AS TO THE ADMISSIBILITY OF

Application No. 43348/98
by M. M.
against Switzerland

The European Commission of Human Rights sitting in private on 14 September 1998, the following members being present:

MM J.-C. GEUS, Acting President
S. TRECHSEL
M.P. PELLONPÄÄ
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
C. BÎRSAN
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 3 July 1998 by M. M. against Switzerland and registered on 8 September 1998 under file No. 43348/98;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a citizen of the Democratic Republic of Congo born in 1967, resides in Frauenfeld in Switzerland. Before the Commission, he is represented by Mr A. Blättler, a lawyer practising in Zürich.

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

The applicant has been involved in asylum proceedings. In 1994 his request for asylum was dismissed by the Federal Office for Refugees (Bundesamt für Flüchtlinge) and in 1996, upon appeal, by the Swiss Asylum Appeals Commission (Schweizerische Asylrekurskommission). The applicant was ordered to leave Switzerland.

In the meantime, the applicant became HIV-infected. He commenced an intensive medical treatment leading to certain positive results. According to a medical report of the Zürich University Hospital of 2 February 1998, the applicant did not suffer from any illness related to HIV, though this could happen at any time. The applicant required particular medical treatment, in particular ten tablets a day, at a cost of approximately 17,000 Swiss Francs (CHF) per year. With this treatment it could be expected that after three years the applicant's immunal system would recover.

In 1996 the applicant was convicted of having committed serious bodily injury and of having wilfully spread infectious illnesses. He was sentenced to three years' imprisonment and ordered to leave Switzerland for a period of 10 years.

In 1997 the applicant requested the Aliens' Police (Fremdenpolizei) of the Canton of Thurgau not to expel him in view of his illness. The request was transmitted to the Federal Office for Refugees which refused it on 12 February 1998. The Office found, inter alia, that the applicant did not suffer from any HIV-related disease and that no particular care was required. He would be able to continue his treatment upon return to his home country, and the Swiss authorities would be willing to take over the costs, initially for a period of one year.

The applicant's appeal was refused by the Swiss Asylum Appeals Commission on 30 April 1998. The Appeals Commission noted that the case of D. v. United Kingdom

(Eur. Court HR judgment of 2 May 1997, Reports of Judgments and Decisions 1997-III p. 777 et seq.) differed in that that applicant, who had been terminally ill and required intensive medical care, was to be granted the possibility of dying in dignity. In the present case, it was true that the medical situation was difficult in the Democratic Republic of Congo. However, the necessary tests could also be undertaken in South Africa without the applicant having to leave his home country.

The Appeals Commission further considered that the applicant, who had been convicted for spreading illnesses, remained a danger to Swiss public order. Thus, in view of his previous conduct it could be assumed that he would continue to infect other persons. Reference was made, inter alia, to the fact that the applicant was the father of two children from two mothers.

COMPLAINTS

The applicant complains under Article 3 of the Convention of his imminent expulsion to the Democratic Republic of Congo. He submits that upon return he could no longer undergo the required medical treatment and that, as a result, he would suffer HIV-related illnesses. The medical infrastructure in his home-country is completely insufficient, and even a very short interruption of the treatment would have catastrophic results for him.

The applicant refers to the report of the Zürich University Hospital of 2 February 1998 which is largely confirmed by a report of the prison doctor of Regensdorf prison in Switzerland. Reference is also made to an undated letter of the World Health Organisation according to which the required treatment "is not widely available to HIV-infected people or AIDS patients in developing countries. While there are notably exceptions such as Thailand, in most countries of Africa, access to AZT and the newer drugs is only possible through the private sector."

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 July 1998.

On 10 July 1998 the Commission decided not to apply Rule 36 of the Commission's Rules of Procedure.

The application was registered on 8 September 1998.

THE LAW

The applicant complains under Article 3 of the Convention of his imminent expulsion to the Democratic Republic of Congo. He is HIV-infected. Upon return he could no longer undergo the required medical treatment and, as a result, he would suffer HIV-related illnesses.

Article 3 of the Convention states:

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

According to the Convention organs' case-law, the right of an alien to reside in a particular country is not as such guaranteed by the Convention. Nevertheless, expulsion may in exceptional circumstances involve a violation of the Convention, for example where there is a serious and well-founded fear of treatment contrary to Article 3 of the Convention in the country to which the person is to be expelled (see Eur. Court HR, Chahal v. United Kingdom judgment of 15 November 1996, Reports of Judgments and Decisions, 1996, p. 1831, paras. 72 et seq.).

The Convention organs are nevertheless not prevented from scrutinising an applicant's claim under Article 3 of the Convention where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of this guarantee. To limit the application of Article 3 of the Convention in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Convention organs must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation (Eur. Court HR, D. v. United Kingdom judgment of 2 May 1997, Reports of Judgments and Decisions 1997-III, p. 792, para. 49).

It is true that the present applicant is HIV-infected. According to the medical report of the Zürich University Hospital of 2 February 1998, he requires a specialised medical treatment at a cost of approximately 17,000 CHF per year, consisting in particular of tablets to be taken 10 times a day, and of regular blood analyses. With this treatment it can be expected that the applicant's immunal system will recover.

However, the case differs in various respects from that of D. v. United Kingdom (loc. cit., p. 777 et seq.). Thus, there is no indication that the applicant suffers from any HIV-related illness. Moreover, as the Federal Office for Refugees pointed out in its decision of 12 February 1998, the Swiss authorities have offered to pay him the treatment upon his return, initially for the period of one year. The Asylum Appeals Commission pointed out in its decision of 30 April 1998 that the required blood tests could be undertaken in South Africa, without the applicant having to leave his country. Finally, it transpires from the medical report of the Zürich University Hospital of 2 February 1998 that the treatment required need not last longer than three years.

As a result, the applicant has failed to show that upon his return to the Democratic Republic of Congo he would face a real risk of being subjected to treatment contrary to Article 3 of the Convention.

The application is, therefore, 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