AS TO THE ADMISSIBILITY OF

Application No. 14312/88
by L.E.
against the Federal Republic of Germany

The European Commission of Human Rights, sitting in private, on 8 March 1989, the following members being present:

MM. S. TRECHSEL, Acting President
J. A. FROWEIN
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J. C. SOYER
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Sir Basil HALL
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. J. RAYMOND, Deputy 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 11 October 1988 by Leila Sami El Makhour against the Federal Republic of Germany and registered on 25 October 1988 under file No. 14312/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to:

- the respondent Government's observations of 5 December 1988 and the applicant's observations in reply of 16 December 1988, 31 January and 13 February 1989;

- the parties' submissions at the oral hearing on 8 March 1989;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

The applicant, born in 1957, is presently staying in Berlin with her Lebanese husband and three children, born in 1977, 1980 and 1982. She is apparently of Palestinian origin. She first had a Palestinian identity card and later she also possessed a Lebanese passport. However, it is in dispute whether or not the applicant acquired Lebanese nationality upon her marriage and whether the passport was valid. The Berlin Registration Office (Einwohneramt) registered the applicant as a stateless person. Before the Commission she is represented by Mr. Kierzynowski, a lawyer practising in Berlin.

In August 1978 the applicant and her husband arrived in Berlin for the first time. They both applied for political asylum. In February 1980 they returned to Beirut. The asylum proceedings were therefore discontinued. In May 1981 the applicant and her husband came to Berlin a second time. They again applied for political asylum. Their requests were dismissed in November 1982. The spouses instituted court proceedings; however, in January 1983 they withdrew their actions and left Berlin.

In April 1984 they came for the third time to Berlin and again applied for political asylum. Since that time they have been staying with their three children in Berlin. In July 1984 the applicant and her husband again withdrew their requests for political asylum. The Berlin Registration Office, having regard to a general policy not to expel persons to Lebanon, issued provisional permissions for them to stay (Duldungen).

On 21 December 1987 the Berlin Registration Office, having regard to a general instruction of the Berlin Senator of the Interior (Senator für Inneres) dated 1 October 1987 concerning all persons from Lebanon staying in Berlin at that date ("Altfallregelung"), granted the applicant's husband a residence permit.

The instruction of the Berlin Senator of the Interior of 1 October 1987 provides that all persons from Lebanon who have stayed in Berlin before 1 October 1987 pending or after asylum proceedings and who have minor children will be granted a residence permit. Excluded are inter alia persons who have been sentenced for criminal offences to a fine of more than 90 day rates (Tagessätze) or three months' imprisonment. According to the case law of the Berlin Administrative Court of Appeal (Oberverwaltungsgericht), only stateless male Palestinians of an age liable for military service would be exposed to such risks and dangers in Lebanon that they are in general not to be deported to Lebanon.

On 15 February 1988 the Berlin Registration Office dismissed the applicant's request for a residence permit. The Office found that the applicant, having committed several criminal offences, could not be granted a residence permit under the relevant instruction of the Ministry of the Interior of 1 October 1987. The applicant had been convicted of shop-lifting four times. On 29 May 1979 the Tiergarten District Court (Amtsgericht) had fined the applicant 600 DM for theft. On 11 January 1983 the Tiergarten District Court had sentenced the applicant to three months' imprisonment on three counts of theft, and the execution of the sentence had been suspended on probation. On 6 February 1986 the Tiergarten District Court had sentenced the applicant to three months' imprisonemnt for theft, and the execution of the sentence had again been suspended on probation. On 19 December 1986 the Tiergarten District had sentenced the applicant to three months' imprisonment for theft and suspended the execution of the sentence on probation. The appeal (Berufung) of the Berlin Public Prosecutor's Office (Staatsanwaltschaft) had been dismissed by the Berlin Regional Court (Landgericht) on 6 March 1987.

On 15 February 1988 the Berlin Registration Office ordered the applicant to leave the Federal Republic of Germany within a month and warned her that she would be deported to Lebanon.

On 23 March 1988 the applicant lodged an appeal (Widerspruch) and requested the suspension of the deportation order. She submitted in particular that the envisaged deportation would violate her right to respect for her family life under the Basic Law (Grundgesetz).

On 30 June 1988 the Berlin Administrative Court (Verwaltungs-gericht) dismissed the applicant's request for a suspension of the decision of 15 February 1988 (Antrag auf einstweiligen Rechts-

schutz). The Court found that under the relevant provisions of the German Aliens' Act (Ausländergesetz) the applicant was obliged to leave the territory of the Federal Republic of Germany. The Court considered the applicant to be a Lebanese national. The provisions of the instruction of 1 October 1987 did not apply to her on the ground that she had committed several criminal offences and had been sentenced to a total of more than three months' imprisonment. The obligation to leave the country and the possible deportation to Lebanon would not cause a particular hardship to the applicant's family life, because her husband and children were able to join her.

Under S. 24 para. 1 of the Code of Administrative Procedure (Verwaltungsverfahrensgesetz) the competent authority has, ex officio, to examine the facts. The authority decides upon the manner and extent of investigations; it is not bound by the parties' submissions and requests to take evidence. Under S. 86 para. 1 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung) the court has, ex officio, to examine the facts; the parties are to be heard. The court is not bound by the parties' submissions and requests to take evidence.

The applicant's appeal (Beschwerde) against the above refusal of a suspension was dismissed by the Berlin Administrative Court of Appeal on 25 July 1988. The Administrative Court of Appeal found in particular that the refusal of a residence permit did not interfere with the applicant's right to respect for her family life in a disproportionate way.

The applicant's petition to the Berlin Diet (Abgeordnetenhaus) was unsuccessful.

On 2 March 1989 the Berlin Senator of the Interior dismissed the applicant's appeal of 23 March 1988 against her deportation. Referring to the decisions in the suspension proceedings, the Senator found in particular that the applicant had to accept a separation of her family at least for some time. Furthermore, even assuming that the applicant was of Palestinian origin, she had in the meantime acquired Lebanese nationality and had been able to travel from and to Lebanon with a Lebanese passport. In July 1988 a "laissez-passer" had therefore been correctly issued for her as travelling document, stating her Lebanese nationality. Moreover, the Senator found that the applicant had failed to substantiate individual reasons to fear persecution in Lebanon as a woman of Palestinian origin. The Senator referred in this respect to a report of the Foreign Office (Auswärtiges Amt) dated 1 July 1988 according to which Palestinians who are integrated in Lebanon can live there without problems. Finally, the Senator considered that the applicant's sentences had exceeded by far the limits for a residence permit under the instruction of 1 October 1987, and that she did not even qualify for a provisional residence permit on probation ("Bewährungsduldung"). The applicant could, under the relevant regulations, expect permission to return to her family in Berlin at the earliest two years after her departure ("Die Wiedereinreise zu Ihrer hier lebenden Familie unter Einhaltung der Einreisevorschriften kann Ihnen frühestens nach zwei Jahren - gerechnet vom Tag Ihrer Ausreise an - in Aussicht gestellt werden.").

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that her envisaged deportation to Lebanon would amount to inhuman treatment. She submits in particular that she has no relatives in Beirut who could support her. She fears that she would, as a woman without protection, be exposed to the dangers and risks of the civil war in Lebanon. As a Palestinian she would be persecuted and discriminated against in Lebanon. She submits that she is of Palestinian origin and did not acquire Lebanese nationality upon

marriage to her husband. Furthermore, she fears that the Lebanese authorities will not accept her "laissez-passer" as a valid document on the ground that such "laissez-passer" are generally only issued to stateless Kurds and stateless Palestinians who are not registered with the UNRWA. She would therefore risk arrest upon her arrival in Lebanon.

2. The applicant also complains under Article 8 para. 1 of the Convention that the decision of the German authorities to deport her to Lebanon violates her right to family life. She submits that, having regard to the interests of their children and their further development, her husband will not be able to follow her to Lebanon. She considers that her previous convictions do not justify this interference under Article 8 para. 2 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 October 1988 and registered on 25 October 1988.

On 10 November 1988 the Commission decided that, in accordance with Rule 42 para. 2 (b) of the Rules of Procedure, notice should be given to the Government of the Federal Republic of Germany of the application and that they should be invited to submit written observations on the admissibility and merits of the application. Furthermore, the Commission decided to indicate to the Government of the Federal Republic of Germany, in accordance with Rule 36 of the Rules of Procedure, that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Commission not to deport the applicant to Lebanon until the Commission had had an opportunity to examine the application further during its December session.

The Government's observations of 5 December 1988 were received on 9 December 1988.

On 15 December 1988 the Commission prolonged the indication under Rule 36 of its Rules of Procedure until it had had an opportunity to examine the application further during its January session.

The applicant's observations in reply were submitted on 16 December 1988. Further observations were submitted by the applicant on 31 January and 13 February 1989.

On 20 January 1989 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application. Furthermore, it decided to prolong the indication under Rule 36 of its Rules of Procedure until the date of the hearing.

On 7 February 1989 the President of the Commission decided that legal aid should be granted to the applicant for the representation of her case before the Commission.

At the hearing which was held on 8 March 1989 the parties were represented as follows:

For the Government

Mr. Meyer-Ladewig Ministerialdirigent,
Federal Ministry of Justice, Agent

Mr. Voss Senatsrat,
Berlin Senator of
the Interior, Adviser

For the Applicant

Mr. Kierzynowski Lawyer, Representative

THE LAW

The applicant complains that her envisaged deportation to Lebanon would amount to inhuman treatment and violates her right to respect for her family life with her husband and three children. She invokes Articles 3 and 8 (Art. 3, 8) of the Convention.

Article 3 (Art. 3) of the Convention provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Commission has constantly held that the deportation or extradition of a person can, in certain exceptional circumstances, involve a violation of Article 3 (Art. 3) where there is serious reason to believe that the person to be deported or extradited will be subjected to treatment prohibited by the Article in the receiving country (see No. 8581/79, Dec. 6.3.80, D.R. 29 p. 48).

Article 8 para. 1 (Art. 8-1) of the Convention, inter alia, provides that everyone has the right to respect for his family life. According to Article 8 para. 2 (Art. 8-2) there shall be no interference by a public authority with this right except such as is in accordance with the law and is necessary in a democratic society, inter alia, for the prevention of disorder or crime.

The respondent Government contend that the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. They submit that the applicant has not exhausted the main administrative appeal proceedings before the Berlin administrative courts, and that she failed to raise the substance of her complaint under Article 3 (Art. 3) of the Convention in the court proceedings concerning her request for a suspension of the deportation order.

The Commission recalls that if an individual complains that his deportation violates Article 3 (Art. 3) of the Convention, only appeals with suspensive effect can be considered effective (see No. 7216/75, Dec. 20.5.76, D.R. 5 p. 137). In the present case, the applicant's request for a suspension of the deportation order remained unsuccessful.

Furthermore, the Commission finds that, in the particular circumstances of the present case, the applicant was not required to invoke before the domestic authorities, in addition to her complaint about the imminent separation from her family, her fears about the dangers and risks for her as a single woman of Palestinian origin in Lebanon. The Commission notes in particular that, according to the established case law of the Berlin Administrative Court of Appeal, which was not questioned by the respondent Government, it was accepted that only stateless male Palestinians of an age liable for military service were exposed to such dangers that they should not be deported to Lebanon. Consequently, no effective remedy as to this allegation existed for the applicant. Moreover, it is to be noted that, under S. 86 para. 1 of the Administrative Code of Procedure, the Berlin administrative courts had, ex officio, to examine the facts and to apply the law accordingly.

The applicant's complaint under Article 8 para. 1 (Art. 8-1) of the Convention can also not be rejected for non-exhaustion of domestic remedies under Article 26 (Art. 26) in conjunction with Article 27 para. 3 (Art. 27-3) of the Convention, since it is only another aspect of the decision to deport the applicant to Lebanon, which cannot be dealt with separately.

Furthermore, the Commission observes that the Berlin Senator of the Interior, in his decision of 2 March 1989 dismissing the applicant's appeal of 23 March 1988, stated that the applicant could expect permission to return to Berlin at the earliest after two years from the date of her departure. At the

hearing on 8 March 1989, the respondent Government submitted that in similar cases foreigners who had not been granted a residence permit under the instruction of 1 October 1987 and who had had to leave Berlin, had, for humanitarian reasons, already been permitted to return to Berlin.

The Commission also notes that the Berlin Administrative Court and the Berlin Court of Appeal, in the suspension proceedings in 1988, examined the effect of the applicant's envisaged deportation upon her family life. The Berlin Senator of the Interior, in the above decision of 2 March 1989, referred to the reasoning of the Berlin Administrative Courts in the suspension proceedings concerning the alleged violation of her right to respect for her family life. The Commission observes that the main proceedings, which lasted almost one year at the level of the administrative appeal proceedings, may not terminate before expiry of the period of two years, when the applicant can expect permission to return to Berlin.

The Commission considers that the applicant, in these special circumstances, cannot be required to await the outcome of the main proceedings.

As to the well-foundedness of the application, the respondent Government have submitted that the applicant failed to substantiate that she would risk treatment contrary to Article 3 (Art. 3) of the Convention upon her return to Lebanon. As regards Article 8 (Art. 8) of the Convention, the Government maintain that she had not shown that her family could not follow her to Lebanon. In any event, having regard to the applicant's conviction for property offences, the interference with her right to respect for her family life would be necessary in a democratic society for the prevention of disorder and crime.

The Commission, however, considers that the applicant's complaints under Articles 3 and 8 para. 1 (Art. 3, 8-1) of the Convention raise complex issues of fact and law which can only be resolved by an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded. No other grounds for inadmissibility have been established.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case

Deputy Secretary to the Commission Acting President of the Commission

(J. RAYMOND) (S. TRECHSEL)