DECISION

AS TO THE ADMISSIBILITY OF

Application No. 19710/92
by Volkan TOSUN
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 11 January 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, 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 10 March 1992 by Volkan TOSUN against Germany and registered on 18 March 1992 under file No. 19710/92;

Having regard to:

- the Commission's decision of 10 February 1993 to communicate the application;

- the observations submitted by the respondent Government on 23 April and 10 December 1993 and the observations in reply submitted by the applicant on 21 June 1993 and 24 January 1994;

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 Turkish citizen, born in 1965 and currently living in Turkey. Before the Commission he is represented by Mr. Norbert Wagener, a lawyer practising in Frankfurt am Main.

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

In or about 1969, when he was four years old, the applicant arrived with his family, his parents and four brothers and sisters, in Germany. A younger sister was born there later.

The applicant attended school in Ludwigshafen and worked thereafter in his parents' restaurant. From 1985 to 1987 he was the manager of this restaurant.

In 1984 and 1986 the applicant was convicted of theft and aggravated theft and fined, respectively sentenced to six months' imprisonment on probation.

On 25 March and 20 June 1988 the applicant was convicted by the Frankenthal Regional Court (Landgericht) of armed robbery in two cases and sentenced to three and to five years' imprisonment. The Regional Court fixed later a cumulative sentence (Gesamtstrafe) of five years' and six months' imprisonment.

After having served half of this sentence, the Zweibrücken Court of Appeal (Oberlandesgericht) suspended the remainder of the sentence on probation having regard to the favourable prognosis of the applicant's personality.

On 31 January 1991 the Ludwigshafen Aliens Office ordered the applicant to leave Germany on the ground that the applicant had been convicted of criminal offences and sentenced to more than five years' imprisonment. Reference was made in particular to Section 47 para. 1 (1) of the Aliens Act (Ausländergesetz). According to this provision, a foreigner shall be expelled from Germany if he has been finally sentenced to a minimum of five years' imprisonment for having committed wilfully one or more offences (... wird ein Ausländer ausgewiesen, wenn er wegen einer oder mehrerer vorsätzlicher Straftaten rechtskräftig zu einer Freiheitsstrafe von mindestens fünf Jahren verurteilt worden ist).

The applicant lodged an administrative appeal (Widerspruch) against the deportation order. These proceedings are still pending.

At the same time the applicant requested to suspend, pending the appeal proceedings, the execution of the deportation order (Antrag auf einstweiligen Rechtsschutz).

On 29 May 1991, the Administrative Court (Verwaltungsgericht) at Neustadt an der Weinstrasse dismissed this request. The Court found that the deportation order had been issued in accordance with the relevant provisions of the Aliens' Act. The competent authorities did not enjoy any margin of appreciation when ordering the applicant's deportation. Having regard to the applicant's sentence of more than five years' imprisonment and the seriousness of the offences committed by him, the public interest in the prevention of disorder and crime outweighed the applicant's interests in staying in Germany although he had lived with his family in that country for many years. Furthermore there was a particular public interest in enforcing the deportation order rapidly with a view to deterring other foreigners from committing similar offences.

The applicant's appeal (Beschwerde) against the refusal to be granted a suspension of the deportation order was dismissed by the Rheinland-Pfalz Administrative Court of Appeal (Oberverwaltungsgericht) on 29 October 1991.

On 19 December 1991 the Federal Constitutional Court (Bundesverfassungsgericht), sitting as a panel of three judges, refused to admit the applicant's constitutional appeal against the above decisions, on the ground that it offered no prospect of success.

The Federal Constitutional Court held that it was not in breach of any constitutional right to expect the applicant to pursue the appeal proceedings from Turkey.

On 8 April 1992 the applicant was expelled to Turkey.

COMPLAINTS

The applicant complains under Article 8 of the Convention that his deportation to Turkey violates his right to respect for family life. In his application he submitted that he had been brought up and educated entirely in Germany and that he would now to be removed from his home country, the only place where he did have a family, to a place where he had solely spent his holidays, where he would be without employment and where he would have difficulty in speaking Turkish.

Until the outcome of the appeal proceedings, which may last several years, he would be separated from his family. The refusal to suspend the execution of the deportation order was not proportionate to the aim pursued. Although he had committed several serious offences in the past, his conduct has considerably improved. He has not committed any further offences, has a permanent employment, is the owner of his flat and is engaged to a Turkish woman, living in Germany.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 March 1992 and registered on 18 March 1992.

On 10 February 1993 the Commission decided to communicate the application to the respondent Government and to invite them to submit written observations on the admissibility and merits of the application.

On 23 April 1993 the Government submitted their observations. The observations in reply by the applicant were submitted on 21 June 1993.

On 10 December 1993 the Government submitted further observations. Observations in reply by the applicant were submitted on 24 January 1994.

THE LAW

The applicant complains of the decision of the Administrative Court at Neustadt an der Weinstrasse of 29 May 1991, by which the suspensive effect of his appeal against the order to leave the territory of Germany was refused. He alleges that this decision and his deportation to Turkey have the effect of breaking up his family life even if only for the duration of the appeal proceedings. He relies on Article 8 of the Convention which states, so far as relevant:

"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 ... for the prevention of disorder or crime, ... "

The Government emphasize that the question in issue concerns the refusal to suspend the execution of the deportation order, but not the deportation order as such, in respect of which domestic remedies are not yet exhausted. The right to interim measures, namely to authorise the applicant's return to Germany pending the outcome of the appeal proceedings, is not guaranteed by Article 8 of the Convention.

The Government add that the enforcement of the deportation order is in any event justified under para. 2 of Article 8 of the Convention. The interference with the applicant's rights was in accordance with the law, pursued the aim of the prevention of disorder and crime and was necessary in a democratic society.

The Government stress in particular the seriousness of the offences, the fact that the applicant was an adult when he committed the offences and the fact that the question of the lawfulness of the deportation order has not yet been determined. The applicant will be able to leave his native country again and return to Germany, should the courts

quash the expulsion order issued against him. Finally, contacts with his family can be maintained by correspondence and visits during holidays.

The applicant complains that section 47 para. 1 (1) of the Aliens Act leaves no discretion to the authorities and obliges them to issue an expulsion order if a five years' prison sentence has been pronounced. He stresses that the authorities have not taken in consideration that the Zweibrücken Court of Appeal has suspended the second half of his sentence having regard to the favourable prognosis of the his personality, that his conviction and sentence occurred several years ago and that since then he has not committed any further offences. He had a permanent employment, his own flat and is engaged to a Turkish woman living in of Germany. It will take several years until a final decision will be given in the proceedings on the merits. During this long period he will be separated from his family and suffer an irreparable damage.

The Commission first observes that the expulsion decision at issue is, for the moment, of a provisional character in the sense that the competent court continues to be seized of the appeal against the deportation order.

The question before the Commission is therefore whether the refusal of granting the applicant's appeal suspensive effect and his deportation to Turkey before the deportation order has become final, reveals an appearance of a violation of the Convention.

The Commission recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed in Article 8 para. 1 (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 9203/80, Dec. 5.5.81, D.R. 24 p. 239). Such expulsion may also amount to an interference with the person's private life.

In the present case the expulsion may have interfered with the applicant's family life or private life or both.

However, the Commission does not need to resolve this issue, as this complaint is in any event manifestly ill-founded for the following reasons.

Insofar as the refusal to grant suspensive effect to the applicant's appeal against the order to leave Germany interferes with his right to respect for his private or family life within the meaning of Article 8 para. 1 of the Convention, such interference is not in breach of Article 8, if it is justified under Article 8 para. 2 of the Convention.

As regards the lawfulness of the interference, the Commission observes that the German authorities, when refusing suspensive effect of his appeal against the order to

leave Germany, relied on Section 47 para. 1 (1) of the Aliens Act. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2.

Moreover, when refusing to grant the applicant's appeal suspensive effect, the German authorities considered that the applicant had been convicted of serious offences and that the impugned measure was in the interest of the prevention of disorder and crime. This is a legitimate aim mentioned in Article 8 para. 2.

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether such a need for an interference exists, but it goes hand in hand with European supervision (see, Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, p. 15, para. 128; Funke judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission notes that the administrative authorities had regard to the applicant's private and family situation. The German administrative courts also considered the applicant's long stay in Germany and the situation of his family, and weighed his private and family interests against the public interest in his leaving the country, based on his conviction for serious offences and sentence to more than five years' imprisonment. This reasoning was confirmed by the Federal Constitutional Court.

In these circumstances, the Commission considers that there are relevant and sufficient reasons for the refusal to grant the applicant's appeal suspensive effect and to expel him before the termination of the proceedings concerning the challenged order to leave Germany. The Commission further notes that it is not unreasonable to expect the applicant's Turkish fiancee to follow him to Turkey. The applicant has not shown that the provisional execution of the expulsion order would cause him irreparable or disproportionate damage. Rather he will be free to return to Germany would he eventually succeed in his administrative court action. Weighing the applicants' private and family interests, and the public interests at stake, the Commission finds that the German authorities did not overstep the margin of appreciation left to them.

Consequently, the interference with the applicants' right guaranteed by Article 8 was justified under para. 2 of that Article in that it can reasonably be considered "necessary in a democratic society ... for the prevention of disorder and crime." Thus there is no appearance of a violation of Article 8 of the Convention.

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

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (C.L. ROZAKIS)