AS TO THE ADMISSIBILITY OF

Application No. 22406/93
by S.N.
against Switzerland

The European Commission of Human Rights sitting in private on 10 September 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

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 28 July 1993 by S.N. against Switzerland and registered on 3 August 1993 under file No. 22406/93;

Having regard to:

- the report provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 31 August 1993 and the observations in reply submitted by the applicant on 7 September 1993;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Pakistani citizen born in 1963, is a student currently residing in Lausanne, Switzerland. Before the Commission he is represented by Mr Clément of the Association "La Maison", which provides social and legal assistance in Lausanne.

I.

In 1988 the applicant was enrolled as a student at Lahore University in Pakistan where he was a member of the National Student Federation. This Federation supported the Pakistani People Party of Benazir Bhutto, and opposed the military regime of Zia-ul-Haq.

On 9 March 1988 a student demonstration was organised in Lahore to protest against martial law. In the course thereof the police intervened with tear gas and arrested several students.

On 10 March 1988 a demonstration was organised demanding the release of these students. The demonstrators were attacked by a group of supporters of the pro-Government group, Jamal E-Islami. Z.K., a member of the Jamal E-Islami, was injured and later died.

In the night of 10 to 11 March 1988 the applicant was arrested and detained on remand on suspicion of manslaughter. He claims that during his detention he was ill-treated by the police. Two other persons were also arrested and charges brought against them.

A professor visited the applicant in detention and offered to help him leave Pakistan in order to avoid the trial. The applicant subsequently requested his release on bail.

The hearing was fixed for 28 March 1988. However, the public prosecutor failed duly to submit an indictment, and the hearing was adjourned to 8 July 1988. On this date the Lahore Court decided to release the applicant as from 9 July 1988. The applicant was released on "interim bail" and in view of forthcoming university examinations. The bail of 50.000 Rupies was provided by the university professor. The trial was again fixed for 26 July 1988.

After his liberation, the professor proposed that the applicant leave the country. Between 10 and 20 July 1988 the applicant went into hiding in Lahore with relatives.

On 20 July 1988 the applicant left Pakistan by air, using his own passport with an Italian visa arranged by his professor. The visa was issued by the Italian Embassy at Islamabad and was dated 28 March 1988.

The applicant travelled over Italy to Switzerland, where on 9 September 1988 he requested asylum.

II.

The applicant was questioned by the Swiss authorities as to his request for asylum on 12 September and 15 November 1988. On 30 November 1988 the applicant underwent a medical examination.

On 14 May 1992 the Federal Office for Refugees (Office Fédéral des réfugiés) dismissed the applicant's request for asylum. In its decision the Office noted, in particular, certain discrepancies in the applicant's explanations.

Thus, it was noted that, although claiming to have been detained after 10 March 1988, the applicant had obtained a visa from the Italian Embassy on 28 March 1988, and requested a prolongation on 26 June 1988. Moreover, when originally questioned by the Swiss authorities, the applicant had stated that he came to Switzerland due to difficulties with the police in view of his membership of the National Student Federation; subsequently, he informed the Swiss authorities that he had been ill-treated during detention, and that proceedings were pending against him on the grounds of manslaughter. The decision also noted that the medical examination had only revealed two small scars on the applicant's knees, whereas he had claimed to have wounds on his body.

The Federal Office for Refugees regarded it as incredible that in view of the charges brought against the applicant he would have been released from detention in order to prepare his university examinations; or that, having been provisionally released on bail he would be able to leave Pakistan with a passport.

The decision concluded that there were no indications under Article 3 of the Convention militating against the applicant's expulsion, and that the expulsion could therefore be enforced.

This decision was served on 18 May 1992 on the applicant's representative. The decision stated that the applicant could file an appeal within 30 days of receipt of the decision with the Swiss Appeals Commission in Matters of Asylum (Commission suisse de recours en matière d'asile).

The applicant's representative did not however transmit the decision to the applicant. As the latter did not appeal against it, the decision entered into force on 19 June 1992. The applicant apparently learned thereof later on. He then employed a new legal representative who on 19 August 1992 obtained a copy of the decision. The applicant thereupon requested reinstitution into the proceedings. This request was filed on 21 August 1992.

According to Section 24 of the Federal Act on Administrative Procedure, the request for reinstitution into the proceedings must be filed within ten days and must be accompanied by the act in respect of which there exists an impediment.

On 9 September 1992 the Swiss Appeals Commission in Matters of Asylum declared the request inadmissible. The decision states: "the appeal statement was not filed within the time-limit of ten days after the end of the alleged impediment, that is ... until 31 August 1992" ("Toutefois, l'acte de recours n'a pas été déposé dans le délai de dix jours dès la fin de l'empêchement allégué, soit ... jusqu'au 31 août 1992").

On 17 September 1992 the applicant's new legal representative filed a request for reconsideration of the decision of 14 May 1992 of the Federal Office for Refugees. In support of his request he submitted a report of Amnesty International.

On 23 September 1992 the Federal Office for Refugees declared this request inadmissible. The Office found that the applicant had not mentioned any new circumstances which had not already been considered during the asylum proceedings. It noted in particular that the original decision had already considered the general situation in Pakistan at the time concerned. The Office further noted that the report of Amnesty International referred to detention of political opponents between 1990 and 1992 in the Sindh province, which could not serve to support the applicant's claims.

The decision of the Federal Office further stated that the decision of 14 May 1992 had entered into force and could be executed.

Against this decision the applicant filed an appeal with the Swiss Appeals Commission in Matters of Asylum.

On 16 October 1992 the applicant submitted to the Appeals Commission an extract of the Pakistani Penal Code, as well as a copy of a letter of 20 September 1992 meanwhile received by fax from a Pakistani lawyer (see below at III.).

On 28 October 1992 the Appeals Commission requested the applicant's lawyer to produce a translation of the extract of the Pakistani Penal Code. This the applicant submitted on 13 November

1992.

The appeal was dismissed by the Swiss Appeals Commission in Matters of Asylum on 29 January 1993.

The Appeals Commission noted that it could reconsider a previous decision if there was a change of circumstances since the first decision, or if the applicant submitted new elements of proof which had not been previously known. However, the Appeals Commission found that it could not comment on the extract of the Pakistani Penal Code as the applicant had not submitted a translation thereof.

Insofar as the applicant referred to the letter of the Pakistani lawyer, the Appeals Commission considered that this document related to facts which the applicant knew, or should have known, well before he filed his request for reconsideration of the original decision.

III.

After his arrival in Switzerland, the applicant was in contact with his lawyer in Pakistan.

Thus, he apparently telephoned his lawyer in Pakistan on 19 September 1992. It transpired from the telephone call that, if the applicant returned to Pakistan, he would be in serious danger. In particular, as he was the subject of criminal proceedings, upon leaving the aeroplane in Pakistan he risked arrest and detention in view of the punishment which had been inflicted on him in his absence.

A letter dated 20 September 1992 from the lawyer refers to the "telephonic conversation with me". After recapitulating the facts, the letter states that "(the applicant) was actually involved in the above murder case due to political rivalry. At present he is declared as fugitive from law. His case has been sealed by the court. His trial would start as and when he comes back in Pakistan ..."

On 16 June 1993 the applicant received a fax from his lawyer, containing a "judegment" of "the Court of District and Session Judge Lahore" which is dated 12 October 1992. The document concerns the applicant and two other co-accused and numbers two pages. It noted that, according to the prosecution, "the death of Z.K. was caused because of the fire made by Irfan Ahmed. Due to instigation of (the applicant), Abbas Khan Inspector who investigated the whole case supported the version of the prosecution" (sic). The document continues in its original, uncorrected version:

> "After going through the evidence led by the prosecution and the defence version, I hold Irfan Ahmed, Saeed Alam Niazi and Khurshid Bukhari guilty of murder of Z.K. and in consequence of my finding Irfan Ahmed is sentenced to death in the offence undersection ... <illegible> ... and RS.2000/- as fine in 16 MPO in default of payment of fine. He will further under go 6 months simple impresorment, as for the absconding accused (the applicant) and Khurshid Bukhari are concerned. They are absconding and fugitive from law their case is separated. They shall face the trial as and when they are arrested."

COMPLAINTS

1. The applicant complains of his imminent expulsion to Pakistan where he alleges that he will be subjected to inhuman and degrading treatment and probably torture, contrary to Article 3 of the Convention. The applicant submits that the Swiss authorities, when deciding on his expulsion, did not properly consider whether he would be subjected to such a risk.

2. The applicant complains under Article 13 of the Convention that he did not have an effective remedy at his disposal in respect of his complaints under the Convention. The applicant recalls that it was through the fault of his legal representative that he missed the time-limit for filing an appeal against the decision of 14 May 1992. According to the principle of good faith, the applicant cannot be accused of negligence. The applicant also complains of the incorrect conclusions in the various decisions.

3. Under Article 1, para. 1, of Protocol No. 7 to the Convention, the applicant complains that the Swiss authorities did not enable the applicant to put forward grounds militating against his expulsion and did not examine his case.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 July 1993 and registered on 3 August 1993.

On the same day the President of the Commission decided to communicate the case to the respondent Government and to invite the parties to submit their written observations on admissibility and merits of the application under Article 3 of the Convention. He also indicated to the Government, pursuant to Rule 36 of the Commission's Rules of Procedure, that a stay in the applicant's expulsion to Pakistan would be desirable until the Commission had had an opportunity to examine the case.

The Government's observations were received by letter dated 31 August 1993. The applicant's observations in reply were dated 7 September 1993.

THE LAW

1. The applicant complains of his imminent expulsion to Pakistan, where he alleges that he will be subjected to inhuman and degrading treatment and probably torture, contrary to Article 3 (Art. 3) of the Convention.

a) The Commission has constantly held that the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, expulsion may in exceptional circumstances involve a violation of the Convention, for example where there is a serious fear of treatment contrary to Articles 2 or 3 (Art. 2, 3) of the Convention in the country to which the person is to be expelled (see No. 10564/83, Dec. 10.12.84, D.R. 40 p. 262; mutatis mutandis Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 32 et seq., para. 81 et seq.).

b) Under Article 26 (Art. 26) of the Convention "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

The applicant submits that in his case the final decision was that of the Appeals Commission of 29 January 1993, against which no further appeal was possible. In his view, the arguments which he put forward in those proceedings were essentially the same as those which he could have raised in the light of the Lahore District Court judgment of 12 October 1992.

The Government contend that the applicant has not exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. Thus, the final decision which the applicant obtained in

respect of his request for asylum was that of the Federal Office for Refugees on 14 May 1992. The applicant failed to file an appeal against this decision. The decision of 29 January 1993 concerned a decision of the Federal Office for Refugees which declared inadmissible the applicant's request for reconsideration of a previous decision. Moreover, the applicant could, in the light of the judgment of 12 October 1992 of the Lahore District Court, have requested reconsideration of the authorities' decision to expel him from Switzerland.

The Commission notes that the applicant's request for asylum was dismissed by the Federal Office for Refugees on 14 May 1992, which also decided that the decision could be enforced. The applicant could have filed an appeal against this decision to the Appeals Commission for Asylum Matters. However, he did not do so. It appears that, through negligence on the part of his representative, he failed to comply with the time-limit of 30 days for filing such an appeal. The applicant also failed to comply with the requirements for filing a request for reinstitution within the time-limit.

The applicant has not, therefore, exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

The applicant submits, however, that he subsequently filed a request for reconsideration of the decision of 14 May 1992 which was dismissed by the Swiss Appeals Commission on 29 January 1993.

The Commission recalls its case-law concerning requests in Switzerland for the reconsideration of decisions which have already entered into force. Such a request is considered an effective remedy within the meaning of Article 26 (Art. 26) of the Convention if circumstances are invoked which were unknown at the time of the final decision. Thus, in a similar case against Switzerland, after the Swiss authorities had decided to expel the applicant, he alleged new political developments militating against his expulsion. The Commission found that under Swiss law the applicant could have been expected to ask for reconsideration of the decision to expel him, which in the circumstances constituted an effective remedy within the meaning of Article 26 (Art. 26) of the Convention (see No. 18079/91, X. v. Switzerland, Dec. 4.12.91, to be published in D.R.).

In the present case the Commission notes that the decision of the Appeals Commission of 29 January 1993 concerned a request for reconsideration. However, in these proceedings, the applicant submitted an extract of the Pakistani Penal Code, a document of Amnesty International, and the copy of a letter received by fax from a Pakistani lawyer. In the Commission's opinion, it cannot be said that these documents referred to circumstances unknown at the time when the final decision was taken.

This request for reconsideration does not therefore constitute an effective remedy within the meaning of Article 26 (Art. 26) of the Convention.

It is true that before the Commission, the applicant appears to rely on the document of the Lahore District Court of 12 October 1992 as a means of evidence militating against his expulsion. This document which the applicant only obtained on 16 June 1993 was never examined by the Swiss authorities.

Even assuming that this document concerned new circumstances unknown at the time when the applicant's request for asylum was dismissed, the Commission considers in the light of the above case-law that the applicant could have been expected to submit it to the Federal Office for Refugees and again request reconsideration of the decision to expel him. However, he failed to do so.

In this respect, therefore, the applicant has also not complied with the condition as to the exhaustion of domestic remedies

This part of the application must therefore be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

c) In any event, this part of the application would also have to be declared inadmissible as being manifestly ill-founded for the following reasons.

The applicant submits in support of his allegations a report by Amnesty International stating that ill-treatment is widespread in Pakistan. The applicant further recalls that under Swiss law a person applying for asylum must upon the first interrogation only summarily provide the reasons for leaving the home country; the detailed reasons must only be given at the subsequent interrogation. The applicant further submits that according to general experience it was perfectly possible for the applicant to leave Pakistan by plane although he had been released on bail.

The Government point out various discrepancies in the applicant's submissions before the Swiss authorities. The Government further contend that the judgment of the Lahore District Court is false as it contains various formal mistakes. For instance, the pleadings of the applicant's lawyer are not mentioned. Moreover, while stating that three persons are guilty, it goes on to state that two persons have not yet been tried. In this respect, the Government point out that the Swiss Appeals Commission has recently examined 37 judgments of Pakistani courts submitted by Pakistani citizens; 36 of them were false.

The Commission recalls that the mere possibility of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 (Art. 3) of the Convention (see Eur. Court H.R., Vilvarajah and others judgment of 30 October 1991, Series A no. 215, p. 37, para. 111).

The Commission has examined the circumstances of the present case as they have been submitted by the applicant, who claims that upon his return to Pakistan he will be subjected to treatment contrary to Article 3 (Art. 3) of the Convention.

Insofar as it can be determined, the applicant appears to refer to the demonstration in which he participated, which led to the death of a person. As a result, criminal proceedings were instituted against three persons, among them the applicant. He further appears to refer to the ill-treatment which he suffered while remanded in custody, and to the fact that, according to the judgment of the Lahore District Court of 12 October 1992, a co-accused has meanwhile been sentenced to death.

The Commission has first examined the judgment of the Lahore District Court of 12 October 1992.

The Commission observes that the mere fact that, upon return in his home country, a person risks punishment for a criminal act, cannot in itself raise an issue under Article 3 (Art. 3) of the Convention. However, according to the Lahore judgment, the death penalty was pronounced against a co-accused. The applicant apparently fears that he will undergo the same punishment. Thus, an issue could arise under Article 1 of Protocol No. 6 (P6-1) to the Convention within the meaning of the Commission's case-law.

In this respect, the Commission recalls that it has left open whether Article 1 of Protocol No. 6 (P6-1) to the Convention engages the responsibility of a State, such as Switzerland which has ratified this Protocol, where, upon deportation, the person concerned faces a real risk of being subjected to the death penalty in the receiving State (see No. 15216/89, Dec. 16.1.91, to be published in D.R.).

Nevertheless, the Commission notes an inconsistency in the document concerned. On the one hand, it holds the applicant "guilty of murder of Z.K.", thus implying that the applicant has already been convicted. On the other hand, the judgment states that the applicant and another co-accused "shall face the trial as and when they are arrested", thus implying that the outcome of the proceedings is still uncertain.

The Lahore District Court judgment does not therefore sufficiently confirm the applicant's fears that upon his return to Pakistan he will undergo treatment falling within the ambit of Article 3 (Art. 3) of the Convention or Article 1 of Protocol No. 6 (P6-1) to the Convention.

The Commission furthermore observes that the applicant has not provided any other official documents confirming his arrest and detention between 10 May and 10 July 1988.

Finally, the Commission notes certain inconsistencies in the applicant's submissions before the domestic authorities. First, the applicant did not at the outset inform the domestic authorities of his principal reason for leaving Pakistan. Thus, upon his first interrogation by the Swiss authorities, he merely referred to his difficulties with the police. Only upon a later interrogation did he refer to his detention and ill-treatment and that criminal proceedings had been instituted against him. Second, although allegedly charged with the serious offence of the instigation to manslaughter, the applicant claims that he was released on bail in order to prepare his university examination. Finally, the Commission notes that, although allegedly released on "interim bail", the applicant was able to pass through the control at the airport and leave the country.

The Commission finds therefore that the applicant has failed to show that, upon his return to Pakistan, he would face a real risk of being subjected to treatment falling within the ambit of Article 3 (Art. 3) of the Convention or Article 1 of Protocol No. 6 (P6-1) to the Convention.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 13 (Art. 13) of the Convention that he did not have an effective remedy at his disposal in respect of his complaints under the Convention. Under Article 1, para. 1, of Protocol No. 7 (P7-1-1) to the Convention, the applicant also complains that the Swiss authorities did not enable him to put forward grounds militating against his expulsion, and did not examine his case.

The Commission notes that the applicant had the possibility of filing an appeal against the decision of the Federal Office for Refugees on 14 May 1992. This would have enabled him to put forward grounds militating against his expulsion. However, on account of the negligence of his representative, the applicant failed to file the appeal.

The Commission finds, therefore, that the applicant had adequate remedies at his disposal for the purposes of Article 13 (Art. 13) of the Convention. This part of the application is therefore manifestly

ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Finally, the applicant may be understood as complaining under Article 6 (Art. 6) of the Convention of the unfairness of the proceedings before the Swiss authorities.

However, according to the Commission's case-law, a decision as to whether an alien should be allowed to stay in a country or be expelled does not involve either the 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 (see No. 8118/77, Dec. 19.3.81, D.R. 25 p. 105).

This aspect of the application is therefore incompatible ratione materiae with the provisions of the Convention, pursuant to 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) — (C.A. Nørgaard)