AS TO THE ADMISSIBILITY OF

Application No. 23446/94
by Gholamreza NIKNAM
against Sweden

The European Commission of Human Rights (Second Chamber) sitting in private on 12 October 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 September 1993 by Gholamreza NIKNAM against Sweden and registered on 14 February 1994 under file No. 23446/94;

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 Iranian citizen, born in 1929. He is presently serving a prison sentence in Norrtälje, Sweden.

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

Particular circumstances of the case

In 1991 the applicant married a woman of Iranian origin, S., who he claims has been granted Swedish citizenship. The applicant had left his own family in Iran in order to marry S., who had entered Sweden in 1986 together with her then husband, also an Iranian citizen. Subsequently she has lived both in Sweden and Iran.

In June 1992 the applicant was granted a short-term residence permit in Sweden. He entered the country in August 1992 and his residence permit was subsequently prolonged until June 1993.

On 18 June 1993 the District Court (tingsrätten) of Gothenburg convicted the applicant of aggravated smuggling and an aggravated narcotics offence and sentenced him to three years' imprisonment. It also issued a prohibition on his return to Sweden valid until 1 June 2003. The applicant had objected to his deportation, referring to alleged threats by his previous family in Iran and his loss of his

pension rights there. The District Court observed, however, that, according to the National Immigration Board (statens invandrarverk), there were no obstacles under Chapter 8, Sections 1-4 of the 1989 Aliens Act (utlänningslag 529/89) to his deportation. The District Court further had regard to "his previous aggravated criminal behaviour directed against Sweden which he [had] pursued after his entry into Sweden". No details pertaining to his previous criminal behaviour have been provided by the applicant.

The District Court also convicted S. of similar offences and sentenced her to five years and six months' imprisonment.

The applicant appealed to the Court of Appeal of Western Sweden (Hovrätten för Västra Sverige) as far as his deportation order was concerned, requesting it to revoke the deportation order or to shorten the prohibition on his return. He alleged that he risked being executed in Iran because he had helped S. escape from the country in 1990. The smuggler who had assisted in her escape had allegedly revealed the applicant's identity. Although the applicant had been a highly placed official in the administration of the Shah, he had been able to retain his position during time of the subsequent regime, since his activities in support of the Shah had not been revealed prior to his departure from Iran. It had allegedly only at this stage of the criminal proceedings in Sweden become known to the Iranian authorities that he had been a supporter of the Shah. For instance, two months before the hearing before the Court of Appeal his "previous flat" in Iran had been searched and photographs showing him receiving awards from the Shah had been found.

In its opinion to the Court of Appeal the National Immigration Board considered it impossible to state whether there were obstacles to the enforcement of the applicant's deportation, as he had not, before the Board itself, invoked any political reasons for allowing him to stay in Sweden. The Board stated, however, that no severe punishment could be expected in Iran for the offence of having assisted in someone's escape from the country. Although active dissidents supporting, for instance, the re-establishment of monarchy in Iran risk such punishments, the applicant's particular position in the administration of the Shah and the fact that he had received awards from him could not be considered as entailing a risk that he would "get into trouble" on his return to that country.

On 4 August 1993 the Court of Appeal upheld the deportation order and the prohibition on return to Sweden.

On 10 September 1993 leave to appeal was refused by the Supreme Court (Högsta domstolen).

On 28 July 1994 the applicant was informed that he would be released on parole on 5 November 1994.

The applicant has submitted, inter alia, a statement by the Norwegian office of the "Followers of Flag of freedom Organization of Iran" ("FFO") according to which he sympathises with this movement which is apparently banned in Iran. The statement further certifies that he practises the Bahai religion which is also banned in Iran because it is considered tantamount to apostasy.

The applicant has also submitted a copy of a purported indictment issued by an Iranian prosecution authority on 21 April 1993. According to the document, the applicant is suspected of having assisted in S.'s escape from the country on 24 June 1990. At the time S. was suspected of criminal behaviour in Iran and her passport issued in that country had been seized.

The applicant has furthermore submitted a copy of a purported indictment issued by an Iranian prosecution authority on 6 July 1993.

The document refers to findings during the search of the applicant's "home" in Tehran from 22 May to 21 June 1993.

The applicant has finally submitted a copy of a purported indictment issued by an Iranian prosecution authority on 17 June 1993 and referring to his activities within "FFO" and his "propaganda" for the Bahai religion.

Relevant domestic law

1. Deportation on account of criminal behaviour

An alien can be deported on account of his criminal behaviour on certain conditions laid down in Chapter 4, Sections 7 and 10 of the Aliens Act. For instance, when considering whether to order an alien's deportation the Court shall take into account his living and family conditions, the duration of his stay in Sweden and his possible status as a refugee.

An alien who is to be deported may never be sent to a country where there is a firm reason to believe that he would be in danger of being subjected to capital or corporal punishment or torture, or to a country where he is not protected from being sent to a country where he would be in such danger (Chapter 8, Section 1). Neither may he be sent to a country where he would risk being persecuted or to a country where he would not be protected from being sent on to a country where he would risk being persecuted (Section 2, subsection 1). He may, however, be sent to such a country 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. However, this does not apply if the threatened persecution in the receiving state implies danger to his life or is otherwise of a particularly grave nature (subsection 2). Similarly, the alien may be sent to a country referred to in subsection 1 if he has engaged in activities endangering the national security of Sweden and if there is reason to suppose that he would continue to engage in such activities in Sweden and he cannot be sent to any other country (subsection 3).

A prohibition on return may be issued either for a certain period of time or indefinitely (Chapter 4, Section 14). An alien who has been prohibited from returning to Sweden may, nevertheless, be granted a permit to visit the country for extremely important purposes. For particular reasons, such a permit may be granted at the request of someone other than the alien himself (Section 15).

2. Asylum

Under Chapter 3, Section 1 of the Aliens Act an alien may be granted asylum because he is a refugee or, without being a refugee, if he wishes not to return to his home country because of the political situation there and provided he can invoke weighty reasons in support of his wish. The term "refugee" refers to an alien 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, having regard to his race, nationality, membership of a special group in society or his religious or political convictions, and who cannot or does not wish to avail himself of his home country's protection (Chapter 3, Section 2).

COMPLAINTS

1. The applicant complains that, if expelled to Iran, he risks being subjected to torture, imprisonment and possibly capital punishment because of his political and religious opinions and, notably, his political activities in favour of the previous regime of the Shah. He invokes Article 2 of Protocol No. 4 to the Convention.

2. The applicant further complains that his deportation would, if enforced, unjustifiably separate him from his wife S., who he claims is a Swedish citizen. He does not, in this respect, invoke any particular provision of the Convention.

THE LAW

1. The applicant alleges that, if returned to Iran, he will risk being subjected to torture, imprisonment and possibly capital punishment in view of his political and religious opinions and political activities in favour of the previous regime of the Shah. He invokes Article 2 of Protocol No. 4 (P4-2) to the Convention, which guarantees the liberty of movement and freedom to choose one's residence.

The Commission finds that the complaint falls to be examined under 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."

The Commission recalls that under Article 26 (Art. 26) of the Convention it may only deal with an application provided, inter alia, that all domestic remedies have been exhausted, according to the generally recognised rules of international law. It observes that only before the Court of Appeal did the applicant refer to his alleged dissident activities and apostasy as grounds militating against his deportation. However, even assuming that the applicant was unable to make these allegations at an earlier stage and that he has therefore complied with the requirement in Article 26 (Art. 26), the complaint is nevertheless inadmissible for the following reasons.

The Commission recalls that Contracting States have the right to control the entry, residence and expulsion of aliens (cf. 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 individual 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 expelled (ibid., p. 34, para. 103). A mere possibility of ill-treatment is not itself sufficient to give rise to a breach of Article 3 (Art. 3) (ibid., p. 37, para. 111).

The Commission observes that it was only at a late stage of the criminal proceedings that he objected to his deportation on the grounds that he risked being persecuted on account of his political and religious views. However, nothing would have prevented him from referring to those grounds already in an asylum request to the National Immigration Board and, at any rate, in the criminal proceedings before the District Court. The Commission therefore considers that there are reasons to doubt the accuracy of his submissions and the documents submitted.

The Commission thus concludes, on the evidence before it concerning the applicant's background and the general situation in Iran, that it has not been established that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if expelled to that country.

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

2. The applicant further complains that his deportation would, if enforced, unjustifiably separate him from his wife S., who is said to be a Swedish citizen. He does not invoke any particular provision of the Convention.

The Commission has considered this complaint under Article 8 (Art. 8) of the Convention which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that the Contracting States are in principle free to control the entry, residence and expulsion of aliens. Expulsion of a person from a country in which close members of his family live may, however, amount to an unjustified interference with his right to respect for his family life as guaranteed by Article 8 (Art. 8) of the Convention (e.g. Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, pp. 19 et seq., paras. 43 et seq.).

Assuming that the applicant's wife S. is a citizen of Sweden and that she resides in Sweden, the Commission considers that the applicant's deportation to Iran would interfere with his right to respect for his family life. It must next be examined whether this interference would be justified under the terms of para. 2 of Article 8 (Art. 8-2). Under that paragraph such an interference must satisfy three conditions: it must be "in accordance with the law", it must pursue one or more of the aims enumerated in para. 2 and it must be "necessary in a democratic society" for that aim or those aims. The necessity criterion implies the existence of a pressing social need and, in particular, requires that the measure must be proportionate to the legitimate aim pursued (ibid., pp. 18 et seq., paras. 37 et seq.). Regard should further be had to the margin of appreciation afforded to the Contracting States (Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, pp. 15-16, para. 28).

It has not been contested that the deportation order was issued "in accordance with the law". The Commission considers that the enforcement of the deportation order would pursue a legitimate aim under Article 8 para. 2 (Art. 8-2), namely the interest of public safety and the prevention of crime and disorder. As regards the question whether the interference was "necessary in a democratic society" in pursuit of the said aims, the Commission observes the gravity of the offences on account of which the applicant's deportation was ordered. It also appears that he has previously committed serious offences in or directed against Sweden. Finally, there is no substantiation of the allegation that the applicant's wife would be wanted in Iran and thus unable to follow him there.

Taking into account the margin of appreciation left to the Contracting States, the Commission therefore concludes that the enforcement of the applicant's deportation would be justified under Article 8 para. 2 (Art. 8-2) of the Convention in that it can reasonably be considered as "necessary in a democratic society" in pursuance of the above-mentioned aims. Accordingly, the enforcement of the deportation order would not violate Article 8 (Art. 8).

It follows that this part of the application 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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)