AS TO THE ADMISSIBILITY OF

Application No. 24136/94
by H. Z.
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 30 November 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 9 March 1994 by H. Z. against Sweden and registered on 11 May 1994 under file No. 24136/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a citizen of former Yugoslavia and of Kosovo-Albanian origin. He was born in 1972 and is currently residing at Kristinehamn, Sweden. Before the Commission he is represented by Mr. Lars Sjödin, a lawyer at Härnösand.

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

Particular circumstances of the case

The applicant entered Sweden on 1 September 1992. On 2 September 1992 he requested asylum there, alternatively a residence permit on humanitarian grounds, referring to his fear of being arrested and forced to participate in acts of war committed by the army of former Yugoslavia.

In January 1993 the applicant started cohabiting with A., a woman of Swedish nationality, and her son from a previous relationship.

On 9 March 1993 the National Immigration Board (statens invandrarverk) rejected the applicant's request for asylum or a residence permit and decided to expel him from Sweden. He was furthermore prohibited from returning to Sweden before 1 April 1995.

The applicant appealed, referring, inter alia, to his relationship with A., with whom he contracted marriage on 28 May 1993. He informed the Aliens Appeals Board (utlänningsnämnden) of the marriage on 11 June 1993.

On 28 June 1993 the Aliens Appeals Board rejected the applicant's appeal, considering, in particular, that his relationship with A. did not constitute a reason for granting a residence permit while he was staying in Sweden.

The applicant lodged a further request for a residence permit, complaining that his submission of 11 June 1993 had not been taken into account by the Aliens Appeals Board.

On 6 July 1993 the National Immigration Board rejected the applicant's further request, considering that the new circumstances invoked were not sufficient for the granting of a residence permit.

In the autumn of 1993 the applicant applied for a passport at the Embassy of former Yugoslavia in Stockholm. No passport was issued. The applicant then lodged a further request for a residence permit, claiming that it was impossible for him to obtain a passport enabling him to leave the country for the purpose of lodging a fresh request for a residence permit in Sweden.

On 21 December 1993 the National Immigration Board rejected the applicant's further request, observing that on 28 July 1993 the Embassy of former Yugoslavia had requested the applicant to fill out certain forms and to state how he had been able to leave that country without a passport. Subsequently he had been requested to appear in person at the Embassy in order for his passport application to be processed. According to the applicant, it emerged from his subsequent meeting with Embassy staff that he would have to undergo his military service in former Yugoslavia upon his expulsion there and that he would therefore not be issued with a passport.

As from June 1994, A. is pregnant with a child to be born to her and the applicant.

Relevant domestic law

According to the 1989 Aliens Act (utlänningslag 1989:529), an expulsion order issued by the National Immigration Board may be combined with a prohibition on the alien's return valid either for a certain period of time or indefinitely (Chapter 4, Sections 1 and 14). An alien who has been prohibited from returning to Sweden may, nevertheless, be granted a permit to visit the country for extremely important purposes. For particular reasons, such a permit may be granted at the request of someone other than the alien himself (Chapter 4, Section 15).

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 if the request is based on new circumstances and provided that the applicant is entitled to asylum or there are weighty humanitarian reasons for allowing him to stay in Sweden (Chapter 2, Section 5, subsection 3).

COMPLAINTS

The applicant complains that his impending expulsion to former Yugoslavia would violate his rights under Article 8 of the Convention. The expulsion would disrupt his family life and prevent a subsequent reunification of the family.

THE LAW

The applicant complains that his impending expulsion to former Yugoslavia would disrupt his family life and thus violate his rights under Article 8 (Art. 8) of the Convention. This provision 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 Commission recalls that the Contracting States are in principle free to control the entry, residence and expulsion of aliens. The duties imposed by Article 8 (Art. 8) of the Convention cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, paras. 67 and 68). Expulsion of a person from a country in which close members of his family live may, however, amount to an unjustified interference with his right to respect for his family life as guaranteed by Article 8 (Art. 8) of the Convention (e.g., Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, pp. 19 et seq., paras. 43 et seq.).

The Commission considers that the decision ordering the applicant's expulsion from Sweden and the related prohibition on his return would, if enforced, interfere with his right to respect for his family life due to his relationship with his Swedish wife residing in that country. It must next be examined whether this interference would be justified under the terms of para. 2 of Article 8 (Art. 8-2). Under that paragraph such an interference must satisfy three conditions: it must be "in accordance with the law", it must pursue one or more of the aims enumerated in para. 2 and it must be "necessary in a democratic society" for that aim or those aims. The necessity criterion implies the existence of a pressing social need and, in particular, requires that the measure be proportionate to the legitimate aim pursued (the above-mentioned Moustaquim judgment, pp. 18 et seq., paras. 37 et seq.). Regard should further be had to the margin of appreciation afforded to the Contracting States (Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, pp. 15-16, para. 28).

The Commission is satisfied that the expulsion order was issued "in accordance with the law". It also considers that the enforcement of the order would pursue a legitimate aim under Article 8 para. 2 (Art. 8-2), namely the economic well-being of the country. As regards the question whether the interference was "necessary in a democratic society" in pursuit of the above-mentioned aim, the Commission observes that the applicant and A. contracted marriage only after the National Immigration Board's initial expulsion order. He cannot therefore reasonably have expected to be able to pursue his family life with A. in Sweden. The Commission further observes that the expulsion order has not yet been enforced and that the prohibition on his return to Sweden is to expire in April 1995. Should enforcement take place, the applicant or his wife could, in principle, apply for a short-term residence permit enabling him to visit her in Sweden even while the prohibition on return is valid.

Taking into account the margin of appreciation left to the

Contracting States, the Commission concludes that the enforcement of the expulsion order would be justified under Article 8 para. 2 (Art. 8-2) of the Convention in that it can reasonably be considered as "necessary in a democratic society" in pursuance of the above-stated aim. Accordingly, the enforcement of the expulsion order would not violate Article 8 (Art. 8).

It follows that 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 Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)