AS TO THE ADMISSIBILITY OF

Application No. 43391/98
by K. K.
against Switzerland

The European Commission of Human Rights sitting in private on 18 September 1998, the following members being present:

MM J.-C. GEUS, Acting President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
M.A. NOWICKI
B. CONFORTI
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

Mr M. de SALVIA, 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 29 July 1998 by K. K. against Switzerland and registered on 10 September 1998 under file No. 43391/98;

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, a Sri Lankan citizen born in 1974, resides in Basel in Switzerland. Before the Commission she is represented by Mr G. Ehrler, a lawyer practising in Basel.

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

Particular circumstances of the case

In 1994 the applicant left Sri Lanka and entered Switzerland where on 13 July 1994 she requested asylum. Her request was dismissed on 5 December 1994 by the Federal Office for Refugees (Bundesamt für Flüchtlinge) and, upon appeal, on 27 February 1995 by the Swiss Asylum Appeals Commission (Schweizerische Asylrekurskommission), as her submissions did not appear credible. She was ordered to leave.

It appears that the applicant returned to Switzerland.

On 8 October 1997 she filed a new request for asylum, claiming, inter alia, that she had fallen in love with a Sri Lankan citizen living in Switzerland whom she intended to marry. She was heard by the authorities on 17 and 24 October 1997.

On 19 November 1997 the Federal Office for Refugees declared her request inadmissible as her case had already been decided. On the one hand, the previous asylum proceedings were closed, and her intention to marry a Sri Lankan citizen in Switzerland was irrelevant from the point of view of asylum. On the other hand, her return to Sri Lanka posed no problems under Article 3 of the Convention. The situation in Sri Lanka was such that she could be expected to return; in case of need she could address herself, inter alia, to the Swiss Embassy in Colombo. This decision was confirmed, upon appeal, by the Asylum Appeals Commission on 8 April 1998.

The applicant was requested to leave Switzerland by 31 May 1998.

On 4 June 1998 the applicant filed a request for reconsideration of the decision of 19 November 1997.

In her request, she submitted that she intended to marry another Sri Lankan citizen, Mr S. K., and that, on 4 June 1989, the same day, they had instituted civil matrimonial proceedings at the Registrar's Office of Basel-Stadt. Moreover, they had been living together since 1995, and had already been married according to Hindu rites. The applicant pointed out that her husband had also requested asylum. While it was possible that this request would eventually be dismissed, she should be permitted, in view of the family life, to stay in Switzerland as long as her husband was there. Having regard to the husband's pending asylum proceedings, the couple could not be expected to live their marriage in Sri Lanka.

On 8 June 1998 the applicant filed a statement of a Basel hospital dated 5 June 1998 according to which she was pregnant in the sixth week. She submitted that S. K. was the father.

On 17 June 1998 the Asylum Appeals Commission declared the applicant's request inadmissible. It considered that the applicant's case had been finally decided, and the reconsideration of the previous decision could only concern the manner of the applicant's expulsion (Ausgestaltung des Vollzugs).

Relevant domestic law and practice

S. 12f para. 1 of the Asylum Act (Asylgesetz) provides:

(Translation)

"After having submitted a request for asylum and until the departure, when the asylum proceedings have been terminated with legal force ..., no procedure for the granting of a residence authorisation by the Aliens' Police may be instituted, except if there is an entitlement hereto ..."

COMPLAINTS

1. The applicant complains under Article 8 of the Convention of her imminent expulsion to Sri Lanka which would separate her from her husband and her child from its father. It cannot be argued that they are not yet formally married. While it cannot be excluded that her husband's request for asylum, now pending for nine years, will eventually be dismissed, the applicant considers that at least until this decision has been taken the family can remain in Switzerland. It cannot be expected that her future husband returns to Sri Lanka during the asylum proceedings.

2. Under Article 13 of the Convention the applicant complains that she did not have an effective remedy at her disposal to raise the complaint under Article 8 of the Convention about the separation from her husband. She submits that this complaint is

"arguable" within the meaning of the Convention organs' case-law. Neither the Federal Office for Refugees nor the Asylum Appeals Commission dealt in substance with her request.

The applicant points out that S. 12f of the Asylum Act cannot be considered as granting an effective remedy in this respect, as it only envisages such a request if the other family member has an "entitlement". However, the applicant's future husband does not meet this requirement, as he has neither Swiss nationality nor an authorisation to establish domicile in Switzerland, as required by the case-law of the Federal Court (see ATF <Arrêts du Tribunal Fédéral> 116 Ib 355; 115 Ib 4; 111 Ib 163 et seq.).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 July 1998.

On 4 August 1998 the Acting President decided not to apply Rule 36 of the Commission's Rules of Procedure.

The case was registered on 10 September 1998.

THE LAW

1. The applicant complains under Article 8 of the Convention of her imminent expulsion to Sri Lanka which would separate her from her husband and her child from its father. As long as his asylum proceedings are pending, he cannot be expected to return to Sri Lanka.

Article 8 of the Convention states, insofar as relevant:

"1. Everyone has the right to respect for his private and family life ...

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."

a) In the present case, the applicant's request for reconsideration was declared inadmissible by the Swiss Asylum Appeals Commission on 17 June 1998 as the applicant's case had been finally decided. Moreover, the applicant has filed no other remedy before the Swiss authorities.

An issue arises therefore whether the applicant has complied with the requirement under Article 26 of the Convention as to the exhaustion of domestic remedies. The Commission need nevertheless not resolve this issue as this part of the application is in any event inadmissible for the following reasons.

b) According to the Convention organs' case-law, there is no right under the Convention to reside in a particular country. Exceptionally, the expulsion of a person from a country where close members of his or her family are living may amount to an infringement of the right to respect for family life guaranteed in Article 8 para. 1 of the Convention (see Eur. Court HR, Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, para. 36).

Article 8 of the Convention can nevertheless not be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see Eur. Court HR, Gül v. Switzerland judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 173, para. 38).

In the present case, the applicant submits that she has been married to S. K. according to Hindu rites, and that they have instituted civil matrimonial proceedings in Basel-Stadt. She is moreover expecting a child whose father is S. K.

However, insofar as the applicant submits that she was already married to S. K. according to Hindu rites, it does not transpire from the documents submitted that she sufficiently raised this point during the pending asylum proceedings.

Insofar as she instituted matrimonial proceedings in Basel-Stadt on 4 June 1998 and submitted the statement of a Basel hospital of 5 June 1998 according to which she was pregnant in the sixth week, the Commission notes that the final decision of the Asylum Appeals Commission was given on 8 April 1998. That decision terminated the applicant's asylum proceedings.

Thus, when the applicant established family life within the meaning of Article 8 of the Convention, she did so at a moment when she no longer had a right to stay in Switzerland. She was therefore fully aware that she would have to lead her family life elsewhere.

As a result, it cannot be said that the Swiss authorities failed to show sufficient "respect for (the applicant's) private and family life" within the meaning of Article 8 para. 1 of the Convention.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. Under Article 13 of the Convention the applicant complains that she did not have an effective remedy at her disposal to raise the complaint under Article 8 of the Convention about the separation from her husband. This provision states:

"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."

The Commission recalls that Article 13 of the Convention requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see Eur. Court HR, Powell and Rayner v. United Kingdom judgment of 21 February 1990, Series A no. 172, p. 14, para. 31).

In the present case, the Commission has just found that the complaints under Article 8 of the Convention are manifestly ill-founded. The Commission finds that the applicant's submissions in this respect do not raise any prima facie issue under the Convention. As a result, no arguable claim can be maintained in respect of a violation of this provision.

It follows that the remainder of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M. de SALVIA
Secretary
to the Commission

J.-C. GEUS
Acting President
of the Commission