AS TO THE ADMISSIBILITY OF

Application No. 27249/95
by Abbas LWANGA and Ali SEMPUNGO
against Sweden

The European Commission of Human Rights sitting in private on 14 September 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
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
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN

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 3 May 1995 by Abbas Lwanga and Ali Sempungo against Sweden and registered on 4 May 1995 under file No. 27249/95;

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

Having regard to the observations submitted by the respondent Government on 24 May 1995 and the observations in reply submitted by the applicants on 16 June 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are citizens of Uganda. They are half-brothers, both born in 1978. They are currently receiving care in a child and youth psychiatric clinic in Umeå, Sweden. They are represented by Ms. Lena Isaksson, a lawyer there.

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

Particular circumstances of the case

The applicants have the same father and different mothers. The first applicant also has another brother, who is younger. The first applicant lived with his parents up to the age of six and then moved to a boarding school in the district of Mukomo. At the age of fourteen he moved to a boarding school in the district of Luvero. He spent the school holidays with his mother, brother and half-brother.

The second applicant lived with his mother up to the age of five, when he moved to a boarding school outside Kampala. At the age of thirteen he moved to a boarding school in the district of Mpigi. During the school holidays he would visit his mother. Occasionally, his father would visit him. After he moved to the second boarding school he would spend the holidays with his father and his family.

The applicants' father would occasionally send messengers to the applicants' schools, bringing letters, money and presents from him.

The applicants arrived in Sweden on 27 August 1993. On arrival in Sweden the applicants immediately applied for asylum. To the Swedish immigration authorities they gave the following account of the reasons for their departure from Uganda.

The applicants had both known of their father's political activities within the dissident faction NALU. He had fled to Kenya in August 1993. While staying at their respective boarding schools the applicants had, on 18 August 1993, been approached by members of NALU who had shown them a letter from their mothers. The letter had told them to leave Uganda immediately, since their mothers were wanted by the authorities. The applicants had first been taken to Kampala and from there transported to Nairobi, Kenya, where they had been informed that their father as well as the leader of NALU had been killed by representatives of the Ugandan regime.

At the Nairobi airport the applicants had been provided with Ugandan passports and flight tickets enabling them to go Stockholm via Sofia. A man had given them an address and a telephone number of a man in Stockholm and had told them to state to the Swedish authorities that he was their brother. They had not been accompanied on their journey. Before the Swedish authorities the applicants stated that they assumed that they had been enrolled in NALU by their father and that, once he had been killed, NALU had organised their journey to Sweden.

According to the Government, the first applicant stated, on 27 August 1993, that the applicants had left Uganda since they had been unable to support themselves after their father's death. On 30 September 1993, however, the applicants stated that they had left Uganda after having learnt that they were being wanted by the authorities.

Initially, the applicants stayed at a refugee reception centre in Stockholm. From November 1993 they stayed at a centre in Skellefteå receiving refugee children without accompanying guardians.

The applicants' asylum request was rejected by the National Immigration Board (Statens invandraverk) on 23 November 1993. The Board considered, in particular, that their accounts of their background had been vague. According to the Board, the applicants had also been able to leave Uganda with valid passports despite the fact that they were allegedly wanted there.

The applicants' appeal to the Aliens Appeals Board (Utlännings-

nämnden) was rejected on 17 June 1994. This Board also found that the applicants had left Uganda with valid passports issued on 6 August 1993. They had given very vague and partly contradictory information about their previous whereabouts in Uganda as well as of the age of their father and the first applicant's brother. The Board therefore found reason to question the credibility of the applicants' accounts. Irrespective of whether these accounts were credible, the Board found that the applicants had no reason to fear persecution in the receiving country. The Board decided, however, that the enforcement should be carried out on condition that the applicants were to be received by relatives or staff of the Swedish Embassy in Uganda. The Board found it certain that the applicants still had relatives in the receiving country.

Subsequently the police authority of Skellefteå, in vain, attempted to contact the applicants' mothers in Uganda. The Swedish Embassy in Uganda also carried out investigations but without success.

On 7 November 1994 the local police in charge of planning the enforcement of the expulsion order informed the National Immigration Board that it was not possible to carry out the enforcement as it had been ordered. A representative of the Board then orally instructed the police that the applicants were to be met on their return to Uganda by a representative of the national child welfare authority together with a representative of the Swedish Embassy.

On 27 March 1995 the applicants lodged a request for a residence permit on humanitarian grounds, invoking the unsuccessful attempts to reach any of their relatives in Uganda. This request was rejected by the Aliens Appeals Board on the same day. In its decision the Board incorrectly stated that the applicants were to reach the age of eighteen during 1995.

According to the applicants, an official of the Swedish Embassy stated, on 4 April 1995, that it would have no or at the most very limited possibilities of helping them on their return to Uganda.

On 6 April 1995 the police authority of Skellefteå ordered that the applicants should be detained pending enforcement of the expulsion order. On the same day they underwent a child psychiatric examination and later went into hiding. According to a report of 7 April 1995, the doctors Anna Lindström and Bo Viklund, of the child and youth psychiatric clinic of Umeå, found that the applicants were suffering from depression, were frequently considering suicidal acts and were therefore in need of child psychiatric care.

On 7 April 1995 the applicants lodged a further request for a residence permit on humanitarian grounds, invoking the above-mentioned expert report. This request was refused on 13 April by the Aliens Appeals Board.

On 20 April 1995 the applicants were admitted to the child and youth psychiatric clinic of Umeå, regard being had to their mental state as well as to their physical difficulties in absorbing liquids.

According to a report of 26 April 1995 by Dr. Bruno Hägglöf, Senior Physician at the psychiatric clinic, the applicants had, at the time of their admission, shown symptoms of depression and suicidal tendencies. They had also expressed suicidal plans. They also suffered from nutritional problems caused by a weak faculty of consuming fluids. In view of their state of health Dr. Hägglöf stated having reported their situation to the social authorities.

On 28 April 1995 the police authority contacted the psychiatric clinic with a view to preparing the enforcement of the expulsion order concerning the applicants. Dr. Hägglöf, however, considered that the applicants were still in need of psychiatric treatment and therefore

questioned the planned enforcement. The police did not pursue their enforcement attempt.

On 1 May 1995 the applicants again requested a residence permit on humanitarian grounds, invoking their state of health. This request was refused on 2 May 1995.

Following the indication given by the Acting President of the Commission on 3 May 1995 (see "Proceedings before the Commission"), the Aliens Appeals Board, on 5 May 1995, stayed the enforcement of the expulsion order concerning the applicants.

On 9 May 1995 the Aliens Appeals Board revoked the order of 6 April 1995 that the applicants should be detained pending enforcement of the expulsion order.

According to the applicants, they have had no contacts with any relatives in Uganda since November 1993. This statement can allegedly be verified by staff of the refugee reception centre at Skellefteå.

Relevant domestic law

According to the 1989 Aliens Act (utlänningslag 1989:529), a residence permit may be granted to an alien for humanitarian reasons (chapter 2, section 4, subsection 1 (2)). A so-called new request for a residence permit may only be granted if the request, lodged by an alien who is to be refused entry or expelled by a decision which has acquired legal force, is based on new circumstances and provided the applicant is either entitled to asylum or there are weighty humanitarian reasons for allowing him or her to stay in Sweden (chapter 2, section 5, subsection 3). As from 1 July 1994 a request pursuant to chapter 2, section 5, shall be lodged with the Aliens Appeals Board.

When considering whether to refuse an alien entry or to issue an expulsion order, the authorities must examine, pursuant to chapter 8, sections 1-4, of the Aliens Act, whether the alien can be returned to a particular country or whether there are other special obstacles to the enforcement of such a decision. Any necessary instructions regarding the enforcement order shall be given by the Government, the Aliens Appeals Board or the National Immigration Board in their decisions (chapter 4, section 12).

If the enforcement meets no obstacles under chapter 8, an alien is to be expelled or returned to the country of origin or, if possible, to the country from which he or she came to Sweden. If the decision cannot be enforced in one of these manners or if special reasons exist, the alien may be sent to another country (chapter 8, section 5).

If the enforcing authority finds that the enforcement cannot be carried out or that further information is needed, it shall notify the National Immigration Board accordingly. In such a case, the Board may decide on the question of enforcement or take such other measures as are necessary (chapter 8, section 13).

If an expulsion order or a decision refusing entry contains no instructions regarding its enforcement or if it is evident that the instructions cannot be complied with, the enforcing authority shall decide how to carry out the enforcement, provided it does not proceed in accordance with chapter 8, section 13 of the Aliens Act (chapter 7, section 2 of the 1989 Aliens Ordinance (utlänningsförordning 1989:547)).

When considering a new request for a residence permit lodged by an alien who is to be expelled according to a decision which has acquired legal force, the National Immigration Board (and in certain cases also the Government) may stay the enforcement of that decision.

For particular reasons the Board may also otherwise stay enforcement (chapter 8, section 10). Similarly, the Aliens Appeals Board may decide to stay the enforcement of a previous expulsion order.

The National Immigration Board or the Aliens Appeals Board may refer a matter to the Government if, for instance, its outcome is of particular importance to the future application of the Aliens Act or if other particular circumstances warrant the Government's consideration of the case (chapter 7, section 11).

According to the 1991 Act on Compulsory Mental Care (lag 1991:1128 om psykiatrisk tvångsvård), such care shall be terminated at the request of the competent police authority whenever the person placed in care is ordered to be expelled. This presupposes, however, that the Chief Physician is of the opinion that the alien's condition allows enforcement to take place and consequently grants the request (section 29; Government Bill no. 1190/91: 58, appendix 1, p. 270). No appeal lies against the Chief Physician's decision upon a request made by the enforcing authority (section 33 of the 1991 Act).

COMPLAINT

The applicants complain that an enforcement at present of the expulsion order would subject them to a trauma constituting inhuman treatment contrary to Article 3 of the Convention. They refer to their background in Uganda as well as to the expert evidence adduced concerning their current state of health. They allege, in particular, that no one would care for them in Uganda after their return and assert that there is no child welfare authority with such duties in Uganda.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 May 1995 and registered on 4 May 1995.

On 3 May 1995 the Acting President indicated to the respondent Government that it would be desirable in the interest of the parties and the proper conduct of the proceedings not to enforce the expulsion order concerning the applicants until the Commission had examined the application at the latest on 26 May 1995. The Acting President further communicated the application to the Government, pursuant to Rules 34 para. 3 and 48 para. 2 (b) of the Rules of Procedure.

On 25 May 1995 the Commission prolonged the Acting President's indication under Rule 36 until 7 July 1995.

The Government's written observations were submitted on 24 May 1995 and the applicants' observations in reply on 16 June 1995.

On 6 July 1995 the Commission prolonged its indication under Rule 36 until 15 September 1995.

On 7 July 1995 the Commission granted the applicants legal aid.

THE LAW

The applicants complain that an enforcement at present of the expulsion order would subject them to a trauma constituting inhuman treatment contrary to Article 3 (Art. 3) of the Convention. This provision reads as follows:

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

The Government consider the application to be manifestly ill-founded. First, the applicants' fear that they would be politically

persecuted on their return to Uganda is exaggerated. The Government invoke the political changes in the receiving country and refer to inconsistencies in the applicants' account of their background. For instance, on 27 August 1993, the first applicant stated to the Swedish authorities that the applicants had left Uganda since they had been unable to support themselves after their father's death. Later, however, the applicants stated that they had left their country after having learnt that they were being wanted by the authorities. The Government submit that, at any rate, the applicants' passports had been issued already on 6 August 1993, that is before their father is said to have been killed. This would seem to indicate that the applicants' journey to Sweden had been planned in advance. The Government furthermore submit that the applicants were able to leave their country after having presented their passports at the border between Uganda and Kenya. This does not support their contention that they are wanted by the Ugandan authorities. Nor are they likely to encounter problems caused by NALU, since their departure from Uganda is said to have been arranged by that organisation. The Government therefore argue that substantial grounds have not been shown for believing that the applicants would, on account of their background in Uganda, face a real risk of treatment contrary to Article 3 (Art. 3) if returned to that country. The Government also consider that the applicants can be returned to Uganda despite their current state of health. The enforcement of the expulsion order would not involve such a trauma on their part that this would amount to a violation of Article 3 (Art. 3). Reference is made, in particular, to the medical report submitted by Dr. Hägglöf on 26 April 1995. Moreover, the applicants stated in September 1993 that their grandparents and possibly their mothers still remained in Uganda. The Government point out that since the applicants have no relatives in Sweden, their well-being in that country would have to be ensured by the social authorities.

The Government finally submit that the local police authority must, when preparing the enforcement, consider the applicants' state of health and, if necessary, notify the National Immigration Board of any impediment to the enforcement. The applicants' physical and mental state at the time of any planned enforcement will therefore be decisive.

The applicants submit that their application is not primarily related to the political situation in Uganda but to the fact that they are to be returned there despite their mental state and age and without any indication that they would be cared for on their return. They nevertheless emphasise that on arriving in Sweden they were only fourteen and fifteen years old. It is therefore reasonable to suppose that at that time they were frightened and insecure, this explaining the discrepancies between certain of their accounts of their background.

The applicants recall that their further request for a residence permit on humanitarian grounds was based on a medical report that there was a risk that they would commit suicide and that because of their state of health they had been urgently admitted for psychiatric care. Their request was nevertheless rejected without the Aliens Appeals Board having consulted any of the physicians normally heard in expulsion cases of this kind.

The applicants finally contend that since their arrival in Sweden in August 1993 they have had no contact with Uganda and have not been contacted by anyone in that country. There are strong indications that their respective mothers have disappeared. Despite the efforts made by the Swedish authorities in order to locate any of their relatives in Uganda there is no evidence that any relatives remain there. Moreover, the medical evidence adduced indicates that the applicants are in need of long-term psychiatric treatment. It can be assumed that the Swedish authorities have considerably greater possibilities for supporting and helping them than the Ugandan authorities.

(a) The Commission has first examined whether the applicants' return to Uganda would, if enforced, violate Article 3 (Art. 3) of the Convention on account of their father's alleged political background in that country and the surrounding circumstances.

The Commission recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. The right to political asylum is not protected in either the Convention or its Protocols (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, para. 102). However, expulsion by a Contracting State 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 would face 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 expelled (ibid., para. 103). A mere possibility of ill-treatment is not in itself sufficient (ibid., p. 37, para. 111).

The Commission notes the Swedish authorities' doubts as to whether the applicants would, on account of their father's background, face a real risk of treatment contrary to Article 3 (Art. 3), if returned to Uganda. It also notes that chapter 8 of the Aliens Act imposes an absolute obligation on the enforcement authority in Sweden to refrain from expelling an alien, should the human rights situation in the receiving country constitute a firm reason to believe that he or she would be in danger of being subjected to capital or corporal punishment, or torture, in that country.

The Commission does not find it established that there are substantial grounds for believing that the applicants would, on account of their father's background in Uganda, be exposed to a "real risk" of being subjected to treatment contrary to Article 3 (Art. 3) in that country.

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

(b) The Commission has next examined the application in the light of the applicants' allegation that no one would care for them on their return to Uganda as well as in the light of their current state of health. The question to be answered is whether the enforcement at present of the expulsion order would in itself involve such a trauma to the applicants that Article 3 (Art. 3) would be violated (cf. Eur. Court H.R., Cruz Varas and others judgment of 20 March 1991, Series A no. 201, p. 31, paras. 83-84).

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (the above-mentioned Cruz Varas and others judgment, loc.cit.).

The Commission notes that the enforcement of the expulsion order concerning the applicants was initially subject to written instructions to the enforcing police authority which were issued by the Aliens Appeals Board on 17 June 1994. On 7 November 1994 the police received oral instructions from the National Immigration Board, according to which the applicants are, on their return, to be met by a representative of the Ugandan child welfare authority and a representative of the Swedish Embassy. The Commission assumes that no enforcement will take place without assurances that both of these

conditions are met.

The Commission therefore finds that in the circumstances of this case it is not unreasonable to assume that the applicants' return to Uganda would not amount to a violation of Article 3 (Art. 3). It appears, moreover, that, should the applicants be placed in compulsory care in Sweden, enforcement could under no circumstances take place without permission of the Chief Physician responsible for their care. Given that the enforcing police authority must request this physician to terminate the care, he or she still retains a further opportunity to assess, in a decisive manner, the applicants' state of health at the time of the planned enforcement.

In these circumstances the Commission cannot find it to have been shown that the applicants' possible return to Uganda would amount to a violation of Article 3 (Art. 3) on account of the alleged absence of carers in Uganda or the applicants' current state of health.

It follows that this aspect of the complaint 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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)