AS TO THE ADMISSIBILITY OF

Application No. 33124/96
by Abdurahim INCEDURSUN
against the Netherlands

The European Commission of Human Rights sitting in private on 25 February 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 27 August 1996 by Abdurahim INCEDURSUN against the Netherlands and registered on 24 September 1996 under file No. 33124/96;

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 Turkish citizen of Kurdish origin, born in 1952, and at present residing in the Netherlands. Before the Commission he is represented by Ms G.E.M. Later, a lawyer practising in The Hague.

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

The applicant entered the Netherlands on 5 June 1995 and, on 7 June 1995, requested asylum, or alternatively a residence permit for humanitarian reasons. According to the applicant, he risked political persecution in Turkey for his known sympathies for the cause of the Kurdish people. He stated that he had been politically active between 1984 and 1992 at the municipal level and that his brother I.'s political activities for the Kurdish people had made I., a founding member of the political party HEP (Halkin Emek Partisi - People's Working Party; at present an illegal and dissolved pro-Kurdish party), a public figure nationwide. As a result of these political activities, the Turkish authorities started to exert pressure on the applicant's family.

The applicant stated that he had been arrested in 1992 on five occasions and that he had been detained for periods varying from one week to twenty days in the course of which he had been questioned and ill-treated. He also stated that, together with his brother I. and thirteen others, he had been prosecuted on charges of aiding and abetting the PKK (Kurdish Workers' Party - an armed separatist movement). In 1994 he learned that, by judgment of 23 December 1992, the State Security Court of Diyarbakir had acquitted him and all other accused of these charges for lack of evidence. The applicant further stated that, upon the advice of his family and a local official, he had since 1992 been living in hiding in different places in Turkey under false identities, that of the persons who had been prosecuted together with him in 1992, five persons had been killed at some later point in time and that his brother I. had disappeared and is presumed dead. He stated that he had left Turkey upon the advice of his family, who told him that the police regularly visits them and are looking for him.

On 25 July 1995, the State Secretary for Justice (Staatssecretaris van Justitie) rejected the applicant's requests. As regards the applicant's request for asylum, the State Secretary considered that it had not been established that the applicant had substantial grounds to fear persecution in Turkey. The State Secretary considered in this respect that, apart from the five times in 1992 when the applicant had been arrested and detained for a certain period of time without any further consequences and the criminal proceedings against him which had in fact ended in an acquittal, the applicant had since then not encountered any problems with the authorities. As regards his request for a residence permit, the State Secretary recalled that under Article 11 para. 5 of the Aliens Act (Vreemdelingenwet) a residence permit can be refused on grounds of public interest, since the Dutch authorities in applying Article 11 para. 5 of the Aliens Act follow a restrictive immigration policy in view of the population and employment situation in the Netherlands. As the applicant's presence in the Netherlands could not be regarded as serving any specific Dutch interests and as no compelling humanitarian reasons were found to exist on the basis of which a residence permit could be issued, the State Secretary of Justice considered that the applicant did not satisfy the criteria for the issuing of a residence permit.

On 23 August 1995, the applicant filed an objection (bezwaarschrift) against this decision with the State Secretary. In support of his objection, the applicant stated that in his political activities he had always strongly supported the interests of the Kurdish people, that the HEP party had been declared illegal in 1993 and that, according to an official report (ambtsbericht) of the Netherlands Ministry of Foreign Affairs (Ministerie van Buitenlandse Zaken) of 12 January 1995, criminal proceedings had been instituted against parliamentarians of that party. Referring to a letter of 20 January 1995 of Amnesty International setting out in a general way

the persecution of members and supporters of the pro-Kurdish parties, the applicant argued that since he was known as a political activist, as a member of a known Kurdish family and as the brother of a prominent member of a prohibited party, his expulsion to Turkey would expose him to persecution on grounds of illegal political activities supporting the cause of the Kurdish people.

Pursuant to Article 32 of the Aliens Act, the State Secretary decided on 20 October 1995 that the applicant was not allowed to stay in the Netherlands pending any appeal proceedings instituted by him and ordered him to leave the Netherlands within two weeks.

On 30 October 1995, the applicant requested the President of the Aliens' Chamber (Vreemdelingenkamer) of the Regional Court (Arrondissementsrechtbank) of The Hague to grant an interim measure (voorlopige voorziening) allowing him to await the outcome of the objection proceedings in the Netherlands.

Following a hearing held on 12 March 1996, the President of the Aliens' Chamber rejected the applicant's request for an interim measure on 19 March 1996. The President noted that the applicant had stated that he had only been politically active when this was legally possible, that he had been acquitted in 1992 and that in the period between the end of 1992 and his departure to the Netherlands in 1995, the applicant had been able to live in Turkey. The President did not find it established that the Turkish authorities still considered the applicant as an important political opponent in whom they were actively interested.

Insofar as the applicant relied on Article 3 of the Convention, the President found no substantial grounds on the basis of which the existence of a genuine and personal risk of treatment contrary to this provision on his return to Turkey had to be assumed. The President further found that no compelling humanitarian reasons for granting the applicant a residence permit had become apparent.

Having reached this finding and as no other legal rules appeared to have been violated, the President concluded that the State Secretary's decision not to allow the applicant to remain in the Netherlands pending the outcome of the proceedings regarding the applicant's objection could not be regarded as unreasonable. As the applicant's objection did not stand a reasonable chance of success and as a further investigation was not held to be able to contribute to the examination of the applicant's case, the President, in pursuance of Article 33b of the Aliens Act, also decided the merits of the applicant's objection against the State Secretary's decision of 25 July 1995 and rejected it as ill-founded.

On 30 May 1996, the applicant requested the State Secretary of Justice to review (herziening) his request for asylum, or alternatively for a residence permit on humanitarian grounds. He emphasised that he had only been able to live in Turkey between 1992 and 1995 under false identities, that two of his brothers had also fled Turkey, that in 1994 his brother I. had been prosecuted on charges of illegal political activities related to the PKK and that it must be assumed that he had died given the fact that several obituaries had been published since. The applicant further requested not to be expelled pending the outcome of his request for a revision.

After having considered the applicant's arguments, the State Secretary of Justice rejected the revision request on 5 August 1996, finding no reasons for a revision of the previous rejection of the applicant's requests.

By letter of 23 August 1996, the State Secretary reminded the applicant that he had been ordered to leave the Netherlands on 20 October 1995.

On 26 August 1996, the applicant filed an objection against the decision of 5 August 1996. These proceedings are currently still pending.

On 26 August 1996, the applicant submitted a new request to the President of the Aliens' Chamber of the Regional Court of The Hague to grant an interim measure allowing him to await the outcome of the objection proceedings in the Netherlands.

Following a hearing held on 3 December 1996, the President of the Aliens' Chamber rejected the applicant's request for an interim measure on 19 December 1996. Insofar as the applicant argued that the President, in the decision of 19 March 1996, had committed errors in the assessment of the applicant's situation, it was held that this finding could not be reviewed in the present proceedings as Article 33(e) of the Aliens Act excluded an appeal against such decisions. The President further found that no new facts or circumstances had become apparent.

Referring to the previous decision of 19 March 1996, the President of the Aliens' Chamber held that there could be no reasonable doubt that there was no danger of persecution within the meaning of Article 15 para. 1 of the Aliens Act. No indication was found for the assumption that the objection of 26 August 1996 would stand a reasonable chance of success.

Having reached this finding and as no other legal rules appeared to have been violated, the President concluded that the State Secretary's decision not to allow the applicant to remain in the Netherlands pending the outcome of the applicant's objection could not be regarded as unreasonable. As the applicant's objection did not stand a reasonable chance of success and as a further investigation was not held to be able to contribute to the examination of the applicant's case, the President, in pursuance of Article 33b of the Aliens Act, also decided the merits of the applicant's objection of 26 August 1996 and rejected it as ill-founded.

COMPLAINTS

1. The applicant complains that his expulsion to Turkey would expose him to a real risk of being subjected to treatment contrary to Article 3 of the Convention and could possibly result in his being killed without any due process of law and thus amount to a violation of Article 2 of the Convention and Protocol No. 6.

2. The applicant complains under Article 6 para. 1 of the Convention, both in itself and in conjunction with Article 13 of the Convention, that the Dutch authorities and the President of the Regional Court have incorrectly assessed the applicant's problems by having insufficiently considered the evidence submitted by the applicant in support of his requests.

3. The applicant finally complains that he is currently residing illegally in the Netherlands and that, if arrested, he will be detained with a view to his expulsion which in view of the problems related to the proceedings before the President of the Regional Court will be in violation of Article 5 of the Convention.

THE LAW

1. The applicant complains that his expulsion to Turkey would expose him to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention and could possibly result in his being killed without any due process of law and thus amount to a violation

of Article 2 of the Convention and Protocol No. 6 (P6-2) to the Convention.

The Commission is of the opinion that it cannot, at this stage of the proceedings, determine the admissibility of this part of the application and it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure, to give notice of this part of the application to the respondent Government.

2. The applicant complains under Article 6 (Art. 6) of the Convention, both in itself and in conjunction with Article 13 (Art. 6+13) of the Convention, that the Dutch authorities and the President of the Regional Court have incorrectly assessed the applicant's problems by having insufficiently considered the evidence submitted by the applicant.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal established by law...."

Article 13 (Art. 13) of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Insofar as the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention, the Commission recalls its constant case-law, that this provision is not applicable to proceedings concerning the granting of political asylum or residence permits for aliens (cf. No. 9285/81, Dec. 6.7.82, D.R. 29 p. 205; and No. 13162/87, Dec. 9.11.87, D.R. 54 p. 211).

Insofar as the applicant relies on Article 13 (Art. 13) of the Convention, the Commission notes that the applicant's case, including his argument that his expulsion would amount to a violation of Article 3 (Art. 3) of the Convention, has been examined by the State Secretary of Justice and the President of the Regional Court, respectively. The Commission is, therefore, of the opinion that the applicant had effective remedies within the meaning of Article 13 (Art. 13) of the Convention, of which he did in fact avail himself.

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

3. The applicant finally complains that he is currently residing illegally in the Netherlands and that, if arrested, he will be detained with a view to his expulsion which in view of the problems related to the proceedings before the President of the Regional Court will be in violation of Article 5 (Art. 5) of the Convention.

Article 5 (Art. 5) of the Convention, insofar as relevant, reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...."

The Commission notes in the first place that the applicant has failed to raise this complaint in the domestic procedure and has, therefore, failed to exhaust domestic remedies (cf. No. 19601/92, Dec. 19.1.95, D.R. 80 p. 46).

Even assuming that the applicant would have duly exhausted domestic remedies, the Commission notes that it does not appear nor is it alleged that the applicant has in fact been arrested and detained.

In these circumstances, the Commission finds that the applicant, as regards his complaint under Article 5 (Art. 5) of the Convention, cannot be considered a victim within the meaning of Article 25 (Art. 25) of the Convention.

It follows that also this complaint must be rejected as 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,
DECIDES TO ADJOURN the applicant's complaint that his expulsion would be contrary to his rights under Articles 2 and 3 of the Convention and Protocol No. 6 to the Convention;

unanimously,
DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission