AS TO THE ADMISSIBILITY OF

Application No. 26609/95
by Felicia ONYEGBULE
against Austria

The European Commission of Human Rights sitting in private on 16 October 1995, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
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
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

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 27 February 1995 by Felicia ONYEGBULE against Austria and registered on 2 March 1995 under file No. 26609/95;

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 2 May 1995 and the observations in reply submitted by the applicant on 21 June 1995;

Having deliberated;

Decides as follows:

THE FACTS

The facts, as they have been submitted by the parties, may be summarised as follows.

The applicant, born in 1972, is a national of Nigeria, who is currently residing in Vienna. Before the Commission she is represented by Mr. J. Unterweger, a lawyer practising in Vienna.

A. Particular circumstances of the case

In December 1990 the applicant got married in Nigeria. Her husband is also a Nigerian national, and has been lawfully resident in Austria since 1989.

On 27 September 1991 the applicant came to Austria. She was travelling on a Nigerian passport, giving her maiden name. She submits that she used this passport as it would have taken a very long time to have the name changed in Nigeria. The passport contained an entry visa by the Austrian embassy in Lagos. Subsequently, on 17 October 1991, the Vienna Federal Police Authority (Bundespolizeidirektion) upon presentation of the said passport, granted the applicant a further visa (Sichtvermerk). On 14 January 1992 the applicant presented a translation of her marriage certificate to the Federal Police Authority and was again granted a visa. The applicant did not apply for asylum.

On 27 January 1992 the applicant gave birth to a son.

On 25 November 1992 the Vienna District Criminal Court (Bezirksgericht für Strafsachen) convicted the applicant of attempted theft and imposed a fine of AS 900 on her.

On 17 March 1993 the Vienna Regional Criminal Court (Landesgericht) convicted the applicant of having used a forged document and sentenced her to four months' imprisonment, suspended on probation. The Court found that the entry visa in the applicant's passport was a falsification, which she had knowingly used when she came to Austria in 1991. Following appeal proceedings before the Vienna Court of Appeal (Oberlandesgericht), this judgment became final on 25 August 1993.

On 9 February 1994 the Vienna Inner City District Court convicted the applicant of attempted theft and imposed a fine of AS 1,500 on her.

On 5 May 1994 the Vienna Federal Police Authority (Bundespolizeidirektion), referring to S. 18 para. 1 subpara. 1 and para. 2 subpara. 6 of the Austrian Aliens Act (Fremdengesetz), imposed a residence ban against the applicant valid for ten years. The Federal Police Authority noted the applicant's convictions, in particular her conviction in August 1993 of having used a forged document when she had been sentenced to a suspended term of imprisonment. It followed that, by using her passport with the falsified entry visa, she had made false statements before an authority in order to be allowed to enter Austria. Further, the Authority considered that she had failed to file details as to her family relations in Austria which could outweigh the public interest in public safety and the prevention of disorder.

On 14 September 1994 the Vienna Public Security Authority (Sicherheitsdirektion) dismissed the applicant's appeal. The Authority noted that the applicant had twice been convicted, namely in 1992 and 1994, for attempted theft and sentenced to pay a fine. Further, she had been convicted of having used a forged document and been sentenced to four months' imprisonment suspended on probation. Thus, also the requirements for issuing a residence ban under S. 18 para. 2 subpara. 1 were met. The Public Security Authority, referring to Article 8 para. 2 of the Convention, found that the residence ban pursued the aim of the prevention of disorder and crime, as well as the protection of the rights of others. It considered that the residence ban constituted a serious interference with the applicant's right to respect for her family life. However, taking into account that the spouses had unlawfully arranged for their family life in Austria, and that the applicant had repeatedly committed offences in Austria, the residence ban appeared necessary for the aims pursued.

On 24 November 1994 the Vienna Federal Police Directorate ordered that the applicant be taken into detention with a view to her

expulsion.

On 1 December 1994 the Administrative Court (Verwaltungsgerichtshof) dismissed the applicant's complaint concerning the residence ban. It found that her residence would endanger public order and security. Thus, the residence ban against her was necessary for the prevention of disorder or crime. This public interest outweighed her interest in staying in Austria. Although she had strong family ties in Austria, she had only been resident there for a short period and was not well integrated.

On 19 December 1994 the applicant, who had her son with her, who was then aged two years and eleven months, was taken into detention with a view to her expulsion. Her son was separated from her and put into a public children's home. After some days he was handed over to the applicant's husband. In a file note dated 9 January 1995, the competent authority noted that it was not envisaged to expel the applicant's son. The applicant's husband and son both have residence permits valid until October 1996.

On 29 December 1994 the Vienna Independent Administrative Tribunal (Unabhängiger Verwaltungssenat) dismissed the applicant's complaint about her detention with a view to her expulsion.

On 7 January 1995 officers of the Vienna Federal Police Authority brought the applicant to Vienna airport in order to deport her to Nigeria. In view of the applicant's resistance, the pilot refused to take her on board and she was returned to the police prison.

On 12 January 1995 the applicant was released, as she was no longer fit for detention, after being on a hunger strike for several days.

B. Relevant domestic law

According to S. 18 para. 1 of the Aliens Act (Fremdengesetz), a residence ban may be issued against an alien if there are reasonable grounds for believing that his stay will disturb public order or security (subpara. 1) or that it will be contrary to the public interest, as provided for in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (subpara. 2).

Paragraph 2 of S. 18 illustrates cases in which "reasonable grounds" within the meaning of para. 1 are given, e.g. if an alien has been sentenced to more than three months' imprisonment by an Austrian court, and this judgment has become legally effective (subpara. 1); or if an alien makes false statements before an authority, relating to his person, or the purpose or envisaged duration of his stay in Austria, in order to be allowed to enter Austria or to obtain a residence permit (subpara. 6).

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the residence ban against her violates her right to respect for her family life. She submits in particular that the residence ban is not necessary in a democratic society within the meaning of Article 8 para. 2. In this context she argues that the convictions on which the residence ban was based, concerned relatively minor offences and that the authorities did not duly take her interest in remaining in Austria into account.

2. The applicant complains under Article 3 of the Convention that her expulsion to Nigeria would expose her to a risk of being tortured or of being subjected to inhuman or degrading treatment. She submits in particular that she would be persecuted by the moslem military

regime because she belongs to the Ibo people and is a christian. She alleges that most of her family members have already been killed.

3. Further, the applicant submits that the separation from her son, when she was taken into detention with a view to her expulsion, and the fact that he was put in a children's home for some days, constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 February 1995 and registered on 2 March 1995.

On 3 March 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 2 May 1995. The applicant replied on 21 June 1995.

THE LAW

1. The applicant complains under Article 8 (Art. 8) of the Convention that the residence ban against her violates her right to respect for her family life.

Article 8 (Art. 8), so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 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 Government submit that the residence ban against the applicant did not constitute an interference with her right to respect for her family life. They submit in particular that the applicant's husband and her son can be expected to follow her to Nigeria, as her husband is also a Nigerian national and has only been residing in Austria for some years and is, thus, not well integrated there. Their son, although born in Austria, is only three years old. Further, the Government argue that, if there was an interference, it was justified under Article 8 para. 2 (Art. 8-2). In particular, the applicant entered Austria illegally with a false entry visa, and was subsequently convicted of having forged documents. Moreover, she was convicted twice of attempted theft. Thus, the residence ban was necessary in the interest of public safety and for the prevention of crime.

The applicant submits in particular that the contested residence ban was not necessary within the meaning of Article 8 para. 2 (Art. 8-2). She argues that her husband, who has been living and working in Austria since 1989, and her son, who was born there in 1992, both have residence permits valid until October 1996. Moreover, she and her family belong to the Ibo people, who are persecuted in Nigeria because they are christians. Thus, her husband and son cannot be expected to follow her to Nigeria. Further, the applicant submits that her interest in remaining in Austria outweighs the public interest in expelling her. She argues that she was only convicted of minor offences. In particular, as regards the two convictions for attempted theft, only fines were imposed. As regards the conviction for forging documents the sentence to four months' imprisonment was suspended on

probation.

The Commission recalls that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, para. 102). The Commission further recalls that Article 8 (Art. 8) does not impose a general obligation on the part of States to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouse for settlement in that country. Rather, the State's obligation to admit to its territory aliens who are relatives of settled immigrants will vary according to the circumstances of the case (Eur. Court H.R. Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 34, paras. 67-68).

In the present case the applicant has not shown that there were any serious obstacles to establishing family life in her home country. In particular, the applicant's husband, who is also a Nigerian national, has only been living in Austria since 1989 and their son, born in 1992, is still in pre-school age. Both of them only hold temporary residence permits valid until October 1996. Moreover, the Commission considers that the applicant failed to substantiate her allegation that she and her family would risk persecution in Nigeria on account of their christian faith.

In addition, the Commission notes that, according to the judgment of the Vienna Regional Criminal Court, the applicant used a passport containing a forged entry visa when coming to Austria. Further she used this passport, when applying for a further visa to be allowed to stay. Thus, she knew or could have known that she did not have a right to reside in Austria on account of her marriage (see mutatis mutandis, Abdulaziz, Cabales and Balkandali judgment loc. cit.).

In these circumstances, the Commission finds that the issuing of a residence ban against the applicant did not constitute a lack of respect for her family life.

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

2. The applicant complains under Article 3 (Art. 3) of the Convention that her expulsion to Nigeria would expose her to a risk of being tortured or of being subjected to inhuman or degrading treatment. She submits in particular that she would be persecuted by the moslem military regime because she belongs to the Ibo people and is a christian. She alleges that most of her family members have already been killed.

Article 3 (Art. 3) reads as follows:

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

The Commission observes that the applicant did not provide any evidence for her above allegations in the proceedings before the Commission. Nor did she apply for asylum in Austria. In these circumstances, the Commission finds that the applicant failed to show substantial grounds for believing that she would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment if she was expelled to Nigeria (Vilvarajah and Others judgment, loc. cit., para. 103).

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

3. The applicant also complains that the separation from her son, when she was taken into detention with a view to her expulsion, and the fact that he was put in a children's home for some days, constituted inhuman and degrading treatment within the meaning of Article 3 (Art. 3) of the Convention.

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 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 and mental effects, and in some instances, the sex, age and state of health of the victim (Eur. Court H.R., Cruz Varas and Others judgment of 20 March 1991, Series A no. 201, p. 31, para. 83).

The Commission finds that the treatment complained of, namely the separation from her son, was carried out in the context of the applicant's envisaged expulsion. There is no indication that it was not carried out with the necessary diligence, her son being placed in a public children's home until he was handed over to the applicant's husband a few days later. Thus, the treatment complained of did not reach the level of severity necessary for Article 3 (Art. 3) to be applicable.

It follows that this part of the application is also 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) — (S. TRECHSEL)