AS TO THE ADMISSIBILITY OF

Application No. 17878/91
by Azezo MBUNZU
against the Netherlands

The European Commission of Human Rights sitting in private on 11 May 1992, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

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 14 February 1991 by Azezo MBUNZU against the Netherlands and registered on 8 March 1991 under file No. 17878/91;

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 is an Angolan national, at present residing in Amsterdam. It is unclear whether the applicant was born in 1958 or 1966.

Before the Commission the applicant is represented by M.J.A. Leijen, a lawyer practising in Alkmaar, the Netherlands.

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

In January 1990 the applicant was called up for military service in the Angolan governmental MPLA forces. At that time the MPLA forces were fighting against the UNITA resistance movement. The applicant's only two brothers had already lost their lives serving in the MPLA

army. The applicant's father did not want his only remaining son to perform military service and decided that the applicant should leave Angola. The applicant initially went into hiding and subsequently, assisted by friends, left Angola on 2 March 1990 holding a valid passport and exit visa.

He arrived in the Netherlands on 3 March 1990, where he immediately requested asylum and a residence permit.

On the same day, the applicant was interviewed by an official from the Ministry of Justice. He declared he did not want to join the army as his two brothers had already died in active service and as new conscripts were immediately sent to the war front without any training.

On 11 April 1990 the Deputy Minister of Justice rejected the applicant's requests for asylum and a residence permit.

Following the applicant's request of 21 May 1990 for a review of this decision, the Deputy Minister of Justice on 18 June 1990 refused to give suspensive effect to this request as regards the applicant's expulsion from the Netherlands.

As the Deputy Minister of Justice failed to decide the request for review within three months, the applicant, on 13 September 1990, filed an appeal with the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State) against the fictitious negative decision by the Deputy Minister, which appeal is still pending.

On 10 August 1990 the applicant started summary proceedings (kort geding) before the President of the Regional Court (Arrondissementsrechtbank) of The Hague, claiming the right to remain in the Netherlands pending the final outcome of his requests for asylum and a residence permit.

On 28 September 1990 the Acting President of the Regional Court rejected the applicant's request, including the applicant's complaint under Article 3 of the Convention.

The Acting President held, inter alia, that a refusal to perform military service can only under special circumstances lead to a status of refugee, which circumstances, in his opinion, had not been established in the applicant's case and that under Dutch law the right to refuse military service is not considered as a fundamental human right.

The applicant's subsequent appeal against this decision with the Court of Appeal (Gerechtshof) of The Hague is still pending.

By letter of 4 June 1990, a friend of the applicant informed the applicant that his father had been arrested on 26 May 1990 as a result of the applicant's absconding and was detained at an unknown place.

By an anonymous telegram of 28 February 1990 and by letters of 25 March and 11 August 1991 from his uncle the applicant was informed that his father had died in prison in November 1990.

On 31 May 1991 a peace agreement was signed between the Angolan Government and the UNITA resistance movement. Since 1 June 1991 a ceasefire is in force and on 12 July 1991 the Angolan Government issued an Amnesty Act, which provides amnesty for, inter alia, persons who have refused to perform military service and deserted before 31 May 1991.

COMPLAINTS

1. The applicant complains that the Netherlands authorities by expelling him to Angola expose him to a serious risk of losing his life in an inhuman and senseless civil war. He submits that upon his return he will be sent immediately and untrained to the war front. He relies in this respect on Articles 2 and 3 of the Convention.

2. The applicant complains under Article 6 para. 1 of the Convention that he had no access to an independent and impartial tribunal in respect of the decisions on his requests for asylum and a residence permit, as civil courts in the Netherlands cannot examine decisions on such requests on the merits.

3. The applicant also complains that, contrary to Article 13 of the Convention, he had no effective domestic remedy in the Netherlands for his claims.

4. The applicant submits that in Angola he cannot freely express his views on the civil war. He complains that his expulsion to Angola by the Netherlands authorities would, therefore, also constitute a violation of his rights under Articles 9 and 10 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 February 1991 and registered on 8 March 1991.

On 8 March 1991, the Commission decided, under Rule 36 of its Rules of Procedure, to indicate to the respondent Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Commission not to expel the applicant to Angola until the Commission had had an opportunity to examine the application.

The Commission also decided to invite the Government to submit observations in writing on the admissibility and merits of the application. Pending the submission of the Government's observations, the Commission prolonged the indication under Rule 36 several times. The indication expired on 10 March 1992.

The Government's observations were submitted on 15 January 1992 and the applicant's reply thereto was submitted on 4 March 1992.

THE LAW

1. The applicant complains that his expulsion to Angola amounts to inhuman or degrading treatment in breach of Article 3 (Art. 3) of the Convention which reads as follows:

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

He also invokes Article 2 para. 1 (Art. 2-1) of the Convention which provides as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The Government submit that, as a result of their inquiry into the situation in Angola, it may be assumed that the hostilities in Angola have ceased and that the peace agreement between the MPLA and the UNITA, which has been concluded on 31 May 1991, is being observed. The Government are further of the opinion that the applicant failed to submit substantial grounds for his claims under Article 2 (Art. 2) of the Convention and has not shown in a convincing way the existence of

a real and personal risk that upon his return to Angola he will be subject to treatment contrary to Article 3 (Art. 3) of the Convention.

The applicant submits that even at present his chances of survival are nil in view of the continuing violence and general food shortage in Angola. The applicant is, in any event, of the opinion that the case will have to be considered in the light of the facts as they were at the time the Deputy Minister of Justice on 18 June 1990 denied suspensive effect to the applicant's request for review. On this basis the applicant is of the opinion that he has submitted sufficient and convincing information, indicating that if he had been expelled at that time he would undoubtedly have been arrested, possibly detained and in any event forced to fight at the front, which in his opinion constitutes treatment contrary to Article 3 (Art. 3) of the Convention.

The Commission recalls its constant case-law according to which the Convention guarantees no right of residence or right of asylum in a State of which the person concerned is not a national (cf., for example, No. 1802/62, Dec. 26.3.63, Yearbook 6 pp. 463, 479). Expulsion is not as such one of the matters governed by the Convention (No. 7256/75, Dec. 10.12.76, D.R. 8 p. 161). As a result, a measure of expulsion is not in itself contrary to the Convention.

The Commission recalls, however, that its case-law also consistently holds that the deportation of an alien may, in exceptional circumstances, raise an issue under Article 3 (Art. 3) of the Convention where there are serious reasons for believing that the person in question would be exposed in the country to which he is to be expelled to treatment prohibited by that Article (cf. No. 12877/87, Dec. 7.7.87, D.R. 53 p. 254).

The Commission must therefore examine whether there are in this case serious reasons for believing that the applicant, if expelled to Angola, would be exposed to treatment prohibited by Article 3 (Art. 3).

In its Cruz Varas judgment, the Court noted as one of the principles relevant to its assessment of the risk of ill-treatment the following:

> "(...)
> (2) ... the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded however from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears; ..." (Eur. Court H.R. Cruz Varas judgment of 20 March 1991, Series A no. 201, para. 76).

The Commission considers that the general situation in Angola at the time the applicant's requests were rejected by the Dutch authorities was undoubtedly unstable. However, the applicant has not substantiated in which respect his personal situation at that time was any worse than that of the generality of other young Angolan men who were called up for active service in the governmental MPLA forces (cf. mutatis mutandis, Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, para. 111, to be published in Series A no. 215).

The Commission finds in this respect not unimportant that the applicant left Angola on 2 March 1990 holding a valid passport and exit visa.

In any event, the Commission notes that on 31 May 1991 a peace

agreement has been concluded between the Angolan government and the UNITA resistance movement and that on 12 July 1991 an Amnesty Act has been issued, providing amnesty for, inter alia, persons having refused military service and deserters.

In these circumstances the Commission considers that the grounds the applicant has presented in support of his claim are not sufficient to allow the conclusion that his expulsion to Angola would amount to a violation of Article 3 or Article 2 (Art. 3, 2) of the Convention.

The Commission, therefore, finds that the application, in this respect, is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the civil courts do not control the merits of decisions by the Deputy Minister concerning asylum and residence permits but only examine their lawfulness.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by an independent and impartial tribunal established by law."

The Commission recalls that a decision whether an alien should be allowed to stay in a country or be expelled does not involve a determination of the alien's civil rights or obligations or a criminal charge within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (cf. No. 9990/82, Dec. 15.5.84, D.R. 39 p. 119).

The Commission is, therefore, of the opinion that this complaint must be rejected for being incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains that he did not have an effective remedy and has invoked Article 13 (Art. 13) of the Convention which provides as follows:

> "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."

However, according to the constant case-law of the Convention organs, "Article 13 (Art. 13) cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be; the grievance must be an arguable one in terms of the Convention" (Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no 131, para. 52).

The Commission considers that the applicant cannot be said to have had an arguable claim under the Convention and, in any case, noting that an appeal to the Council of State could have resulted in the quashing of the decision of the Deputy Minister, finds that such an appeal would have constituted an effective remedy within the meaning of Article 13 (Art. 13) of the Convention.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant finally complains that his expulsion to Angola

would violate his rights under Articles 9 and 10 (Art. 9, 10) of the Convention, as in Angola he cannot freely express his views on the civil war.

Article 9 (Art. 9) of the Convention protects the right to freedom of thought, conscience and religion. Article 10 (Art. 10) of the Convention concerns the right to freedom of expression.

The Commission cannot examine complaints concerning alleged violations of the Convention by the authorities of a country, which is not a party to the Convention.

This complaint must, therefore, be rejected for being incompatible ratione personae with the Convention 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) — (C.A. NØRGAARD)