AS TO THE ADMISSIBILITY OF

Application No. 20990/92
by M.C.P
against Sweden

The European Commission of Human Rights sitting in private on 8 April 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI

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 16 November 1992 by M.C.P against Sweden and registered on 25 November 1992 under file No. 20990/92;

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

Having regard to the observations submitted by the respondent Government on 22 December 1992 and the observations in reply submitted by the applicant on 28 January 1993;

Having deliberated;

Decides as follows:

THE FACTS

Particular circumstances of the case

The applicant is a Peruvian citizen born in 1972. Before leaving Peru she was a student at the "P.".

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

She left Peru on 7 December 1990 and arrived in Sweden on 9 December 1990. It would appear that in March 1991 she applied to the National Immigration Board (statens invandrarverk - the Board) for political asylum, work and residence permits and travel documents. In her application, as supplemented on 26 April 1991, she stated inter

alia the following.

She came from good family conditions. Her parents were of social democrat inclination. In July 1989 one of her cousins was killed by a bomb, presumably by one of the anti-terrorist commandos in operation. In April 1990 she became a member of the "Comité de Defensa del Pueblo", a supporting section of the Sendero Luminoso. She was never arrested on account of her activities. On 21 October 1990 her brother, who was also a supporting member of the Sendero Luminoso, disappeared while interviewing poor people in one of the suburbs of Lima. On the same day the police searched her home in an attempt to arrest also her. When she learned about the search she went into hiding. On 24 October 1990 the family obtained a habeas corpus order from the local district court in respect of the brother. The police subsequently made two further searches of her home but did not find the applicant who had gone into hiding. On 7 December 1990 she managed to leave the country with the help of her father. She decided to go to Sweden where she had an aunt and where she thought she could get refuge as the country was democratic and known for protecting human rights. If she had stayed in Peru she would have disappeared, i.e. been killed and thrown into a mass grave, just as her brother. According to a newspaper article dated 17 March 1991 the lawyer engaged to elucidate what had happened to her brother had been severely injured by a mail bomb. Despite continuous court actions in order to elucidate her brother's disappearance, nothing was known about his fate.

By decision of 7 January 1992 the Board decided to refer the case to the Government for decision, inter alia, as it found that membership in the Sendero Luminoso should not found a right to asylum in Sweden as a result of the severe acts of cruelty committed by the organisation against the civilian population and as that there would, nonetheless, probably be grounds for refusing execution of an expulsion decision by virtue of Chapter 8, Section 1, of the 1989 Aliens Act (utlänningslagen 1989:529). The Board's decision also referred to the evaluation of the applicant's case contained in a separate memorandum. In this memorandum the Board concluded that it had no reason to question the information provided by the applicant about her activities in favour of the supporting section of the Sendero Luminoso; it also knew about her brother's arrest and the fact that his fate was still unknown.

On 28 April 1992 the applicant lodged further observations with the Government. She drew the Government's attention to the severe violations of human rights reported to have been committed by the Peruvian Government, in particular against members and suspected members of the Sendero Luminoso, and argued that membership in that organisation could accordingly not disqualify a person from the right to political asylum.

In the course of the summer the applicant's parents visited her in Sweden in order, inter alia, to find out why her request for asylum was not accepted.

By decision of 1 October 1992 the Government rejected the applicant's applications and forbade her to return to Sweden before 1 October 1994 without special permission from the Board.

On 1 March 1993 the applicant filed a new request for a residence permit with the Board in which she invoked the following new documentary evidence:

(a) a letter dated 21 July 1992 from her father to her previous legal counsel stating that the father had turned to the Inter-American Commission of Human Rights to get protection as a result of the threats which he had received following his attempts to clarify the circumstances of his son's disappearance;

(b) a letter dated 21 January 1993 from the applicant's mother to the

European Commission of Human Rights stating that the family had been exposed to numerous threats from persons acting on behalf of the Peruvian Government after the family started investigating the circumstances of their son's disappearance. The letter also states that these threats have for the time being been kept secret in order not to dissuade any witnesses to the disappearance from stepping forward;

(c) a telefax from Instituto de Defensa Legal in Lima, Peru, dated 27 January 1993 and confirming that the parents had anew instituted criminal proceedings against the Peruvian police on account of the disappearance of the applicant's brother and that, as a result, both the parents and the applicant were exposed to a serious risk of retaliation in order to scare them and make them drop their charges;

(d) a letter dated 11 December 1992 from the family's original counsel in the habeas corpus proceedings, who had since been accepted as a refugee in Sweden, confirming that he had been threatened by the Peruvian police in order to make him drop the case against the police and that he, when he nevertheless pursued the case, had received a letter bomb causing, inter alia, the amputation of his left arm.

By decision of 11 March 1993 the Board rejected the renewed request. The decision stated inter alia:

> "Some of the circumstances relied upon have already been examined by the Government. The new circumstances invoked as well as the new documents do not constitute sufficient grounds for granting asylum. Neither do there exist sufficient grounds of a humanitarian nature for granting a residence permit."

Relevant domestic law

The relevant provisions of the 1989 Aliens Act read:

Chapter 3; Asylum.

Section 1: "The term asylum as used in this Act refers to a residence permit awarded to an alien because

1. he is a refugee,

...

3. without being a refugee, he is unwilling to return to his country of origin on account of the political situation there and is able to invoke very strong grounds in support of this."

Section 2: "The term refugee in the present Act refers to any foreigner who is staying outside the country of which he is a citizen because he feels a well-founded fear of being persecuted in that country by reason of his race, nationality, belonging to a special group in society or his religious or political convictions and who cannot or who does not wish to avail himself of his home country's protection ..."

Section 4: "An alien as referred to in Section 1 is entitled to asylum.

Asylum may, however, be refused if,

in the case of an alien falling under Section 1 ... (3), there are special grounds for not granting asylum,

..."

Chapter 4; Refusal of entry and expulsion.

Section 1: "An alien may be refused entry

...

2. if he does not possess a visa, residence permit or other document required for entry, residence or employment in Sweden,

..."

Section 12: "When a question concerning refusal of entry or of expulsion is examined, it is to be considered whether the alien, pursuant to the provisions of Chapter 8, Sections 1 - 4, cannot be sent to a particular country or whether there are other special obstacles to the decision being enforced.

Decisions made by the Government or the ... Board are to include such directions with regard to enforcement as this examination may call for."

Chapter 7; Appeals etc ...

Section 5: "The Government may, when deciding to refuse entry or to expel an alien, also decide that the alien shall be forbidden to return to Sweden for a certain period of time ... ."

Section 11: "The National Immigration Board may refer a case to the Government for decision if the Board considers such a procedure called for on account of special reasons. ... "

Chapter 8; Enforcement.

Section 1: "An alien who has been refused entry or who is to be expelled may never be conveyed to a country where there is firm reason to believe that he would be in danger of suffering capital or corporal punishment or of being subjected to torture, nor to a country where he is not protected from being sent to a country where he would be in such danger."

Section 2: "When a refusal-of-entry or expulsion order is to be put into effect, the alien may not be sent to a country where he would risk being persecuted, nor to a country where he would not be protected from being sent on to a country where he would risk being persecuted.

An alien may, however, be sent to a country as referred to in paragraph 1 if he cannot be sent to any other country and if he has shown, by committing a particular offence, that public order and safety would be seriously endangered by his being allowed to remain in Sweden. This does not apply if the persecution threatening him in the other country implies danger to his life or is otherwise of a particularly grave nature.

Similarly, the alien may be sent to a country referred to in paragraph 1 if he has conducted activities endangering the national security of Sweden and if there is reason to suppose that he would continue to engage in such activities here and he cannot be sent to any other country."

Section 5: "If enforcement is not subject to any obstacles under Sections 1 - 4, an alien who has been refused entry or who is to be expelled is to be sent to his country of origin or, if possible, to the country from which he came to Sweden.

If the decision cannot be put into effect in the manner indicated in paragraph 1 or there are other special grounds for doing so, the alien may be sent to some other country instead."

Section 13: "If the enforcing authority finds that enforcement cannot be carried out or that further information is needed, the authority is to notify the ... Board accordingly. In such a case, the ... Board may decide on the question of enforcement or take such other measures as are necessary."

COMPLAINTS

The applicant maintains that her expulsion to Peru would violate Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 November 1992 and registered on 25 November 1992.

On 25 November 1992 the President of the Commission decided, pursuant to Rule 36 of the Commission's Rules of Procedure, that it was desirable in the interest of the parties and the proper conduct of the proceedings not to return the applicant to Peru until the Commission had had an opportunity to examine the application. The President also decided that notice of the application should be given to the respondent Government and that the parties should be invited to submit written observations on its admissibility and merits.

The indication given under Rule 36 was subsequently renewed by the Commission on 11 December 1992, 15 January 1993 and 19 February 1993.

The Government's observations were submitted on 22 December 1992 and the applicant's observations in reply on 28 January 1993.

THE LAW

The applicant complains that she will be subjected to ill-treatment contrary to Article 3 (Art. 3) of the Convention and possibly killed if expelled to Peru. Article 3 (Art. 3) provides:

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

The Government point out that an asylum seeker has the right under Swedish law to request a re-examination of the question of asylum. Such a request must be examined by the authorities, provided that there are new circumstances which could call for a different decision. Consequently, this possibility is also open to the applicant, which means, in the Government's opinion, that the question of exhaustion of domestic remedies might arise.

The applicant maintains that she has exhausted all domestic remedies.

The Commission notes that the applicant has invoked before the Commission essentially the same arguments as were considered by the Government and the National Immigration Board in their decisions. As there was no appeal against these decisions, it follows that the applicant must be considered to have exhausted the domestic remedies.

The Government state that there are at present some 900 Peruvians in Sweden who have applied for political asylum. The Government decided 19 of these applications on 8 July 1992 (including the applicant's) in order to provide some guidance for the handling of the remaining cases. Only one application was granted and this for humanitarian reasons. The Government emphasise that some Peruvians whose requests were rejected have already returned to Peru voluntarily and that the Government have received no information to the effect that any of them have been arrested or subjected to ill-treatment upon their return to Peru.

The Government emphasise that their examination of a request for asylum under the Aliens Act takes into account the same factors as are relevant for the application of Article 3 (Art. 3) of the Convention and that they have given the present case careful consideration.

As regards the present case, the Government point out that the applicant was never arrested on account of her activities in Peru and that they did not prevent her from obtaining a valid passport and using this passport when leaving the country. The Government have no information to the effect that the applicant is at present wanted by the Peruvian police on account of terrorist acts or similar activities, nor on account of any other crime.

As regards the question whether the actions undertaken by the family to clarify her brother's disappearance, the Government stress that her parents, who have been strongly involved in these actions, have considered it possible to return to Peru after their visit to Sweden and that there is no indication that they have been threatened in any way due to their activities when investigating their son's disappearance.

The Government thus find it unlikely that the Peruvian police would still have an interest in arresting and interrogating the applicant.

As regards the situation in general in Peru, the Government point out that according to information obtained by the Swedish Embassy in Lima there have been no indications of treatment contrary to Article 3 (Art. 3) of the Convention in the criminal proceedings instituted in 1992 against the leader of the Sendero Luminoso, Mr. Abigael Guzmán, and the other persons arrested together with him. The general opinion among people interested in human rights in Peru appears to be that the special police force responsible for arresting Sendero Luminoso activists suspected of having committed criminal offences is anxious to avoid being accused of having ill-treated those activists.

The Government further refer to a new Peruvian Act on Repenters (Ley de Arrepentimiento) which entered into force in May 1992. According to this Act members of the Sendero Luminoso suspected of having taken part in terrorist acts who have surrendered themselves to the Peruvian authorities may have their sentence cut by half in mitigation, and may also receive assistance in returning to an ordinary life in society in the form of a new identity, a new place to live and new employment. The Government state that they have been informed that some 1,400 persons have surrendered under this legislation.

The Government finally submit that the applicant may leave Sweden whenever she wishes, thereby avoiding her expulsion to Peru.

The applicant disagrees with the Government as regards the Peruvian authorities' interest in her person. She invokes the documents submitted to the National Immigration Board in support of her claim that she is exposed to serious threats to her life in Peru because of her and her family's involvement in the proceedings against the Peruvian police. The applicant also invokes an article in a Swedish newspaper ("Sydsvenska Dagbladet") of 16 September 1992 according to which the Peruvian Government have attempted to obtain the expulsion

of Sendero Luminoso refugees in Sweden against preferential treatment for Swedish companies in Peru. She finally invokes a number of recent reports from Amnesty International and from Americas Watch. According to these reports the human rights situation after the "coup" in April 1992 has seriously deteriorated: the armed confrontation with the Sendero Luminoso has increased in severity, with an increase in violations of human rights and the law of wars by all sides; vaguely defined crimes such as "apology of terrorism" have made almost anyone susceptible of arrest and detention; many suspected terrorists have been held incommunicado, interrogated and maltreated and killed; the independence of the judiciary has disappeared with the dismissal of over a hundred judges (including 13 Supreme Court Justices) and prosecutors who have been irregularly replaced by government supporters - in particular a number of judges have been dismissed after issuing writs of habeas corpus in cases of disappeared persons; no actions are being taken to sanction police or army officials responsible for torture or extra-judicial killings.

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 of an asylum seeker may give rise to an issue under Article 3 (Art. 3) of the Convention, and hence engage the responsibility of a Contracting 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 or she is to be expelled (ibid., p. 34, para. 103). A mere possibility of ill-treatment is not in itself sufficient in this context (ibid., p. 37, para. 111).

The Commission considers that the evidence before it concerning the applicant's background and the general situation in Peru does not establish that there are substantial grounds for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if returned to Peru. In reaching this conclusion the Commission notes the following.

No evidence such as a warrant of arrest or a summons to appear before authorities in Peru has been submitted by the applicant. Nor does it appear from the material of the case file that the applicant would be of special interest to the Peruvian authorities. Thus, the allegation that the applicant is wanted has remained unsubstantiated. She has not herself taken any major part in the proceedings against the Peruvian police. Indeed she left the country shortly after they were instituted. Her parents, who appear to have been closely involved in the proceedings, returned to Peru after their visit to Sweden in the summer of 1992. The evidence before the Commission concerning the applicant's background and the general situation in Peru does furthermore not establish that her personal situation is any worse than that of those Peruvians who have returned voluntarily to their home country following the Government's refusal of asylum (ibid., p. 37, para. 111).

The Commission also attaches importance to the fact that the Swedish authorities appear to have gained a considerable experience in evaluating claims of the present nature by virtue of the large number of Peruvian asylum seekers in Sweden. It notes that residence permits have in fact been granted in numerous cases (cf No. 20809/92, dec. 15.2.93, not yet published).

Moreover, the Commission notes that the Swedish authorities are obliged to consider basically the same factors as are relevant to the

Convention organs' assessment under Article 3 (Art. 3) of the Convention. The Government's decision of 8 July 1992 was also made after careful examination of the applicant's case (cf. Eur. Court H.R., Cruz Varas and Others judgment of 20 March 1991, Series A no. 201, p. 31, para. 81). The Commission in particular observes that Chapter 8, Section 1 of the Aliens Act imposes an absolute obligation also on the enforcing authority in Sweden to refrain from expelling an alien, should the evolution of the human rights situation in the receiving country constitute firm reason to believe that the alien would be in danger of being subjected to capital or corporal punishment or torture in that country.

In these circumstances the Commission cannot find that substantiated grounds have been established for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention on her return to Peru.

It follows that the complaint 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 Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)