

AS TO THE ADMISSIBILITY OF

Application No. 14401/88
by A.
and K.
against Turkey

The European Commission of Human Rights sitting in private
on 12 January 1991, the following members being present:

MM. C.A. NØRGAARD, President

J.A. FROWEIN

S. TRECHSEL

F. ERMACORA

G. SPERDUTI

E. BUSUTTIL

G. JÖRUNDSSON

A.S. GÖZÜBÜYÜK

A. WEITZEL

J.-C. SOYER

H. DANELIUS

Sir Basil HALL

MM. F. MARTINEZ

C.L. ROZAKIS

Mrs. J. LIDDY

MM. L. LOUCAIDES

A.V. ALMEIDA RIBEIRO

M.P. PELLONPÄÄ

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 27 November 1988
by A. and K. against the Netherlands and registered on 28 November
1988 under file No. 14401/88;

Having regard to:

- the observations submitted by the respondent Government on
17 February 1989 and the observations in reply submitted
by the applicants' representative on 27 April and 25 June
1990;

Having deliberated;

Decides as follows:

THE FACTS

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

The two applicants are Iranian citizens, born at Teheran in
Iran in 1962 and 1968, respectively. The first applicant is a
computer scientist and the second applicant has no profession. In the
proceedings before the Commission they are represented by Mr. J. Groen,
a lawyer practising in The Hague, the Netherlands.

I.

According to the submissions made on behalf of the first
applicant before the Commission he has been politically active for a

secular political party in Iran since before the Islamic Revolution. Between 1978 and 1981 he represented this party on the student's committee of the University of Teheran, where he was studying. After the religious purge of 1981, he continued to be politically active outside the University. He has been arrested on one occasion. In 1984 he was readmitted to the University.

In 1987, after he graduated, the first applicant made several attempts to flee Iran in order to avoid performing his military service. He wished to join the rest of his family, which had been granted asylum in the Netherlands many years before. In Teheran, he was in hiding, together with the second applicant, when he discovered that he was being sought by the authorities and that he had apparently been betrayed by a friend.

According to the submissions made on behalf of the second applicant before the Commission, as a secondary school student, he became active for the illegal political party of exiled former Prime Minister Dr. Shahpour Bakhtiar. In November 1987, a private party which the second applicant was attending was raided by the authorities (the Pasdaran) and he was arrested. He received 40 lashings, his hair was shaven off, and he was informed that he would be imprisoned if caught again within two years.

It appears that he was later betrayed by a friend and arrested. He received the same punishment as after his first arrest. The authorities apparently had not realised that he had been arrested before. As he was not admitted to the University for political reasons and would have to perform his military service, during which, it is alleged, he would be forced to fight against "Kurdish rebels", he decided to flee Iran.

II.

The applicants made their way, together with several other Iranians, across the Turkish border to Vann on 28 June or 7 July 1988. While en route for Istanbul, the vehicle in which they were hidden was stopped by Turkish police near Ankara, because it contained contraband Iranian caviar. The applicants were arrested for smuggling on 8 or 14 July 1988. They were allegedly put in a bare cell, and not given food or drink for six days, during which they were also beaten and interrogated daily. The first applicant could contact his brother, a naturalised Dutch citizen, who came to Ankara and arranged for a legal representative.

On 2 September 1988, the applicant were released from custody after paying a bail of 500.000 Turkish Lira. They were informed that they would be allowed to remain in Turkey until 11 October 1988, when they were to give evidence in the caviar smuggling case, only if the UNHCR (United Nations High Commissioner for Refugees) granted them refugee status and they found a third country willing to take them in.

The Turkish legal representative of the applicants assisted them in contacting the Netherlands Embassy, with a view to arranging asylum in the Netherlands, where they have relatives. Earlier, the first applicant's relatives in the Netherlands had arranged with the present representative that he would assist in expediting the asylum request before the Dutch authorities.

Communications from the Dutch authorities suggested that the applicants' chances of being granted asylum were good. However, the Dutch authorities insisted on not taking a decision until their selection committee had been to Turkey to interview the applicants. Furthermore, it appeared that the Turkish authorities were prepared to tolerate the presence of the applicants in Turkey until the Netherlands would grant them asylum in December.

III.

On 25 November 1988, while on their weekly visit to the Turkish Police Headquarters to register, the applicants were arrested. Their arrest was apparently based on the suspicion that they were engaging in illegal activities on Turkish soil. The Government cite false passports and identity documents which were found in the applicants' lodgings after their arrest. Another Iranian refugee, who was arrested with the applicants, escaped and contacted the applicants' relatives in the Netherlands, as well as the representative of the UNHCR in Ankara.

After their arrest, the applicants were sent to Dogubayazit, near the border with Iran. On 26 November 1988, apparently together with seven other Iranian refugees, they were released from Turkish custody and they returned to Iran under circumstances which are in dispute between the parties (see below).

COMPLAINTS

1. The applicants' representative, who, when introducing the application, believed that the applicants were still in Turkey, complained of their imminent expulsion to Iran. He alleged that due to their political activities in Iran, to their evasion of military service, and to their having fled the country, the Iranian authorities would immediately imprison them, torture them and perhaps execute them. He submitted that Iran has a practice of summarily executing citizens who have attempted to flee the country and that by expelling them to Iran, Turkey would expose them to certain torture or death, which constitutes inhuman treatment on the part of Turkey. He invoked Article 3 of the Convention.

The applicants' representative submitted that, after entering Turkey, the applicants had informed the Turkish authorities of their reasons for fleeing Iran and of the persecution to which they might be exposed there. He further submitted that according to a letter from the Netherlands Embassy in Ankara to him, the applicants had been granted refugee status in Turkey on 5 September 1988.

The applicants' representative subsequently alleged that, when on 26 November 1988 the applicants were sent back together with seven other Iranian refugees to the border, two representatives of the UNCHR in Ankara followed them to Dogubayazit where they pointed out to the local authorities that the nine Iranians were refugees recognised by the UNHCR. Subsequently, these two representatives witnessed that the nine Iranians were handed over by the Turkish authorities directly into the hands of Iranian authorities.

The applicants' representative further submitted that these nine refugees were immediately arrested, and seven of the nine were summarily executed. Allegedly, because relatives of the applicants had been alerted to the expulsion, they had travelled to the location and, by means of substantial bribes, succeeded in preventing the applicants' executions. Subsequently, after family members had ceded property to the Iranian State, both applicants were ordered by Iranian authorities to enlist in the army for five years. They have meanwhile been sent to serve in Iranian Kurdistan.

2. The applicants' representative also complained that in respect of the violation of Article 3 of the Convention there was no effective remedy open to the applicants in Turkey, also because of the suddenness and speed of their expulsion, which furthermore took place during a weekend. He invoked Article 13 of the Convention in this respect.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 November 1988 and registered on 28 November 1988.

On 27 November 1988 the President made an indication under Rule 36 to the respondent Government, having found that it was desirable not to expel the applicants to Iran until the Commission could examine the case.

On 5 December 1988 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application. The Commission also decided to prolong the indication under Rule 36 of the Rules of Procedure.

On 20 January 1989 the Commission again decided to prolong the indication under Rule 36 of the Rules of Procedure.

The Government's observations were submitted on 17 February 1989.

On 17 March 1989 the Commission decided not to prolong the indication under Rule 36 of the Rules of Procedure.

The applicants' observations in reply were submitted on 13 April 1989.

On 2 April 1990 the Commission decided to invite counsel to submit further information with regard to the applicants' legal representation. This information was submitted on 27 April 1990.

On 22 May 1990, at the instructions of the Rapporteur, the Commission's Secretary requested the applicants under Rule 42 para. 2 (a) of the Rules of Procedure to submit further information, inter alia statements of witnesses, in order further to clarify the circumstances of their return to Iran.

The applicants submitted their reply to this request on 25 June 1990.

THE LAW

1. The applicants' representative has complained under Article 3 (Art. 3) of the Convention of the applicants' imminent expulsion to Iran. He has claimed that by expelling them to Iran the Turkish authorities would expose them to a serious risk of treatment in Iran contrary to Article 3 (Art. 3) of the Convention which states:

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

a) The respondent Government contend that the applicants have not complied with the condition as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. Reference is made inter alia to Article 125 of the Turkish Constitution according to which judicial remedies are available against all administrative acts and decisions.

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

In the present case, an issue arises as to whether the applicants should have first brought the substance of the complaint they are now making before the Commission before the domestic authorities concerned. However, the Commission need not resolve this issue since the application is in any event manifestly ill-founded for

the following reasons.

b) The applicants' representative has alleged that the applicants had informed the Turkish authorities that they might be persecuted in Iran. The applicants' representative has submitted that when they were handed over by the Turkish authorities to the Iranian authorities, the UNHCR representatives had pointed out to the Turkish authorities that they were refugees recognised by the UNHCR.

The Government contend that, after entering Turkey, the applicants only informed the Turkish authorities that they had fled Iran to avoid having to perform military service, and that they gave no indication of a danger of political persecution. Moreover, while in Turkey, the applicants were not granted refugee status. Rather, the UNHCR merely registered them and agreed to assist them in finding a third country to take them in. When brought to the border on 26 November 1988, the applicants were released for the purpose of allowing them to return to Iran without the Turkish authorities informing the Iranian authorities about their operation.

The Government also contend that the military service awaiting the applicants in Iran could not render their return to Iran contrary to Article 3 (Art. 3) of the Convention. In the Government's view the applicants have not shown any serious danger that would otherwise await them in Iran.

The Commission recalls 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 Article 3 (Art. 3) of the Convention, which prohibits inhuman treatment (see No. 12102/86, Dec. 9.5.86, D.R. 47 p. 286 ; *mutatis mutandis* Eur. Court H.R., *Soering* judgment of 7 July 1989, Series A no. 161, pp. 32 et seq.).

The Commission notes at the outset that the actual circumstances of the applicants' return from Turkey to Iran are in dispute between the parties. The Commission does not find it established whether, as the applicants' representative has contended, the Turkish authorities directly handed the applicants over to the Iranian authorities or, as the Government have submitted, the Turkish authorities, without drawing the Iranian authorities' attention to the applicants, released them in the border region, so that they could themselves return to Iran. In particular, the Commission notes that, although the applicants' representative has claimed that his version could be supported by two witnesses, he has not, despite a request from the Commission, submitted any statement by either of these persons.

It is true that, in the submissions of the applicants' representative, the applicants should not have been returned to Iran at all, as they had previously avoided military service. The applicants' representative has also referred to their political activities in Iran and to the fact that they had fled the country.

The Commission recalls that the mere fact that the applicants feared that, upon their return to Iran, they would be obliged to perform military service cannot as such raise an issue under Article 3 (Art. 3) or any other provision of the Convention (see No. 4314/69, Dec. 2.2.70, Collection 32 p. 97).

Moreover, the Commission considers that the applicants have not shown that, at the time when they left Turkey, they had other serious grounds to fear that, upon their return to Iran, they would be subjected to treatment contrary to Article 3 (Art. 3) of the Convention on account of their evasion of military service or their previous political activities in Iran or for any other reason. It is

relevant to note in this connection that there is no evidence showing that the applicants were in fact subjected to inhuman treatment after their return to Iran. The information provided by the applicants' representative merely indicates that they were enlisted into the Iranian army for five years. However, as stated above, the Commission considers that the obligation to perform military service cannot as such raise an issue under the Convention and this opinion is not changed by the fact that in the present case the obligation relates to an unusually long period.

As a result, the Commission finds that the applicants' representative has failed to show that the Turkish authorities exposed the applicants to a serious risk of treatment contrary to 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 applicants' representative has also complained under Article 13 of the Convention, taken together with Article 3 (Art. 13+3), that there was no effective remedy open to the applicants in Turkey. Article 13 (Art. 13) of the Convention states:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission has just found that the right of an alien to reside in a particular country is not as such guaranteed by the Convention. Article 13 (Art. 13) of the Convention cannot be invoked to enforce the substance of rights not guaranteed by the Convention.

Insofar as the applicants' representative claimed that upon their return to Iran the applicants would be subjected to treatment contrary to Article 3 (Art. 3) of the Convention, the Commission has found that this complaint is manifestly ill-founded. Article 13 (Art. 13) of the Convention only enshrines the right to an effective remedy in domestic law in respect of a grievance which must be an "arguable one" in terms of the Convention (see Eur. Court H.R., Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52; Powell and Rayner judgment of 21 February 1990, Series A no. 172, para. 33). The Commission, recalling that the complaint under Article 3 (Art. 3) is manifestly ill-founded, finds that the complaint under Article 13 (Art. 13) of the Convention cannot be considered to be an arguable claim.

It follows that the remainder of the application is also manifestly ill-founded within the meaning of 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)

