COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

AFFAIRE PAEZ c. SUÈDE

CASE OF PAEZ v. SWEDEN

(18/1997/802/1005)

ARRÊT/JUDGMENT

STRASBOURG

30 octobre/October 1997

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SUMMARY[1]

Judgment delivered by a Chamber

Sweden – decision to expel Peruvian national to Peru, not enforced pending proceedings and subsequently repealed in connection with grant of permanent residence (Aliens Act 1989)

RULE 51 §§ 2 AND 4 OF RULES OF COURT B

No friendly settlement or agreed arrangement in present case – however, circumstances disclosed a "fact of a kind to provide a solution of the matter" (Rule 51 § 2) – applicant's initial complaint to Convention institutions had essentially been that he feared expulsion to Peru would expose him to ill-treatment contrary to Article 3 of the Convention – that threat of potential violation had however been removed by virtue of decision of 23 June 1997 granting him permanent residence in Sweden and lifting expulsion order, enforcement of which had been stayed pending proceedings.

In addition, no apparent reason of *ordre public* for continuing proceedings (Rule 51 § 4).

Conclusion: case ordered to be struck out of the list (unanimously).

COURT'S CASE-LAW REFERRED TO

7.7.1989, Soering v. the United Kingdom; 20.3.1991, Cruz Varas and Others v. Sweden; 30.10.1991, Vilvarajah and Others v. the United Kingdom; 15.11.1996, Chahal v. the United Kingdom

1. This summary by the registry does not bind the Court.

In the case of Paez v. Sweden[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr C. RUSSO,
Mrs E. PALM,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr L. WILDHABER,
Mr P. JAMBREK,
Mr P. KŪRIS,
Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 August and 23 October 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 29482/95) against the Kingdom of Sweden lodged with the Commission under Article 25 by a Peruvian citizen, Mr Jorge Antonio Paez, on 16 November 1995.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 3 of the Convention.

Notes by the Registrar

1. The case is numbered 18/1997/802/1005. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31).

3. The Chamber to be constituted included *ex officio* Mrs E. Palm, the elected judge of Swedish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 21 February 1997 in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr C. Russo, Mr A.N. Loizou, Sir John Freeland, Mr P. Jambrek, Mr P. Kūris and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, Mr L. Wildhaber, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. In a letter to the Swedish Government ("the Government") of 6 February 1997 the Deputy Registrar reiterated that the Commission had previously, under Rule 36 of its Rules of Procedure, indicated to the Government not to enforce the expulsion order concerning the applicant until the Court or its President had taken a position on the question of possible interim measures. The Deputy Registrar pointed out that under Rule 38 § 2 of Rules of Court B interim measures indicated to the Government by the Commission remained recommended once the case had been referred to the Court unless and until the President or the Chamber decided otherwise. No such decision had been taken in this case.

5. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the orders made in consequence on 6 March and 19 June 1997, the Registrar received the applicant's memorial on 27 June 1997. On 16 June 1997 the Government had informed the Registrar that, in the light of new developments, they did not find it necessary to file a memorial. On 30 June the Registrar received a request by the Government to the Court to strike the case out of its list on the ground that the matter had been solved (Rule 51 § 2) by a recent decision of the Alien Appeals Board granting the applicant permanent residence in Sweden. In a letter of 15 July 1997 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

On different dates between 24 July and 14 August 1997, the Registrar received additional observations from the applicant and the Government on the merits of the case, including the request to strike the case out of the Court's list, and on the applicant's Article 50 claims.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 August 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr C.H. EHRENKRONA, Director for Legal Affairs,
Ministry for Foreign Affairs, *Agent*,
Ms I. FRIDSTRÖM, Legal Adviser,
Ministry for Foreign Affairs, *Adviser*;

(b) *for the Commission*
Mr K. HERNDL, *Delegate*;

(c) *for the applicant*
Mr T. NILSSON, *advokat*, *Counsel*.

The Court heard addresses by Mr Herndl, Mr Nilsson and Mr Ehrenkrona.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The applicant is a Peruvian citizen who was born in 1971 and currently lives in Sweden.

8. On 10 February 1991 the applicant left Peru for Sweden, where he arrived on 12 February and requested asylum on 4 March. As grounds for his request he referred to his activities within the armed opposition group *Partido Comunista del Perú – Sendero Luminoso* (Communist Party of Peru – Shining Path; hereinafter "*Sendero Luminoso*"). He had been a member of the movement since July 1990 and had taken part in the distribution of political propaganda. In August 1990 he had participated in the building of a road block. He had also taken part in demonstrations and had given speeches in support of the movement. On 13 November 1990 his closest superior within the movement had been arrested and a few days later he had himself been subjected to an unsuccessful kidnap attempt. While in hiding a search had been carried out in his home. He had stayed with friends until his departure from Peru and, with the assistance of friends, he had left with a valid passport.

The applicant further submitted that his family had been very active politically. His mother and father had been members of left-wing movements; his father had been imprisoned for four years in the 1960s on account of his activities within such a movement. One of his cousins, A.,

had been arrested and killed by paramilitary troops in July 1989 and another, Mr Ernesto Castillo Paez, had disappeared following arrest by the police in October 1990. A further cousin, Ms Mónica Castillo Paez, had also lodged a request for asylum in Sweden, principally referring to her activities within a supporting section of *Sendero Luminoso*.

9. On 1 June 1993 the National Immigration Board *(Statens invandrarverk)* rejected the applicant's asylum request and ordered his expulsion. The Board did not question his account of his activities within *Sendero Luminoso* but considered that his lawful departure from Peru showed that the Peruvian authorities had not become aware of them. Moreover, although the applicant had not himself participated in any serious offences, he had nevertheless been working for an organisation whose methods fell within the exclusion clauses in Article 1 F of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention"). The Article reads:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

10. The applicant subsequently appealed against the above decision to the Aliens Appeals Board (*Utlänningsnämnden*), which, on 16 December 1994, referred the appeal to the Government. In the Board's opinion, it could not be excluded that the applicant might, on his return to Peru, be persecuted on account of his and his family's political activities. He could therefore claim status as a *de facto* refugee. The Board in addition noted that the Swedish Government had been repeatedly criticised for its 1992 decision of principle to the effect that asylum should not be granted to persons who "in one way or another" had been involved in, *inter alia*, the activities of *Sendero Luminoso*.

11. On 12 October 1995 the Government (the Minister of Labour) rejected the applicant's appeal, giving the following reasons:

> "In support of his asylum request [the applicant] has stated that he has been active for the benefit of an organisation which, according to what is known, has committed repeated severe crimes of the character referred to in Article 1 F (a) of [the 1951 Convention]. According to this Article the guarantees of the Convention do not apply to a person who has been active for the benefit of such an organisation.

The Government share the Aliens Appeals Board's assessment that [the applicant] is not a refugee within the meaning of chapter 3, section 2, of the [1989] Aliens Act [*utlänningslag* 1989:529]. He must, however, be considered as having adduced weighty grounds within the meaning of chapter 3, section 1 (3) ... [for his unwillingness to return to his country of origin on account of the political situation there]. Accordingly, [the applicant] in principle fulfils the requirements for being regarded as a so-called *de facto* refugee.

Making an overall assessment, the Government finds, on the basis of [his] activities for the benefit of the above-mentioned organisation ..., that there are special reasons within the meaning of chapter 3, section 4, of the Aliens Act for not granting [him] asylum. The remaining grounds invoked [by him] do not constitute any reason for letting him stay in the country."

12. On 21 December 1995 the National Immigration Board decided to stay the enforcement of the applicant's expulsion in view of an indication to this effect of 7 December 1995 by the Commission under Rule 36 of its Rules of Procedure.

13. Further, the applicant's brother, Mr Gorki Ernesto Tapia Paez sought asylum in Sweden but the Government rejected his request on similar grounds and ordered his expulsion on 12 October 1995. The execution of the expulsion order was however stayed.

14. On 16 February 1996 the Aliens Appeals Board granted the applicant's mother L. and her two daughters M. and I. asylum as *de facto* refugees within the meaning of chapter 3, section 1 (3), of the Aliens Act (see paragraph 21 below).

15. On 28 June 1996 the applicant lodged a fresh request for a residence permit, referring, *inter alia*, to the Commission's decision of 18 April 1996 to declare his application admissible. On 3 July 1996 the Aliens Appeals Board decided to stay enforcement of the expulsion order.

16. On 28 April 1997 the Committee set up under the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment examined a petition lodged by the applicant's brother. It adopted the view that Sweden had an obligation under that Convention to refrain from forcibly returning him to Peru.

Following the above conclusions, the applicant renewed his request for asylum to the Aliens Appeals Board, as did his brother.

17. On 23 June 1997 the Board, having particular regard to the above-cited findings of the United Nations Committee Against Torture, granted the brother permanent residence in Sweden. In the light of this decision and the fact that the circumstances of the applicant's case were in the Board's view similar, it decided to grant also the applicant a permanent residence permit and to repeal the relevant expulsion order. On the other hand, it did not

grant him asylum status. The decision was taken on the basis of chapter 3, section 3, of the 1989 Aliens Act, as amended as of 1 January 1997.

II. RELEVANT DOMESTIC LAW

18. With one exception, all the national decisions in the present case were taken under the Aliens Act 1989 *(utlänningslag* 1989:529) in the version in force until 1 January 1997 when certain amendments (1996:1379) to the Act entered into force. The exception is the decision of 23 June 1997 granting the applicant permanent residence in Sweden (see paragraph 17 above).

19. According to the 1989 Act the National Immigration Board and the Aliens Appeals Board are empowered to determine issues regarding the right of aliens under the Act to enter and remain in Sweden. Under the provisions in force before 1 January 1997, in exceptional cases the Government could determine whether or not an alien should be allowed to remain in the country, provided that either the National Immigration Board or the Aliens Appeals Board had referred the matter for consideration. Such a referral could take place, *inter alia*, if the matter was deemed to be of special importance for the purpose of obtaining guidance as to the application of the Aliens Act (chapter 7, section 11). Since 1 January 1997, such referrals may not be made with respect to applications for residence permits resubmitted on grounds of change of circumstances (chapter 2, section 5 (b)).

20. Chapter 3, section 1 (1) provides that asylum may be granted to an alien if he or she is a refugee. The term "refugee" is defined in section 2 as an alien who is outside his or her country of origin because of a well-founded fear of persecution on grounds of race, nationality, links to a certain social group or religious beliefs or political opinion and who cannot or will not, because of such fear, avail himself or herself of the protection of that country.

21. According to the former section 1 (3), which was repealed on 1 January 1997, asylum could also be granted to a person who, because of the political situation in his or her country of origin, was unwilling to return there and who was able to present convincing grounds for his or her wish to remain in Sweden. A person who had been granted asylum on the latter ground was regarded as a "*de facto* refugee".

Pursuant to section 4 an alien referred to in section 1 was entitled to asylum. However, under that provision, asylum could be refused, *inter alia*, in special circumstances.

22. Since 1 January 1997, a well-founded fear of subjection to the death penalty, corporal punishment, torture or other inhuman or degrading treatment or punishment constitutes a separate ground under chapter 3, section 3, for granting a residence permit.

23. In considering the refusal of entry of an alien or his or her expulsion, the relevant authority should, according to chapter 4, section 12, have regard to whether there are any obstacles of the kind referred to in chapter 8, sections 1–4, to returning him or her to a particular country or whether there are any other specific obstacles to implementing the decision. For instance, under chapter 8, section 1, an alien may not be expelled to a country where there are substantial grounds for believing (*grundad anledning att tro)* that he or she would risk the death penalty, corporal punishment or torture.

According to the amended version of the latter provision an alien may not be expelled to a country where there is reasonable cause to believe *(skälig anledning att tro)* that he or she would risk being subjected to the death penalty, corporal punishment, torture or other inhuman or degrading treatment or punishment.

PROCEEDINGS BEFORE THE COMMISSION

24. In his application (no. 29482/95) of 16 November 1995 to the Commission, Mr Jorge Antonio Paez alleged that his expulsion to Peru would give rise to a violation of Article 3 of the Convention.

25. The Commission declared the application admissible on 18 April 1996. In its report of 6 December 1996 (Article 31) it expressed the opinion that the applicant's expulsion to Peru would not violate Article 3 of the Convention (by fifteen votes to fourteen). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

AS TO THE LAW

26. In the Government's main submission the Aliens Appeals Board's decision of 23 June 1997 to grant the applicant permanent residence in Sweden constituted a fact providing a solution of the matter in issue for the purposes of Rule 51 of Rules of Court B. They invited the Court to strike

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

the case out of its list in accordance with this Rule, paragraphs 2 and 4 of which provide:

> "…
>
> 2. When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary, the parties and the Delegates of the Commission, strike the case out of the list.
>
> …
>
> 4. The Chamber may, having regard to the responsibilities of the Court under Article 19 of the Convention, decide that, notwithstanding the notice of discontinuance, friendly settlement, arrangement or other fact referred to in paragraphs 1 and 2 of this Rule, it should proceed with the consideration of the case."

27. Irrespective of the Aliens Appeals Board's decision of 23 June 1997 (see paragraph 17 above), the applicant requested the Court to proceed with the case. He pointed out that the Government's decision of 12 October 1995 upholding the expulsion order had been final in the sense that it could not be reconsidered unless there was a change of circumstances. In his view, that decision had of itself entailed a breach of Article 3 of the Convention. He asked the Court to award him 200,000 Swedish kronor (SEK) in compensation for the anxiety he suffered through the threat of being expelled to Peru and to order the Government to reimburse him SEK 50,000 for his legal costs.

28. The Commission's Delegate shared the Government's view that the decision of 23 June 1997 constituted a "fact of a kind to provide a solution of the matter" for the purposes of Rule 51 § 2 of Rules of Court B. In his opinion there was no compelling reason for the Court to proceed with the consideration of the case (Rule 51 § 4). As to the merits of the applicant's complaint he recalled that the Commission had not found it established that there were substantial grounds for believing that, if returned to Peru, the applicant would be exposed to a real risk of treatment contrary to Article 3 of the Convention. No evidence had been adduced to show that the applicant was wanted by the Peruvian authorities or was otherwise of any particular interest to them. Nor was there any indication that the applicant had been singled out as a high-profile member of *Sendero Luminoso.*

29. The Court notes that there has been no friendly settlement or agreed arrangement in the present case. The grant of the permanent residence permit and the repeal of the expulsion order were measures which the Swedish authorities had taken on 23 June 1997 in response to a fresh request by the applicant (see paragraphs 15 and 17 above), having regard to the similarities which in their view existed between his case and that of his brother. The latter had been granted permanent residence in Sweden following the findings on 28 April 1997 by the United Nations Committee Against Torture that Sweden had an obligation under the United Nations Convention Against Torture to refrain from returning him to Peru (see paragraph 16 above).

However, the Court considers that the circumstances disclose a "fact of a kind to provide a solution of the matter" (Rule 51 § 2). The applicant's initial complaint to the Convention institutions was essentially that he feared that his expulsion to Peru would expose him to ill-treatment contrary to Article 3 of the Convention. That threat of a potential violation has however been removed by virtue of the decision of 23 June 1997 granting him permanent residence in Sweden and lifting the expulsion order, the enforcement of which had been stayed pending the proceedings (see paragraph 12 above).

30. In addition, the Court discerns no reason of *ordre public* (public policy) for continuing the proceedings (Rule 51 § 4). In this respect it is to be noted that in several previous cases the Court has had the opportunity to rule on the responsibility under the Convention of a Contracting State where it has been alleged that there are substantial grounds for believing that the person concerned, if expelled or extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country of destination (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35–36, §§ 90–91; the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, § 69; the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 36, §§ 107–08; and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1859, §§ 95–97). In doing so, the Court has specified the nature and extent of the obligations arising in the context of the Convention. The present case does not disclose any fact or circumstance which would require the Court to pursue its examination of the case.

31. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing on 30 October 1997 under Rule 57 § 2, second sub-paragraph, of Rules of Court B.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar