AS TO THE ADMISSIBILITY OF

Application No. 23159/94
by Mandushe DRESHAJ
against Finland

The European Commission of Human Rights sitting in private on 19 May 1994, the following members being present:

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

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 18 October 1993 by Mandushe DRESHAJ against Finland and registered on 3 January 1994 under file No. 23159/94;

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 3 March 1994 and the observations in reply submitted by the applicant on 14 April 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Kosovo-Albanian and a citizen of the Federal Republic of Yugoslavia. She was born in 1978. Currently she is staying with her father at a refugee centre in Vaasa, Finland. Before the Commission she is represented by Mr. Tomas Brännkärr, a teacher in Vaasa.

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

summarised as follows.

Particular circumstances of the case

The applicant entered Finland from Sweden on 28 January 1993 together with her family, consisting of her parents and three siblings, 17, 11 and 5 years old, respectively. They immediately requested asylum, or alternatively residence permits.

On 17 March 1993 the Ministry of the Interior (sisäasiain-ministeriö, inrikesministeriet) rejected the request. As the asylum request was considered manifestly unfounded, no appeal lay against the decision.

On 6 April 1993 the Ministry of the Interior ordered the applicant's family to be returned to Sweden. This decision was served on the applicant and her family on 4 May 1993 at 9.00 hours. Immediately after having been served with the decision, the applicant and her family lodged an appeal with the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen) and requested that the enforcement be stayed. This appeal had no suspensive effect.

According to the Government, the family was informed at the moment of the notification of the decision that it would be enforced on the same day, that the police would pick them up at their place of residence, drive them to the passenger harbour and accompany them on board a ferry leaving for Sweden at 16.00 hours. The applicant's father had then promised that all family members would be available for the enforcement. However, when the police came to pick the family up one hour prior to the departure of the ferry only the mother and two of the applicant's siblings (11 and 5 years old) were found at the family's place of residence. Having been brought to the harbour, the applicant's mother was informed that the boat would await the absent family members as long as possible.

On 4 May 1993 at 16.00 hours the ferry left for Sweden with the applicant's mother and two siblings on board. On their return to Sweden they were expelled to the Federal Republic of Yugoslavia.

On 8 July 1993 the Supreme Administrative Court rejected the appeal lodged by the applicant and her family on 4 May 1993.

On 2 August 1993 the applicant, her father and brother lodged a further request for asylum, or alternatively residence permits, on humanitarian grounds. They remained in hiding until 3 August 1993.

In his opinion of 30 August 1993 the Acting Aliens' Ombudsman (ulkomaalaisvaltuutettu, utlänningsombudsmannen) considered the applicant, her father and brother to be in need of protection for humanitarian reasons.

On 6 September 1993 the Ministry of the Interior rejected the further request for asylum and residence permits. The Ministry again considered the asylum request manifestly unfounded.

In his opinion of 13 September 1993 the Chairman of the Asylum Board (turvapaikkalautakunta, asylnämnden) stated, however, that the asylum request could not be considered manifestly unfounded. In view of this opinion, on 17 September 1993, the Ministry of the Interior gave the applicant, her father and brother the right to appeal to the Asylum Board against the refusal to grant them asylum or residence permits. An appeal is apparently still pending before the Asylum Board.

In March 1994 the applicant's mother and two siblings re-entered Finland, where they joined the applicant and the other family members and lodged a fresh request for asylum.

Relevant domestic law

The 1991 Aliens' Act (ulkomaalaislaki 378/91, utlänningslag 378/91) provides that this Act, any provisions of a lower rank and international treaties by which Finland is bound, shall be applied to aliens' entry into and departure from Finland. In the application of the Act aliens' rights shall not be unnecessarily restricted (section 1, subsections 1 and 3).

No alien may be returned to an area where he may be subjected to inhuman treatment or such persecution as referred to in section 30, or to an area from which he could be sent on to another such area (section 38, subsection 2, as amended by Act no. 639/93).

An alien who has entered Finland without a residence permit may be granted a fixed-term residence permit if he is in need of protection or if there are strong humanitarian or other particular reasons for issuing such a permit (section 20, subsection 1, para. 3).

An asylum request may be immediately rejected if the asylum seeker has entered Finland from another Nordic country, or from a country to which he may be returned, having regard to section 38, subsection 2, provided that no grounds exist for issuing him with a residence permit under section 20, and provided that he cannot show any specific grounds for considering the country in question unsafe for him (section 32, subsection 3, as added by Act no. 639/93).

Asylum requests are decided by the Ministry of the Interior. The Aliens' Ombudsman shall be given an opportunity to be heard, unless this would be clearly unnecessary (section 33). If the Ministry concludes that an asylum request is manifestly unfounded, it must request an opinion from the Chairman or Deputy Chairman of the Asylum Board. If this opinion also concludes that the request is manifestly unfounded, there is no appeal against the Ministry's decision (section 34, as amended by Act no. 639/93).

An alien who considers that a refusal of entry by the Ministry of the Interior has infringed his rights may appeal to the Supreme Administrative Court (section 58, as amended by Act no. 639/93). A refusal of entry may, however, be enforced regardless of an appeal (section 62, as amended by Act no. 639/93).

An alien may be detained with a view to being expelled if such a decision has been made or is under preparation and provided there are reasonable grounds for suspecting that he might evade the enforcement (section 45, as amended by Act no. 639/93, and section 46).

COMPLAINTS

The applicant complains about the expulsion of her mother and two of her siblings which separated her from that part of her family. She also complains about the terms of the enforcement of the expulsion order in that respect, alleging that the police made the expelled part of the family believe that the remainder of the family had already embarked on the ferry leaving for Sweden. She invokes Articles 3 and 8 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 October 1993 and registered on 3 January 1994.

On 20 January 1994 the Commission decided to request the respondent Government to submit written observations on the admissibility and merits of the application.

The Government's observations were submitted on 3 March 1994. Following an extension of the time-limit fixed for that purpose, the applicant submitted comments in reply on 14 April 1994.

THE LAW

1. The applicant complains of the expulsion of her mother and two of her siblings which separated her from that part of her family. She also complains of the implementation of the expulsion, alleging that the police made the expelled part of the family believe that the remainder of the family had already embarked on the ferry leaving for Sweden. She invokes Articles 3 and 8 (Art. 3, 8) of the Convention.

2. The Commission has first examined the application under Article 3 (Art. 3) of the Convention which reads as follows:

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

The Government consider this aspect of the application to be manifestly ill-founded. As regards the separation of the applicant from part of her family, the Government refer to the case-law of the Commission according to which the general situation in the region of Kosovo in the Federal Republic of Yugoslavia is not such that an expulsion would violate Article 3 (Art. 3). The applicant has not substantiated any specific risk of ill-treatment in Kosovo, had she chosen to pursue her family life with her mother and siblings there. Nor has she shown any other particular reason why this could not be expected of her.

The Commission recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. However, "the 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 that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced 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 returned" (Eur. Court H.R. Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p 34, para. 102).

The Commission also recalls that the treatment prohibited by Article 3 (Art. 3) of the Convention is of a severe nature. An assessment of whether such treatment is in breach of this provision must take account of all the circumstances of the case, the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the complainant (cf. e.g. No. 8317/78, Dec. 15.5.80, D.R. 20 p. 44 at p. 79).

The Commission finds, on the evidence before it concerning both the applicant's and her family's individual background and the general situation in Kosovo, that it has not been established that there were substantial grounds for believing that she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention, had she pursued her family life there with her mother and siblings. It also finds that the separation of the applicant from part of her family does not amount to the kind of severe ill-treatment proscribed by Article 3 (Art. 3), having regard to her age and the fact that she remained with her father.

Finally, assuming that the applicant can, as required in Article 25 (Art. 25) of the Convention, claim to be a "victim" of a violation of Article 3 (Art. 3) due to the alleged terms of the enforcement concerning her mother and two siblings, the Commission does not find it established that the police acted in a manner inconsistent with the requirements of that provision.

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

3. The Commission has next considered the application under Article 8 (Art. 8) of the Convention which reads 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."

The Government submit that this aspect of the application is also manifestly ill-founded, considering, on balance, that there has been no lack of respect for the applicant's right to respect for her family life. The expulsion of part of her family was carried out in accordance with the law and with the legitimate aim of preventing disorder. In the circumstances of the case the expulsion was, furthermore, a proportionate and necessary measure in a democratic society in pursuance of that aim. The Government underline that it would have been possible to place the applicant and her whole family in detention in order to secure the enforcement of the expulsion order. This measure was, however, not resorted to. The Government further refute the applicant's assertion that her mother and two siblings were led to believe that the remaining part of the family had already embarked on the ferry.

The Commission considers that the separation of the applicant from part of her family and, in particular, her mother, raises the question whether there has been a lack of respect for her family life. It recalls that the notion of "respect" enshrined in Article 8 (Art. 8) of the Convention is not clear-cut. This is the case especially where the positive obligations implicit in that concept are concerned. Its requirements will vary considerably from case to case according to the practices followed and the situations obtaining in the Contracting States. In determining whether or not such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, as well as to the margin of appreciation afforded to the Contracting States (Eur. Court H.R., B. v. France judgment of 25 March 1992, Series A no. 232-C, pp. 47 et seq., paras. 44 et seq.).

The Commission further recalls that as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals to its territory. In the field of immigration Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67). Insisting on family unity when part of the family has gone into hiding to avoid the enforcement could, for instance, seriously impede the effectiveness of immigration control (cf. Cruz Varas and Others v. Sweden, Comm. Report 7.6.90, para. 101, Eur. Court H.R., Series A no. 201, p. 48).

In the present case the Commission observes that the intention of the Finnish authorities was to expel the whole of the applicant's family, but without placing the family members in detention in advance. However, given that the applicant, her father and one of her siblings did not show up in time for the planned enforcement, the authorities

were prevented from expelling the whole family at the same time.

In the above circumstances and despite the applicant's young age, the duties imposed by Article 8 (Art. 8) of the Convention cannot be considered as extending to an obligation on the respondent State to refrain from expelling her mother and two siblings.

Finally, assuming again that the applicant can, as required in Article 25 (Art. 25) of the Convention, claim to be a "victim" of a violation of Article 8 (Art. 8) due to the alleged terms of the enforcement concerning her mother and two siblings, the Commission does not find it established that the police acted in a manner inconsistent with the requirements of that provision.

The Commission concludes therefore that there has been no lack of respect for the applicant's family life.

It follows that this aspect of the application must also 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 — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)