AS TO THE ADMISSIBILITY OF

Application No. 28604/95
by S.M. K.
against Austria

The European Commission of Human Rights sitting in private on 26 February 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
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
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
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 13 September 1995 by S.M. K. against Austria and registered on 19 September 1995 under file No. 28604/95;

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 a Zairese national, born in 1971. Before the Commission he is represented by Mr. A. Grohs, a lawyer practising in Vienna.

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

A. Particular circumstances of the case

The applicant arrived in Austria on 28 January 1994.

On 31 January 1994 he requested asylum and was heard by the Federal Asylum Office (Bundesasylamt). He submitted in particular that since 1992 he was a member of the UDPS and had been elected president of the Kintambo District of Kinshasa in 1993. In June 1993 he had been contacted by collaborators of President Mobutu who had tried to recruit him as an informant. On 4 July 1993 an assembly of the UDPS had taken place in a stadium where clashes with the police had occurred in which four persons had been killed. A friend had hidden him while police officers had been looking for him at his parents' house. In August 1993 he had returned home and had continued to work for the UDPS. He had been contacted again by collaborators of President Mobutu. On 11 November 1994 police officers had looked for him at his parents' house. Since they could not find him they had returned on 12 January 1994, had put fire to the house and had raped his sister. With the help of members of the UDPS who had given him 400 $ and a passport he had managed to leave Zaire. From Zaire he had gone by truck to Johannesburg (South Africa) and from there by plane to Austria.

On 7 February 1994 the Asylum Office dismissed the applicant's request. It found that his statements were not credible and contained contradictions. In particular, his account of the events which caused his flight lacked details and was rather schematical. The events which took place on 4 July 1993 at the stadium were not acts of persecution directed against the applicant himself and afterwards he could continue his political activity without any hindrance. Also his account of the modalities of his flight was not credible. It was implausible that he covered a distance of some 3500 km (Kinshasa - Johannesburg) within 8 days on a truck under African road conditions. It was also implausible that with only 400 $ he managed to finance the whole journey. In any event, the applicant had passed through Zambia, Botswana and Zimbabwe before arriving in South Africa and all these states were contracting states of the Geneva Refugee Convention. He therefore could have found protection against persecution there.

On 7 February 1994 the Baden District Administrative Authority (Bezirkshauptmannschaft) heard the applicant. The Administrative Authority issued a deportation order (Ausweisungsbescheid) against the applicant as it found that after asylum had been refused his stay in Austria was unlawful. The Administrative Authority also informed him of the possibility of filing a request under Section 54 of the Aliens Act whereupon the applicant requested the declaration that his expulsion to Zaire was inadmissible. The Administrative Authority then decided to interrupt the proceedings under Section 54 of the Aliens Act until a final decision was taken in the asylum proceedings.

On 21 February 1994 the applicant appealed against the deportation order.

On 7 April 1994 the Lower Austria Public Security Authority (Sicherheitsdirektion) dismissed the appeal against the deportation order. It found that the Administrative Authority had correctly concluded that the applicant's stay in Austria was unlawful as he had entered Austria without a valid passport and visa.

After having received the Public Security Authority's decision of 7 April 1994 the applicant applied to the Administrative Court (Verwaltungsgerichtshof) for legal aid in order to file a complaint.

On 26 April 1994 the Administrative Court granted legal aid. On 10 May 1994 the Vienna Bar Chamber (Rechtsanwaltskammer) appointed an ex officio lawyer for the applicant. This decision was served on the applicant's lawyer on 24 May 1994.

The applicant's lawyer, after having studied the case, considered

a complaint to the Constitutional Court (Verfassungsgerichtshof) more appropriate than one to the Administrative Court. However, the time-limit for a complaint to the Constitutional Court would have expired on 26 May 1994. On 14 June 1994 an employee of the applicant's lawyer consulted the Chamber of Lawyers on how to proceed in such a case. She was advised to file a complaint to the Constitutional Court within the time-limit for a complaint to the Administrative Court and to request at the same time legal aid for the proceedings before the Constitutional Court.

On 5 July 1994 the applicant's lawyer introduced a complaint to the Constitutional Court together with a request for legal aid.

On 15 July 1994 the Federal Minister for the Interior (Bundesminister für Inneres) dismissed the applicant's appeal against the Asylum Office's decision of 7 February 1994. He found that before arriving in Austria the applicant had passed through Zambia, Botswana and Zimbabwe, all countries which were parties to the Geneva Refugee Convention. Since these countries respected the principle of non-refoulement, the applicant could have found protection there.

On 5 December 1994 the Constitutional Court rejected the applicant's complaint against the Public Security Authority's decision of 7 April 1994 as being lodged out of time. It found that only a request for legal aid addressed to the Constitutional Court could interrupt the running of the six weeks' time-limit for filing a constitutional complaint, but not a request addressed to the Administrative Court. Furthermore, legal aid granted for the purpose of proceedings before the Administrative Court did not automatically extend to proceedings before other authorities.

On 27 January 1995 the applicant's lawyer filed requests for reinstatement of the proceedings (Wiedereinsetzungsantrag) with the Constitutional Court and with the Administrative Court. These requests were rejected by the Administrative Court on 23 February 1995 and by the Constitutional Court on 28 February 1995.

According to the applicant the Minister's decision of 15 July 1994 was served on him belatedly. He filed an application with the Administrative Court for reinstatement of the proceedings. The Administrative Court has not yet decided on his application. Also in the proceedings under Section 54 of the Aliens Act no decision has yet been taken.

B. Relevant domestic law

Section 54 para. 1 of the Aliens Act provides that the Authority, at the alien's request, has to render a declaratory decision on whether or not there are firm reasons to believe that the alien, in a State indicated by him, would be in danger of being subjected to inhuman treatment or punishment or to capital punishment or that his life or his security would be endangered in that State on account of his race, religion, nationality or adherence to a social group or on account of his political opinions.

Such a request may be made during proceedings concerning the issue of a deportation order or a residence ban. The alien has to be informed in time of the possibility to make the request (Section 54 para. 2). An expulsion to the State indicated by the alien may not be carried out as long as the decision relating to the request under Section 54 has not become final (Section 54 para. 4).

COMPLAINTS

1. The applicant complains that if his expulsion to Zaire would be carried out he would risk inhuman treatment and even being killed. He invokes Articles 2 and 3 of the Convention.

2. He further complains under Article 6 para. 1 of the Convention that the proceedings on his complaint to the Constitutional Court against the deportation order were unfair. He submits that the Constitutional Court failed to decide on the merits of his complaint although he had relied on a recommendation by the Bar Chamber.

THE LAW

1. The applicant complains that if his expulsion to Zaire were carried out he would risk inhuman treatment and even being killed. He invokes Articles 2 and 3 (Art. 2, 3) of the Convention.

The Commission has examined the applicant's complaint 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 Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations under Article 3 (Art. 3), to control the entry, residence and expulsion of aliens. The right to political asylum is not protected in either the Convention or its Protocols. However, expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is to be returned (Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A no. 215, p. 34, paras. 102-103). A mere possibility of ill-treatment is not in itself sufficient (ibid., p. 37, para. 111).

The Commission recalls further that an applicant can only claim to be a victim of an alleged violation of Article 3 (Art. 3) of the Convention within the meaning of Article 25 para. 1 (Art. 25-1) if an expulsion order has been made against him, the mere refusal of a residence permit not being sufficient to meet this requirement (Eur. Court H.R., Vijayanathan and Pusparajah judgment of 27 August 1992, Series A no. 241-B, p. 87, para. 46).

In the present case, the applicant, on 7 February 1994, filed a request under Section 54 of the Aliens Act for a declaratory decision that his expulsion to Zaire was inadmissible. The Baden District Administrative Authority thereupon decided to interrupt the proceedings under Section 54 of the Aliens Act until a final decision was taken in the asylum proceedings. The proceedings under Section 54 of the Aliens Act have not yet been resumed and no decision has been taken therein. However, under Section 54 para. 4 of the Aliens Act the applicant cannot be expelled to Zaire unless a final decision has been taken in these proceedings.

The Commission finds that under these circumstances the applicant cannot at present claim to be a victim of an alleged violation of Article 3 (Art. 3) of the Convention.

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 further under Article 6 para. 1 (Art. 6-1) of the Convention about the alleged unfairness of the proceedings on his complaint to the Constitutional Court against the deportation order.

The Commission recalls, however, that a decision as to whether

an alien should be allowed to stay in a country does not involve the determination of civil rights or of a criminal charge within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (No. 8118/77, Dec. 19.3.81, D.R. 25, p. 105; No. 14620/89, Dec. 3.5.93, unpublished).

It follows that Article 6 para. 1 (Art. 6-1) of the Convention is not applicable in the present case. The remainder of the application is therefore incompatible ratione materiae with the provisions of the Convention within the meaning of its Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)