1990 and has since then been awaiting the grant of asylum. His stepmother ... and half-sister were granted residence permits in the summer of 1992.

Interviews and notes show that [the first applicant] belongs to a Peruvian family whose father seems to be a well-known person active in an opposition movement in Peru.
...

At the age of sixteen [the first applicant] experienced the dissolution of his family, his father having been forced to go into hiding. [His stepmother] was subsequently imprisoned, as the military wanted to find [his father]. During the same period [the first applicant] himself was tortured ... in order to force him to reveal his father's whereabouts. He was subsequently transferred to a prison for minors and was released after six months ... following which he could see his stepmother only on a few occasions, either in the prison or at the mental hospital where she was detained for many years.

In 1986 [his] father died in what the press called a "massacre" in a prison in Lima.

[The first applicant] has been detained on two further occasions, in 1987 and November 1989, the last time because [the military] was trying to find [his stepmother]. This detention gave him good reasons for fearing for his life. He therefore requested asylum following a request lodged by his stepmother. ...

[He] has now been waiting for a residence and work permit for more than two years. Due to serious anxiety and depression he has been given a place in a support group for asylum seekers at this clinic. During the period he has been a member of the group his state has varied. On several occasions he has been offered conversations on an individual basis. On one occasion [his] depression and anxiety were serious and the risk of his committing suicide was considered as great.

After the summer of 1992 [he] has only contacted us by telephone as he has been fearing [an enforcement of the expulsion order].

In connection with this [he] has reacted with symptoms of paralysis and great anxiety, concentration problems, inactivity and passivity. On 9 October 1992 he told me about his present state and said that he, because of the pressing situation, has been suffering from insomnia, despite his previous medication. ...In connection with his insomnia he has had flashbacks from his imprisonment and torture at the age of sixteen and [now] strongly fears that he will be murdered.

[He] cannot at present see any meaning in life, as his only future, in case the expulsion order is enforced, will be a certain, horrifying death. This reaction can thus only be considered a natural one.

The flashbacks from [his] traumatic experiences, which he used to be able to stand because of medication and the support group, have now become more outstanding. [He] suffers from post-traumatic experiences. At present the suicidal risk is great.
..."

On 17 December 1992 the applicants submitted an opinion by the Centre for Torture Victims (Centrum for tortyrskadade) concurring with Dr. Arellano's report and concluding that it seemed extremely unlikely that the first applicant had not been subjected to torture. The opinion

was based on a substantial number of interviews with the first applicant as well as an examination of the first applicant's teeth carried out by a forensic odontologist and an examination by a dermatologist of the first applicant's skin. According to the latter opinion it could not be excluded that the first applicant's scars had been caused by violence.

The applicants deny any connection with Sendero Luminoso.

Relevant domestic law

Under Chapter 2, Section 5, subsection 3 of the Aliens Act a request for a residence permit lodged by an alien, who is to be refused entry or expelled by a decision which has acquired legal force, may only be granted provided the request is based on new circumstances and the applicant is either entitled to asylum or there are weighty humanitarian reasons for allowing him to stay in Sweden.

Under Chapter 3, Section 1, an alien may be granted asylum because he is a refugee (no. 1) or, without being a refugee, if he wishes not to return to his home country because of the political situation there and provided he can put forward weighty reasons in support of his wish (no. 3).

The term "refugee" refers to an alien 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, having regard to his race, nationality, belonging to a special group in society or his religious or political convicitons, and who cannot or does not wish to avail himself of his home country's protection (Chapter 3, Section 2).

An alien as referred to in Chapter 3, Section 1 is entitled to asylum. Asylum may, however, be refused inter alia if, in the case of an alien falling under Chapter 3, Section 1, no. 3, there are special grounds for not granting asylum (Chapter 3, Section 4).

An alien may be refused entry into Sweden if he lacks a visa, residence permit or other permit required for entry, residence or employment in Sweden (Chapter 4, Section 1, no. 2).

When considering whether to refuse an alien entry or to expel him it must be examined whether he, pursuant to Chapter 8, Sections 1-4, can be returned to a particular country or whether there are other special obstacles to the enforcement of such a decision (Chapter 4, Section 12).

A refusal of entry issued by the National Board of Immigration may be combined with a prohibition on return for a specific period of time (Chapter 4, Section 14). In refusing entry the Government, too, may issue a prohibition on return for a specific period of time (Chapter 7, Section 5, subsection 2).

Under Chapter 7, Section 10 the National Board of Immigration may review its decision, if new circumstances have emerged or for any other reason, provided it would not affect the alien negatively or be irrelevant to him. A review may take place even if an appeal has been lodged against the Board's decision. If the Board has handed over the file to the Government it may only review its decision, provided its opinion is requested by the Government.

The National Board of Immigration may, for special reasons, refer a request for asylum to the Government together with its opinion in the matter (Chapter 7, Section 11).

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 being subjected to capital or corporal

punishment or torture, nor to a country where he is not protected from being sent to a country where he would be in such danger (Chapter 8, Section 1).

When a refusal-of-entry or expulsion order is 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 (Chapter 8, Section 2, subsection 1). An alien may, however, be sent to a country as referred to in subsection 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 subsection 1 if he has engaged in activities endangering the national security of Sweden and if there is reason to suppose that he would continue to engage in such activities in Sweden and he cannot be sent to any other country (subsection 2).

If the enforcement is not subject to any obstacles under, inter alia, Chapter 8, Sections 1 and 2, 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 subsection 1 or there are other special grounds for doing so, the alien may be sent to some other country instead (Chapter 8, Section 5).

When considering a request for a residence permit lodged by an alien to be expelled according to a decision which has acquired legal force, the National Board of Immigration (and in certain cases also the Government) may stay execution of that decision. For particular reasons the Board may also otherwise stay execution (Chapter 8, Section 10).

If the enforcing authority finds that enforcement cannot be carried out or that further information is needed, the authority is to notify the National Board of Immigration accordingly. In such a case, the Board may decide on the question of enforcement or take such other measures as are necessary (Chapter 8, Section 13).

Under the 1991 Ordinance on Residence Permits in Certain Cases (förordning 1991:1999 om uppehållstillstånd i vissa utlänningsärenden) an alien who has been staying in Sweden for more than eighteen months on 1 January 1992 may be granted a residence permit unless there are special reasons for granting such a permit. The Ordinance entered into force on 1 February 1992.

COMPLAINT

The applicants complain that, if they were to be returned to Peru, the first applicant would be subjected to ill-treatment contrary to Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 August 1992 and registered on 26 August 1992.

On 26 August 1992 the 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 applicants to Peru until the Commission had had an opportunity to examine the application.

The President further decided, pursuant to Rule 34 para. 3 and

Rule 48 para. 2(b), to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits.

On 11 September 1992 the Commission decided to prolong the indication under Rule 36 until 23 October 1992.

The Government's observations were submitted on 17 September 1992 and the applicants' observations in reply on 5 October 1992.

On 23 October 1992 the Commission decided to prolong its indication under Rule 36 until 11 December 1992 and invited the Government to submit supplementary observations. It further granted the applicants legal aid.

Supplementary observations were submitted by the Government on 27 November 1992.

On 11 December 1992 the Commission decided to prolong its indication under Rule 36 until 16 January 1993.

On 17 December 1992 the applicants submitted their comments on the Government's supplementary observations.

On 15 January 1993 the Commission decided to hold an oral hearing on the admissibility and merits of the application. It further prolonged its indication under Rule 36 until 19 February 1993.

At the hearing, which was held on 15 February 1993, the parties were represented as follows:

The Government

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

The applicants

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

THE LAW

The applicants complain that, if they are expelled to Peru, the first applicant will be subjected to ill-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."

The Government point out that the psychiatric report of 15 October 1992 was given after the issuing of the expulsion order. It was not invoked in the applicants' request for asylum. Under Chapter 2, Section 5 of the Aliens Act the applicants could lodge a further request for asylum or a residence permit referring to new circumstances. As no further request has been lodged the applicants have, contrary to Article 26 (Art. 26) of the Convention, not exhausted domestic remedies. The Government further refer to Chapter 7, Section 10 as well as Chapter 8, Section 10 of the Aliens Act.

The Government further submit that the application is, in any case, manifestly ill-founded, as there are no substantial grounds for fearing that the first applicant would be subjected to torture or other forms of ill-treatment contrary to Article 3 (Art. 3) of the Convention. Although he claims to have been tortured during his detention this allegation has not been substantiated by means of medical certificates or otherwise. Moreover, on all three occasions he was released without any action being taken against him by the authorities.

According to the information available to the Government the first applicant is neither wanted by the Peruvian police as suspected of having committed criminal offences nor were any attempts made to prevent him from leaving Peru. The main purpose of his arrests appears to have been to interrogate him in respect of his father's activities in Sendero Luminoso as well as his stepmother's contacts with that organisation. As his father was killed in 1986 and his stepmother has been granted a residence permit in Sweden it is unlikely that the Peruvian police would still have an interest in arresting and interrogating the first applicant in order to obtain information about them.

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 persons interested in human rights appears to be that the special police force responsible for arresting Sendero Luminoso activists suspected of having committed criminal offences (Dirección Nacional contra el Terrorismo) is anxious to avoid being accused of having ill-treated those persons. The Government further refer to the Peruvian Act on Repeneters (Ley de Arrepentimiento) which entered into force in May 1992 and according to which suspected Sendero Luminoso terrorists who turn themselves in to the Peruvian authorities may get a mitigated sentence and identity protection assistance upon release from prison.

The Government emphasise that their examination of a request for asylum takes into account the same factors as are relevant for the application of Article 3 (Art. 3) of the Convention. Accordingly, the present case has been carefully considered. In addition, having received, in 1991-1992, a total number of approximately 1.300 asylum requests lodged by Peruvians, the Swedish authorities have gained a good knowledge of the situation prevailing in Peru. Out of 314 cases examined in 1992 residence permits were granted in 216 cases, many on humanitarian grounds.

The Government further submit that the applicants may leave Sweden whenever they wish, thereby avoiding their expulsion to Peru.

The Government finally emphasise that out of a total of nineteen decisions made on 8 July 1992 upon requests for asylum lodged by Peruvian citizens only one resulted in a permit to stay in Sweden, namely the case of the first applicant's stepmother and her daughter. These were, however, granted residence permits for humanitarian reasons. All requests were considered individually. Some Peruvians whose requests were rejected have already returned to Peru voluntarily. No arrests of those persons have been reported.

The applicants submit that the psychiatric report is being invoked not in order to show that humanitarian reasons prevent their expulsion to Peru but as further evidence showing that the first applicant runs a substantial risk of ill-treatment should the applicants be returned to that country. Domestic remedies have, thus, been exhausted. Considering domestic remedies as exhausted only upon enforcement of the expulsion order would in the applicants' view render

the protection under the Convention ineffective.

The applicants refute the Government's allegation that the first applicant and the Committee of Relatives of Political Prisoners and Disappeared Persons have contacts with Sendero Luminoso. They further contend that the fact that the first applicant was released from detention on three occasions cannot be construed as an indication that their return would now be safe, nor does the fact that the first and the second applicant managed to leave Peru mean that it would be safe for the applicants to return. In particular, the first applicant's advocacy of humane treatment of political prisoners and the rule of law has put him in a dangerous position. This is confirmed by the strong dissatisfaction expressed in public by the Peruvian Prime Minister as regards the decision to stay execution of the order refusing the applicants and other Peruvian asylum seekers entry into Sweden.

The applicants refer to reports by Amnesty International of May and September 1992 as well as statements by that organisation criticising the human rights situation in Peru. In particular, Amnesty International has criticised the criminal proceedings brought against Mr. Guzmán which it considers fall short of international human rights standards. They further refer to a report of August 1992 by Americas Watch as well as to media information that even lawyers defending suspected Sendero Luminoso terrorists have been detained.

The applicants finally maintain that the human rights situation in Peru has deteriorated since President Fujimori's "coup d'état" in April 1992, persons even more frequently being reported "disappeared" or killed. The deterioration can also be seen in the relaxation of the legal requirements for being considered a terrorist and in the introduction of the vaguely defined offence "apology of terrorism".

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 by a Contracting State of an asylum seeker 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 torture or to inhuman or degrading treatment or punishment in the country to which he is to be expelled (ibid., para. 103). A mere possibility of ill-treatment is not in itself sufficient (ibid., p. 37, para. 111).

In the case at issue the Government have emphasised the first applicant's connection with Sendero Luminoso as a reason for excluding eligibility for de facto asylum. The applicants have denied any such connection, but maintained that due to the first and second applicants' activities in Peru the Peruvian authorities have accused them of having contacts with that organisation.

The Commission considers, however, that while the applicants' allegation that the first applicant has previously been subjected to treatment contrary to Article 3 (art. 3) has found some support in certain evidence submitted to the Commission, this in itself does not suffice to conclude that he would now face a real risk of again being subjected to such treatment should the applicants be returned to Peru. In particular, no evidence such as a warrant of arrest or a summons to appear before authorities in Peru has been submitted by the applicants. Nor does it appear from the material obtained that the applicants would be of any special interest to the Peruvian authorities. Thus, the allegation that at least the first applicant is wanted by the Peruvian authorities has remained unsubstantiated. In addition, the evidence before the Commission concerning the applicants' background and the

general situation in Peru does not establish that their 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 (cf. 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 applicants' 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 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 applicants would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention on their return to Peru.

The question could be raised whether, having regard to the psychiatric report by Dr. Arellano of 23 October 1992, the first applicant's expulsion would involve such a trauma that this as such could amount to a violation of Article 3 (Art. 3) (cf. supra, Cruz Varas judgment, p. 31, paras. 83-84).

The Commission notes, however, that under Swedish law a further request for asylum or a residence permit may be lodged with reference to new circumstances. The applicants have admitted that neither the

psychiatric report of 15 October 1992 nor the report by the Swedish Centre for Torture Victims of December 1992 has yet been invoked in support of such a request. Thus, this possibility is still open to them.

In these circumstances the application 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) (J.A. FROWEIN)