AS TO THE ADMISSIBILITY OF

Application No. 19373/92
by Igor VOULFOVITCH, and Maria OULIANOVA
and Marina VOULFOVITCH
against Sweden

The European Commission of Human Rights sitting in private on 13 January 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

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 20 December 1992 by Igor VOULFOVITCH, and Maria OULIANOVA and Marina VOULFOVITCH aginst Sweden and registered on 20 January 1992 under file No. 19373/92;

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 26 June 1992 and the observations in reply submitted by the applicant on 18 August 1992;

Having deliberated;

Decides as follows:

THE FACTS

Particular circumstances of the case

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

The first applicant was born in 1961. He is an engineer and tennis coach by profession. Before coming to Sweden he lived in St. Petersburg with his wife, the second applicant, born in 1964. Together they have a child, the third applicant. All applicants have been citizens of the Soviet Union.

The family arrived in Sweden on 12 July 1991 on a one-day visa expiring on 15 July 1991. In Sweden they applied for political asylum, travel documents and residence and work permits in accordance with the provisions of the 1989 Aliens Act (utlänningslagen 1989:529).

The applicants provided the Swedish authorities with the following background to their application.

While at university the first applicant participated in certain actions against the Soviet Union's war in Afghanistan. In 1983, after the applicant's participation in one such demonstration had been discovered, the university authorities threatened him with expulsion from the studies and also the stopping of his father's research work unless he cooperated with the KGB by spying on Jews. After having discussed the matter with his father the applicant accepted. He was thereafter asked to provide information on a Jew who was suspected of giving secret lessons of Hebrew. He managed to meet the person in question, but instead of following the KGB's directives, he warned the man of the organisation's interest in his person. When in 1984 he was summoned to do military service he was ordered by the KGB to report on problems within his unit. After his return to university he was asked to try to befriend a student of Greek origin in order to see if that student possessed illegal literature. The applicant never managed to get this information and the KGB did not give him any new assignments. However, in 1987 he was ordered to sign a document whereby he promised not to reveal anything of what he knew about the KGB. He signed. Between 1987 and 1990 nothing happened. However, in December 1990 he was again contacted by the KGB which wished him to continue to spy on Jews in the Soviet Union. He received a proposal to make friends with and to provide information on two Jews. However, this time the applicant refused stating that it had been a mistake from the beginning to cooperate with the KGB. His interlocutor ordered him to sign a new promise not to reveal anything of what he knew about the KGB. The applicant refused this also. The interlocutor then told him in reply that he would regret his attitude.

At the end of January 1991 he received an anonymous and unstamped letter stating "Jewish swine get out of here - unless you disappear something will happen to you and your family !". Up till February 1991 he received two more letters and also telephone calls containing threats to kill him. Also the second applicant received insulting and threatening telephone calls. They reported the matter to the police but the police did not take any action.

When arriving at his home on 1 April 1991 unknown men gave the first applicant a violent blow on his head. He lost consciousness and was taken to hospital with a brain concussion. He does not think that it was a robbery as he carried a lot of money which was not stolen.

On 10 April 1991 unknown men in a car without number plates tried to kidnap the third applicant while she was taken out for a walk by the second applicant and a friend. However, thanks to the intervention of the friend and of a passer-by who had a big dog the kidnapping attempt failed.

Some time during the spring of 1991 someone made a fire outside the applicants' front door and painted a swastika on the door.

On 2 July 1991 the first applicant was summoned to the local department for internal affairs (MVD) charged with dealing with currencies on the black market. He had to sign a paper whereby he promised not to leave St. Petersburg and on 8 July he received a new summons to appear on 12 July. However, on 11 July, the applicants left St. Petersburg for Sweden on board the steamer Iljitj, availing themselves of a permit, previously issued, for them to leave the country to go to Sweden and the USA. They did not encounter any problems entering Sweden.

While still in St. Petersburg, the applicants had hoped to continue from Sweden to the USA with the financial help of a friend there. However the friend got into economic difficulties and could no longer provide any such help. The first applicant accordingly decided to take his family to Sweden.

According to information provided by a friend residing in Stockholm the local militia in St. Petersburg has been searching for the first applicant inter alia at his parents' home. In addition, the applicants received information that the windows of their home, where the second applicant's parents now live, had been smashed by stones and that anti-semitic slogans had been carved into the front door. Furthermore the parents had received anti-semitic telephone calls. The father had reported the matter to the police which had not taken any action.

On 25 November 1991 the National Board of Immigration (statens invandrarverk) decided to hand the cases over to the Government for decision in accordance with Chapter 7, Section 11 of the Aliens Act because of the special circumstances obtaining. In a memorandum annexed to this decision the Board concluded that the applicant's trustworthiness could be questioned but that, even if their story was accepted, the circumstances were not sufficiently serious to warrant the granting of their applications for political asylum.

On 19 December 1991 the Government (Ministry of Labour) decided to reject the applicants' requests and to forbid the applicants to return to Sweden before 1 January 1994 without authorization from the National Immigration Board. It also recalled that the decision contained material which might be secret under the Secrecy Act (sekretesslagen 1980:100). The reasons given were the following:

> "In support of his request Igor Voulfovitch has mainly submitted that he has refused to cooperate with the KGB in order to spy on Jews and that he and his family have been exposed to anti-semitic harassment through anonymous letters, telephone calls and Swastika paintings.
>
> The harassment to which Igor Voulfovitch has been exposed in his home country is not of such a serious character and not in such a way supported by the State that he and his wife Marina Oulianova and their child can be considered as refugees in accordance with Chapter 3, Section 2 of the Aliens Act. Nor does there exist any such weighty reason as is referred to in Chapter 3, Section 1 § 3 of the same law. Nor are there any other grounds for allowing them to remain in the country."

On 14 April 1992 the applicants applied to the Board for a residence permit and for the suspension of the Government's expulsion decision. They referred to continued reports of harassment of Jews in Russia and to the fact that the third applicant's personal development was seriously endangered as a result of the stress following the rejection of their application for political asylum. On the last point they invoked inter alia a certificate from the Psychiatric Child and Youth Care Centre of the Stockholm County Council (psykiatriska barn- och ungdomsvården, Stockholms landsting). They also emphasised that they risked 3 to 5 years imprisonment because they had violated the foreign exchange regulations when they left St. Petersburg: the customs authorities had caught them while attempting to bring 1,470 USD with them instead of the authorised 100 USD. They submitted three summonses to appear before the public prosecutor relating to these charges, the first dated 16 January 1992.

On 5 May 1992 the Board rejected their application. The Board stated inter alia:

"According to Chapter 2, Section 5 of the Aliens Act a request for residence permit, submitted by an alien who is to be refused entry or expelled in accordance with a decision which has gained legal force can only be granted if the request is based on circumstances that have not been previously examined in connection with the question of refusal of entry or expulsion and if the applicant has a right to political asylum here or if there are otherwise very special grounds (synnerliga skäl) of a humanitarian character.

...

The circumstances invoked in the present case regarding ethnic harassment and suspicion of certain criminality, the trustworthiness of which may be questioned, do not change the Government's assessment that there is no ground for asylum. Nor are there sufficiently strong reasons of a humanitarian character to annul the Government's decision and to grant a residence permit."

The applicants are at present in hiding somewhere in Sweden. The details of their expulsion, including the date, have not been fixed. However, under Chapter 8 of the Aliens Act, the police authority is to enforce, as soon as possible, their expulsion to their home country.

Relevant domestic law

The relevant provisions of the Aliens Act read:

Chapter 1: Conditions applying to the residence of aliens in Sweden etc...

Section 4: "An alien staying more than three months in Sweden shall have a residence permit unless he is a citizen of Denmark, Finland, Norway or Iceland. ... ."

Chapter 2: Further provisions on visas, residence and work permits

Section 5: " ... If, however, the alien is to be refused entry or to be expelled under an order which has acquired legal force, an application by him for a residence permit may only be granted if it is based on circumstances which have not previously been examined in the case concerning refusal of entry or expulsion and if

1. the alien is entitled to asylum in Sweden, or
2. there are other exceptional grounds of a humanitarian nature involved."

Chapter 3: Asylum

Section 1: "The term asylum as used in this Act refers to a residence permit awarded to an alien because

1. he is a refugee,

...

3. without being a refugee, he is unwilling to return to his country of origin on account of the political situation

there and is able to plead very strong grounds in support of this."

Section 2: "The term refugee in the present Act refers to any foreigner who is staying outside the country of which he is a citizen because he feels a well-founded fear of being persecuted in that

country because of his race, nationality, belonging to a special group in society or his religious or political convictions and who cannot or who does not wish to avail himself of his home country's protection ..."

Section 4: "An alien as referred to in Section 1 is entitled to asylum.

Asylum may, however, be refused if

1. in view of what is known concerning the alien's previous activities or, for considerations of national security, there are exceptional grounds for not granting asylum,

2. in the case of an alien coming under Section 1 ... (3), there are special grounds for not granting asylum ..."

Chapter 4: Refusal of entry and expulsion
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Section 1: "An alien may be refused entry

...

2. if he lacks a visa, residence permit or other document required for entry, residence or employment in Sweden,

..."

Section 12: "When a question concerning refusal of entry or expulsion is examined, it is to be considered whether the alien, pursuant to the provisions of Chapter 8, Sections 1 - 4, cannot be sent to a particular country or whether there are other special obstacles to the decision being enforced.

Decisions made by the Government or the ... Board are to include such directions with regard to enforcement as this examination may call for."

Chapter 8: Enforcement
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Section 1: "An alien who has been refused entry or who is to be expelled may never be sent to a country where there is firm reason to believe that he would be in danger of suffering capital or corporal punishment or of being subjected to torture, nor to a country where he is not protected from being sent to a country where he would be in such danger."

Section 2: "When a refusal-of-entry or expulsion order is to be put into effect, the alien may not be sent to a country where he would risk being persecuted, nor to a country where he would not be protected from being sent on to a country where he would risk being persecuted.

An alien may, however, be sent to a country as referred to in sub-paragraph 1 if he cannot be sent to any other country and if he has shown, by committing a particular offence, that public order and safety would be seriously endangered by his being allowed to remain in Sweden.

This does not apply if the persecution threatening him in the other country implies danger to his life or is otherwise of a particularly grave nature.

Similarly, the alien may be sent to a country referred to in sub-paragraph 1 if he has conducted activities endangering the national security of Sweden and if there is reason to suppose that he would continue to engage in such activities here and he cannot be sent to any other country."

Section 5: "If enforcement is not subject to any obstacles under Sections 1-4, an alien who has been refused entry or who is to be expelled is to be sent to his country of origin or, if possible, to the country from which he came to Sweden.

If the decision cannot be put into effect in the manner indicated in sub-paragraph 1 or there are other special grounds for doing so, the alien may be sent to some other country instead."

Section 13: "If the enforcing authority finds that enforcement cannot be carried out or that further information is needed, the authority is to notify the ... Board accordingly. In such a case, the ... Board may decide on the question of enforcement or take such other measures as are necessary. ... "

COMPLAINTS

The applicants complain of the decision to refuse them entry into Sweden. They maintain that:

1. their expulsion to Russia would be contrary to Article 3 of the Convention: they run a great risk of being persecuted there on account of the first applicant's Jewish origins and his previous collaboration with the KGB; the first applicant also risks criminal sanctions for having left St. Petersburg without permission and for having violated the foreign exchange regulations;

2. they have been the victims of a violation of Article 13 of the Convention as they have had no effective remedy before any domestic authority in respect of the Government's decision;

3. they have also been the victims of a violation of Article 1, sub-paragraph 1, sub-section b, of Protocol No. 7 to the Convention in that the National Immigration Board handed the case over to the Government which, accordingly, took the expulsion decision as first and final instance, thus depriving the applicants of their right under this Article to have a review of their case.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 December 1991. On 17 January 1992 the Commission rejected the applicants' request under Rule 36 of the Commission's Rules of Procedure for interim assistance in order to prevent their expulsion to Russia, but it decided to bring the case to the notice of the respondent Government and to invite them to submit observations in writing on the admissibility and merits of the application. The application was registered on 20 January 1992.

On 26 June 1992 the Government submitted their observations to which the applicants replied on 18 August 1992.

THE LAW

1. The applicants complain that their expulsion to Russia would be contrary to Article 3 (Art. 3) of the Convention because of the risk of persecution and prosecution there. Article 3 (Art. 3) reads:

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

According to the constant case-law of the Convention organs a person facing extradition or expulsion to a foreign state may, where the measure is imminent, claim to be a victim of a violation of, inter alia, Article 3 (Art. 3) of the Convention if the measure might expose him in that other country to a serious risk of treatment contrary to this Article (see, inter alia, No. 10479/83, Dec. 12.3.84, D.R. 37 p. 158; Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A No. 215, p. 34, para. 103).

As regards the seriousness of the risk of treatment in their home country the applicants have pointed out the first applicant's Jewish origins, his past collaboration with the KGB, the threats, harassments and persecution which he and his family experienced in St. Petersburg before they fled from the country and the subsequent information regarding continued harassments of Jews in Russia in general and in St. Petersburg in particular which he has received inter alia from his wife's parents. The first applicant also stresses that he risks serious sanctions - 3 to 5 years imprisonment - as a result of the breach of foreign exchange regulations and of having left the city without permission despite his having signed a clear undertaking not to do so.

The Government maintain that the applicants' expulsion to Russia would not violate Article 3 (Art. 3) of the Convention. The mere fact that the applicants may have experienced harassments and threats there before fleeing to Sweden - something which has not been proved - is not sufficient to establish that there is still a sufficiently great risk of such treatment to make their expulsion to Russia today contrary to Article 3 (Art. 3) of the Convention. In this context the Government emphasise the changes which have taken place in the former Soviet Union and the rest of the world during the last few years and which have led to the dissolution of the Union, with its more than one hundred different population groups, into a number of independent states united in a commonwealth. They state that the ensuing situation caused - not unexpectedly - some general instability and unrest.

The information available to the Government in the last part of the autumn 1991 with regard to the situation of ethnic minorities in the former Soviet Union included the following. As a rule there seemed, at the time, to exist no state-sanctioned discrimination of minority groups. However, there was an increase of anti-Russian sentiments in many peripheral republics. Increasing frustration in society also gave rise to racism on the grass root level. This racism was directed against all available dissentient groups, including the Jewish community. Jews existed as minority groups all over the Soviet Union and were therefore at risk of harassment in various republics. However, reports of serious harassment had been few. During the previous year, Jewish cultural centres and synagogues had opened in different parts of the former Soviet Union.

The Government claim that, bearing in mind the unsubstantiated character of the applicants' allegations and the developments in the former Soviet Union, the existence of a mere possibility of ill-treatment is not in itself sufficient to make the expulsion of the applicants to Russia a violation of Article 3 (Art. 3) of the Convention; the incidents relied upon are not severe enough, and the connection to the authorities of Russia is too vague.

The Commission recalls that the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 (Art. 3), to control

the entry, residence and expulsion of aliens and furthermore that the right to political asylum is not protected by either the Convention or its Protocols (see, inter alia, Eur. Court H.R., Vilvarajah and Others judgment of 30 October 1991, Series A No. 215, p. 34, para. 102). However, the expulsion of an alien may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person concerned could face 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; a mere possibility of ill-treatment is not in itself sufficient in this context (ibid., pp. 34 and 37, paras. 103 and 111). Furthermore, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3) (ibid., p. 36, para. 107).

The Commission has examined the applicants's allegations of risk of ill-treatment if returned to Russia in the light of the above case-law. It notes first of all that it is still not clear if the applicants must be expelled to that country or if they could also seek to be sent to some other country willing to accept them, e.g. Israel. However the Commission has not found it necessary to clarify this question as, in any event, it does not find that there are substantial grounds for believing that the applicants are faced with a real risk of being subjected to treatment contrary to Article 3 (Art. 3) if returned to Russia. In reaching this conclusion the Commission has in particular noted the changes which have taken place in Russia in the last few years and which have led to significant progress towards increased respect for human rights and the absence of evidence of any government-supported discrimination against persons of Jewish origin.

The Commission accordingly concludes that the applicants' complaints under Article 3 (Art. 3) of the Convention have to be rejected as being manifestly ill-founded, in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicants also allege a violation of Article 13 (Art. 13) of the Convention in that they claim not to have had any effective remedy before a national authority in respect of their allegations of a violation of Article 3 (Art. 3) of the Convention.

The Commission recalls that Article 13 (Art. 13) requires that any individual who has an arguable claim to be the victim of a violation of the rights set forth in the Convention, should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see, inter alia, Eur. Court H.R., Leander judgment 26 March 1987, Series A No. 116, pp. 29 - 30, para. 77 and Boyle and Rice judgment of 27 April 1988, Series A no. 131, pp. 23 - 24, paras. 52 - 55). In the present case, the Commission has rejected the applicants' main complaints as manifestly ill-founded as it has not found that there are substantial grounds for believing that they are faced with a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if sent back to Russia. Against this background the Commission does not consider that the applicants' have any "arguable" claims for the purposes of Article 13 (Art. 13) of the Convention.

It follows that this part of the application is also manifestly ill-founded and has to be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicants also complain about a violation of Article 1, sub-paragraph 1 (b) of Protocol No. 7 (P7-1-1-b) to the Convention in that they had no right to have the Government's decision to expel them reviewed. The Article in question reads in its relevant parts:

> "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached

in accordance with law and shall be allowed:

...

b. to have his case reviewed ... ."

The applicants maintain that, according to Swedish law, they were lawfully resident in the country until the Government took the expulsion decision. They also maintain that, as the Board sent their case to the Government for decision, it was also the Government which in first and final instance decided to expel them, thus depriving them of their right under Article 1, sub-paragraph 1 (b) (Art. 1-1-b), to have their case reviewed.

The Government contend in the first place that the application is incompatible ratione materiae with the provisions of the Convention and its Protocols since the applicants cannot be said to have been lawfully resident in Sweden. They entered the country on a one-day visa valid until 15 July 1991. The Government stress in this context that persons admitted to the territory of the state for non-residential purposes or who are awaiting the decision on a request for a residence permit do not fall within the scope of the protection afforded by Article 1 of Protocol No. 7 (P7-1). The also maintain that it must be up to national law to determine the conditions for a person's presence on the national territory to be "lawful" within the meaning of this Article and that, as soon as an alien does not comply with one or more of these conditions, his presence can no longer be considered "lawful" within the meaning of Article 1 of Protocol No. 7 (P7-1).

The Commission recalls that the point of departure for the interpretation of the Convention is the ordinary meaning of the terms used, read in their context and having regard inter alia to the object and purpose of the Convention (see, inter alia, Eur. Court H.R., Golder judgment of 21 February 1975, Series A No. 18, p. 14, paras. 29-30). In the context of an instrument which, like the Convention, does not guarantee a right to asylum or other residence authorization, the term "lawfully resident" used in Article 1 of Protocol No. 7 (P7-1) must be interpreted to refer basically to lawfulness of the presence according to national law. Thus an alien whose visa or residence permit has expired cannot, at least normally, be regarded as being "lawfully resident" in the country.

Whatever the exact scope of the term lawfully resident it clearly does not comprise aliens in the applicants' situation. The applicants only had a transit visa for a one-day visit to Sweden and have remained, after the expiry of the visa, in the country solely in order to await, first, a decision on their request for political asylum or residence permits and, subsequently, the enforcement of the expulsion decision.

Their complaints under this provision must therefore be declared inadmissible as being incompatible ratione materiae with the provisions of the Convention and its Protocols, in application of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)