AS TO THE ADMISSIBILITY OF

Application No. 16381/90
by R
against Denmark

The European Commission of Human Rights sitting in private on 14 October 1991, the following members being present:

MM. J.A. FROWEIN, Acting President
C.A. NØRGAARD
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER

Mr. J. RAYMOND, Deputy 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 21 March 1990 by R against Denmark and registered on 2 April 1990 under file No. 16381/90;

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 23 May 1991 and the observations in reply submitted by the applicant on 3 June 1991, as well as the submissions of the parties at the hearing held on 8 July 1991 and the documentary evidence submitted on 26 August 1991;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is an Iranian citizen, born in 1961. He is at present serving a six-year prison sentence at Nyborg State Prison, Denmark. Before the Commission he is represented by his lawyer, Mrs. Helle Lokdam, Århus, Denmark.

The applicant came to Denmark on 11 March 1984 where he applied for asylum. He explained to the Directorate for Aliens (Direktoratet for Udlændinge) that he had never been a member of any political organisation or otherwise been politically active. He submitted, however, that on 6 December 1983 he commenced his military service. After approximately two months' basic training, he received ten days' leave before going to the Iranian/Iraqi front. He did not return to the army after the ten-day leave and in mid-February 1984 he

left Iran illegally and arrived in Pakistan, from where he continued to Denmark via Turkey and the then German Democratic Republic.

On 25 September 1984 the Directorate for Aliens informed the applicant that he would receive a time-limited residence permit in accordance with Section 7 para. 1 no. 2 of the Aliens Act with a view to permanent residence in Denmark due to the fact that he had deserted from the Iranian army. This Section of the Aliens Act reads as follows:

(translation)

"1. Upon application a Danish residence permit shall be issued to an alien falling within the provisions of the Convention on the Legal Status of Refugees of 28 July 1951.

2. A Danish residence permit shall be issued to an alien who does not fall within the provisions of the Convention on the Legal Status of Refugees of 28 July 1951, provided that for reasons similar to those stated in that Convention or for other weighty reasons he should not be required to return to his country of origin."

In May 1986 the applicant was arrested and charged with seven counts of rape and attempted rape and one count of theft. During the investigations the Aliens Board (Flygtningenaevnet) submitted, on 19 November 1986, that the reasons which in 1984 were the basis upon which the applicant was granted a residence permit in accordance with the Aliens Act were still valid. According to the Aliens Board the applicant could not be sent to Iran. Furthermore the Board maintained that a deportation of the applicant on the basis of a judgment would require that the situation in Iran would change or that he be deported to another country where he could obtain protection. The Board, however, reserved its position with reference to Section 31 para. 2 (mentioned below).

By judgment of 2 April 1987 the High Court of Western Denmark (Vestre Landsret) sitting with a jury found the applicant guilty of most of the charges brought against him and sentenced him to six years' imprisonment. It was furthermore decided, on the basis of Sections 22 and 26 of the Aliens Act, to expel the applicant from Denmark and prohibit, forever, a return to Denmark. The applicant did not appeal against the sentence or the decision to expel him.

Section 22 of the Aliens Act reads as follows:

(translation)

"An alien who for the purpose of permanent stay has lawfully lived in Denmark for more than the immediately preceding 7 years, and an alien issued with a residence permit under Sections 7 or 8 may be expelled only if:

1. expulsion is deemed necessary for reasons of national security;

2. the alien has repeatedly committed serious criminal offences;

3. the alien is sentenced unconditionally to a minimum of 6 years' imprisonment or other custodial penalty, and because of the sentence and the nature and seriousness of the crime he ought not to remain in Denmark."

Section 26 of the Aliens Act reads as follows:

(translation)

"In deciding on expulsion, not only the alien's relationship with the Danish community, including the duration of his stay in Denmark, shall be taken into consideration, but also whether the expulsion would be considered exceptionally burdensome on him, in particular because of:

1. the alien's age, health and other personal circumstances;

2. the alien's personal or family ties with Danish or foreign nationals living in Denmark;

3. the alien's other ties with Denmark, including whether the alien came to Denmark in his childhood or tender years and therefore spent some or all of his formative years in Denmark;

4. the alien's loose or non-existent ties with his home country or any other country in which he may be expected to take up residence; and

5. the risk that the alien will be ill-treated in his home country or any other country in which he may be expected to take up residence."

In October 1988 the applicant requested the City Court (Byretten) of Nyborg to reconsider, in accordance with Section 50 of the Aliens Act, the decision to expel him contained in the High Court judgment of 2 April 1987.

Section 50 of the Aliens Act reads as far as relevant:

(translation)

"If an expulsion ... has not been enforced within a period of six months from the judgment, an alien may request the question of the annulment of the expulsion order to be brought before the court if he maintains that substantial changes in his situation have occurred ... The request must be made at least 3 months prior to the expected expulsion.

... The request may be rejected by the court if it is obvious that no substantial changes in the alien's situation have occurred.

The court's decision is made in the form of a court order (kendelse) which may be appealed against in accordance with the rules set out in Chapter 85 of the Administration of Justice Act (Retsplejeloven)."

On 13 October 1988 the City Court of Nyborg rejected the request in accordance with Section 50 para. 2 of the Aliens Act. The applicant did not appeal against this decision.

When the applicant learned of his intended release on 9 May 1990 he requested the Chief of Police of Nyborg, on 5 September 1989, to consider whether it would be contrary to Section 31 of the Aliens Act to expel him to Iran.

Section 31 of the Aliens Act reads as follows:

(translation)

"An alien shall not be expelled to a country where he risks persecution for the reasons set out in the Convention on

the Legal Status of Refugees of 28 July 1951, Article 1 (a), or where the alien is not protected against being transferred to such a country.

The above also applies if the reasons stated in Section 7 para. 1 no. 2 ... are at hand, save where there are specific reasons to assume that the alien presents a danger to national security, or if the alien, after a final judgment concerning a particularly dangerous crime, must be assumed to present an imminent danger for the life, health, or freedom of others."

On 3 October 1989 the Chief of Police of Nyborg decided that Section 31 of the Aliens Act would not prohibit the applicant's return to Iran.

The applicant appealed against this decision to the Aliens Board which heard the applicant on 12 December 1989. He explained that upon return to Iran he feared execution because he had deserted from the army and furthermore he feared persecution because of his criminal record in Denmark. On 29 December 1989 the decision of the Chief of Police of Nyborg was upheld. The Aliens Board found that, regardless of the fact that the applicant had obtained asylum in Denmark, he could be expelled in accordance with Section 31 para. 2 of the Aliens Act.

The Chief of Police of Nyborg then informed the applicant's representative that the applicant would be expelled immediately upon release from prison on 9 May 1990.

In February 1990 a member of the Danish Parliament asked the Minister of Foreign Affairs what guarantees he was able to obtain in order to make sure that Iranians who had been granted asylum in Denmark because they had refused military service, would not be executed if they returned to Iran.

In his answer of 20 March 1990 the Minister of Foreign Affairs stated the following:

(translation)

"It naturally follows that it is not possible for the Ministry of Foreign Affairs to obtain guarantees that Iranians who have been granted asylum in Denmark but who are later expelled from Denmark will not be executed if they are sent back to Iran.

The specific case which the question seems to refer to has been finally decided by the Aliens Board."

The case referred to by the Minister was the applicant's case. On 7 May 1990 the applicant asked the Aliens Board to reopen his case, inter alia with reference to a note dated 26 April 1990 from the Ministry of Justice concerning the case-law of the European Court of Human Rights with regard to Article 3 of the Convention, including in particular the Soering case, and Article 1 of Protocol No. 6. Furthermore reference was made to a note dated 2 May 1990 from the Ministry of Foreign Affairs concerning the applicant's situation if he were to return to Iran. The first-mentioned note concluded that, in the light of the case-law of the European Court of Human Rights, it could be assumed that an expulsion to a country which applied the death penalty would be considered by the Court as violating Article 1 of Protocol No. 6 to the Convention. From the second note it appeared that the offences committed by the applicant in Iran (desertion from the army) were not of a kind which could be expected to lead to capital punishment or treatment contrary to Article 3 of the Convention, but that the offences might lead to a prolongation of the

period of military service. It also appeared from the note that rape is a capital crime in Iran.

On 6 June 1990 the Aliens Board refused to reopen the applicant's case and referred the applicant to the Danish courts in order to have the question of expulsion considered under Section 50 of the Aliens Act.

On 9 August 1990 the applicant accordingly brought the question of expulsion before the City Court of Nyborg.

On 20 September 1990 the City Court annulled the decision in the High Court judgment of 2 April 1987 whereby the applicant was to be expelled after having served his 6 year prison sentence. As it could not be excluded that the applicant, if expelled to Iran, might be prosecuted and as it could not be excluded either that he risked execution, the Court found that the expulsion would be contrary to Article 3 of the Convention and Article 1 of Protocol No. 6.

The public prosecutor appealed against this decision to the High Court of Eastern Denmark which heard the case on 12 October 1990. On 6 November 1990 the High Court overruled the City Court's decision.

The High Court stated that the facts of the case, i.e. the information about the risk that the applicant might be ill-treated in Iran if he were to be expelled, did not differ substantially from the information available at the time of his conviction by the High Court of Western Denmark in April 1987. Equally the law, i.e. in particular Article 3 of the European Convention on Human Rights and Article 1 of Protocol No. 6, had remained unchanged. The Ministry of Justice had, in a note dated 26 April 1990, made a legal interpretation of the Convention and the Protocol. This fact could not be considered to have caused substantial changes in the applicant's situation. Against this background the High Court of Eastern Denmark found no grounds under Section 50 of the Aliens Act to annul the decision in the judgment of the High Court of Western Denmark to expel the applicant.

On 31 January 1991 the Ministry of Justice granted the applicant leave to appeal to the Supreme Court (Højesteret) which then received the case-file concerning the applicant's criminal case as well as the case-file concerning the expulsion case.

Before the Supreme Court the Prosecutor General submitted inter alia that an expulsion to a country which applied the death penalty would not as such violate the Convention or its Protocols. A problem would only arise if there was a substantial risk that the person in question, due to the expulsion, would be executed or tortured. In the present case the Prosecutor General did not find this to be the case since there was, in his opinion, no support for the allegation that the applicant would face prosecution for the crimes committed in Denmark, and since desertion from the army in Iran did not appear to carry a punishment which would affect Denmark's obligations under the Convention.

The applicant submitted in particular that he fulfilled the requirements for asylum in Denmark, that he risked prosecution for deserting from the army and for the crimes committed in Denmark, which again could lead to execution after a trial which could not be considered fair. He maintained that an expulsion would be contrary to the Convention and its Protocols and furthermore referred to the general situation in Iran which could only be described as still being unclear.

Upholding on 2 May 1991 the High Court's decision, the Supreme Court stated that, having regard to the nature of the offences committed by the applicant in Iran, there was no reason to assume that

his expulsion would constitute a breach of the European Convention on Human Rights. Furthermore, the Supreme Court stated that there was no particular reason to assume that the applicant would be prosecuted in Iran for the offences of which he had been convicted by the High Court of Western Denmark on 2 April 1987, a reason which might otherwise have made his expulsion a measure contrary to the Convention.

COMPLAINTS

The applicant submits that upon release from prison he will be detained immediately by the police and expelled to Iran on the basis of the judgment of 2 April 1987 and the decision of the Supreme Court of 2 May 1991. The applicant alleges that a return to Iran would expose him to an extreme risk of being subjected to treatment contrary to Article 3 of the Convention or, even worse, execution.

In support of his allegation, the applicant submits that the reason for granting him asylum in 1984 was the fact that he had deserted from the army and the general situation in Iran. On 19 November 1986 the Aliens Board had maintained that he could only be sent to Iran if the situation in Iran would change. The applicant submits, however, that there has been no such change in Iran and this has not been disputed by the Danish authorities. However, the authorities may nevertheless expel him by virtue of Section 31 para. 2 of the Aliens Act which permits expulsion regardless of the fact that a serious risk of persecution exists.

The applicant does not necessarily want to remain in Denmark, but he wants a guarantee that he will be sent to a country where he does not risk treatment contrary to Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 March 1990 and registered on 2 April 1990.

On 6 April 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit observations on its admissibility and merits. It was also decided to indicate to the Government, in accordance with 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 expel the applicant to Iran until the Commission had had an opportunity to examine the application further.

The Commission's indication under Rule 36 of its Rules of Procedure was lifted on 7 September 1990 after the Commission had been informed that the expulsion question was pending before the Danish courts and that the applicant did not risk expulsion before these proceedings had come to an end.

On 7 May 1991 the Government informed the Commission that the Supreme Court, on 2 May 1991, had decided that the expulsion order could be enforced and that the applicant could be expected to be expelled on 16 May 1991.

On 13 May 1991 the Acting President of the Commission decided to indicate to the Government, in accordance with 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 expel the applicant to Iran until the Commission had had an opportunity to examine the application further. The Acting President also fixed the time-limit for the submission of the Government's observations on admissibility and merits at 24 May 1991.

The Government's observations were submitted on 23 May 1991. The applicant submitted observations in reply on 3 June 1991.

On 6 June 1991 the Commission decided to invite the parties to appear before it at a hearing on admissibility and merits. It was furthermore decided to grant legal aid.

At the hearing, which was held on 8 July 1991, the parties were represented as follows:

The Government

Mr.	Tyge Lehmann	Ministry of Foreign Affairs, Agent
Mr.	Michael Elmer	Ministry of Justice, counsel
Mr.	Finn Abrahamsen	Ministry of Foreign Affairs, counsel
Ms.	Lene Larsen	Ministry of Justice, counsel
Mr.	Arne Tornvig Christensen	National Police Commissioner's Office, counsel

The applicant

Mrs.	Helle Lokdam	Counsel for the applicant

Following the hearing the Commission decided to adjourn the case and to obtain from the parties further documentary evidence. This evidence was submitted on 26 August 1991.

THE LAW

The applicant complains that, if expelled to Iran, he will be subjected to treatment contrary to Article 3 (Art. 3) of the Convention. He also complains that upon his return to Iran he will be prosecuted there for the offences of rape and attempted rape committed in Denmark, for which he risks receiving the death penalty. He invokes in this respect Article 1 of Protocol No. 6 (P6-1) to the Convention.

Article 3 (Art. 3) of the Convention reads:

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

Article 1 of Protocol No. 6 (P6-1) to the Convention reads:

"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

In support of his complaints the applicant submits that it would be in breach of the Convention to expel a person who fulfils the conditions for obtaining the legal status of refugee. In this respect the applicant recalls that the Danish Aliens Board still maintains that he fulfils these conditions, which means that he would be in danger if he were to return to Iran. The general situation in Iran is very unclear and unreliable and upon arrival in Iran he will not be in possession of a valid travel document which in itself will lead to his arrest. His prolonged absence from Iran is likely to attract special attention and his original reason for applying for asylum in Denmark, i.e. that he deserted from the army, as well as the fact that he has lived as a de facto refugee in Denmark since 1984 will strengthen the suspicion of sympathies and activities contrary to the Iranian Government's policies.

Furthermore, the applicant submits that it is undisputed that the Iranian authorities do not as such recognise judgments by foreign

courts which do not operate in accordance with Islamic law. His criminal case and his expulsion case have attracted a lot of media attention which undoubtedly has been registered by the Iranian embassy. It is likely, therefore, that he will have to stand trial in Iran for the offences committed in Denmark which in Iran carry the death penalty. As regards the evidence required for that trial the applicant submits that the Iranian courts would attach great importance to the Danish judgment and the assessment made by the Danish court.

Accordingly, the available information about the Islamic Penal Code together with the available knowledge of how law and order is practised in Iran and the uncertainty which is connected with the evaluation of the circumstances, in particular in the light of the limited information available to the Danish authorities, must lead to the conclusion that there would be a serious risk that an expulsion would expose the applicant to treatment contrary to the provisions invoked. He should in any event be given the benefit of any doubt in this respect.

The Government submit that expulsion as a consequence of serious crimes committed by an alien is inherent in every legal system in Europe. Danish law prescribes that decisions concerning expulsion are always made by judicial bodies which inter alia must take into consideration whether an expulsion would expose the person in question to ill-treatment in the receiving country. Information of a general and concrete nature in this respect is provided by the Ministry of Foreign Affairs through Danish and other countries' diplomatic missions, as well as international organisations, such as the UNHCR and Amnesty International. The Government accept that the human rights situation in Iran continues to cause serious concern which is also reflected in critical resolutions, sponsored inter alia by Denmark and adopted by the United Nations General Assembly. However, although it is not possible to issue any guarantees to aliens being returned to their country of origin, the Government submit that each case must be considered on its own merits. This view is supported by a report of May 1990, drawn up by eight western embassies in Tehran, which concluded that a blanket policy of not returning Iranians to Iran was no longer appropriate.

As regards the applicant's situation the Government submit that all usual sources of information, as mentioned above, were used in order to enable the authorities and subsequently the courts to reach a conclusion on the question of expelling the applicant to Iran. In particular the Supreme Court was fully informed of the situation in Iran and of the expected situation of the applicant upon his possible return. This information shows that the mere fact that the applicant applied for asylum abroad is not penalised under Iranian law. It is, however, an offence to leave Iran illegally and the applicant may be punished by one to two years' imprisonment or a fine. Furthermore, it can be expected that the applicant is registered as a first-time deserter. The Iranian provisions on desertion are found in a circular of 23 September 1988 issued by the Iranian Ministry of the Interior which shows that the applicant can only expect additional military service.

As regards the risk of being prosecuted again for the offences committed in Denmark the Government agree that Iranian courts do not accept judgments pronounced by courts which do not apply Islamic law. They also accept that the penalty for rape is execution. However, they submit that Iran does not try a crime committed abroad where the case has been tried and the sentence served abroad. Furthermore, having regard to the Iranian rules on evidence, as set out in the Iranian Penal Code, it would be impossible in practice legally to convict the applicant for the offences committed in Denmark.

Finally, the Government submit that they are prepared to instruct their embassy in Tehran, if the applicant so wishes, to

follow his case to the extent possible.

Against this background the Government contend that they have made a thorough investigation into the applicant's case which shows that there is no substantial risk that he will be subjected to treatment contrary to the Convention or its Protocols if returned to Iran.

The Commission recalls the case-law of the Convention organs according to which the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, the decision of a Contracting State to expel a person 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 there is a substantial risk that the person, if expelled, will be subjected to treatment contrary to Article 3 (Art. 3) of the Convention in the receiving country (see Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 35 et seq., para. 91, and No. 12102/86, Dec. 9.5.86, D.R. 47 p. 286).

The question arises whether analogous considerations apply to Article 1 of Protocol No. 6 (P6-1) to the Convention, in particular whether this provision equally engages the responsibility of a Contracting State where, upon expulsion, the person concerned faces a real risk of being subjected to the death penalty in the receiving State. However, the Commission need not resolve this question since the complaints at issue are in any event manifestly ill-founded for the following reasons.

The examination of the present case involves, on the one hand, the applicant's personal situation and, on the other, the general situation in Iran. For this purpose the parties have provided copies of all relevant material which was at the disposal of the Danish authorities. This material includes information on Iranian law, United Nations and Amnesty International reports on Iran, information concerning the applicants' personal situation and reports supplied through diplomatic missions in Iran. Having regard thereto the Commission finds that the general situation in Iran at present is not of a kind that an expulsion would as such amount to a violation of the Convention or its protocols. In order to raise an issue under the provisions invoked there should accordingly be some substantiation as to the existence of a specific risk of treatment contrary to these provisions in the particular circumstances of the case.

The Commission recalls that upon his arrival in Denmark in 1984 the applicant stated that he had never been a member of any political organisation or otherwise been politically active. The examination of his case has not produced any evidence to the contrary for which reason the Commission finds it established that there exists no substantial risk for the applicant that he will suffer ill-treatment because of political activities.

On the other hand the Commission finds it likely that the applicant will be arrested upon arrival in Iran due to lack of travel documents and handed over to the military authorities due to the fact that he deserted from the army. This would, according to information available to the Commission, in all probability lead to an obligation to do prolonged military service. However, the Commission recalls that the mere fact that an applicant would be obliged to perform military service cannot as such raise an issue under Article 3 (Art. 3) or any other provision of the Convention and this conclusion is not changed by the fact that military service might be prolonged (see No. 4314/69, Dec. 2.2.70, Collection 32 p. 97 and No. 14401/88, Dec. 12.1.91, to be published in D.R.). Furthermore, the applicant has not shown that he has other serious grounds for fearing that, upon his return to Iran, his evasion of military service would subject him to treatment contrary to the provisions invoked by him.

As regards the applicant's criminal record the Commission finds it established that the Iranian courts do not accept judgments pronounced by courts which do not operate in accordance with Islamic law. Furthermore, it is clear that the criminal offences of which the applicant was convicted in Denmark carry, in Iran, the death penalty. The Commission cannot find, however, that there is a substantial risk that the applicant will be prosecuted again for these offences. First of all the Commission recalls that the present case does not concern an extradition request made by the Iranian authorities and, according to the documents submitted, the Iranian authorities will not, either from Denmark or through Interpol, receive any information of the applicant's activities in Denmark. Secondly, the Government submit that according to their sources of information Iranian courts do not try crimes committed abroad where the case has been tried and the sentence served there, an assessment which the applicant has not in any way shown to be incorrect. Thirdly, the Commission finds that the applicant has not submitted any evidence which could lead it to conclude that the collection of the evidence required in order to allow an Iranian court to convict him of the crimes committed in Denmark would be within any practical possibility. Finally, the Commission has noted the respondent Government's offer to instruct their embassy in Tehran, if the applicant so wishes, to follow his case to the extent possible.

As a result the Commission finds that the applicant has failed to show that the Danish authorities would expose him to a serious risk of treatment contrary to Article 3 (Art. 3) of the Convention or Article 1 of Protocol No. 6 (P6-1) to the Convention should they expel him to Iran.

It follows that the application is 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.

Deputy Secretary to the Commission — Acting President of the Commission

(J. RAYMOND) — (J.A. FROWEIN)