

THE FACTS

Whereas the facts presented by the parties and apparently not in dispute may be summarised as follows:

I. As to the applicant's forthcoming expulsion in general

The applicant was born at T in Poland, in 1928. In 1949 he left his country and went to the Federal Republic of Germany. On .. September 1953 he was given, by decision of the Federal Office for the Recognition of Foreign Refugees (Bundesdienststelle für die Anerkennung ausländischer Flüchtlinge), the status of a foreign refugee. However, it derives from the applicant's criminal record, which has been submitted by the respondent Government, that by .. July 1969 the applicant was convicted on nine occasions for aggravated theft, aggravated theft in recidivism and attempted theft amounting to a total of more than 12 years imprisonment. On .. October 1968 the applicant was convicted by the Regional Court (Landgericht) of Berlin of attempted aggravated theft in recidivism and sentenced to 1 1/2 years' imprisonment. At present he is serving this term which is fixed to end on .. November 1969.

As a result of the applicant's numerous convictions the President of the Police (Polizeipräsident) of Berlin, by a decision (Verfügung) of .. November 1967, had already ordered the applicant's expulsion and deportation. This decision was unlimited with regard to the country where to the applicant might be expelled, so that the applicant was likely to be deported to Poland.

On the applicant's appeal (Widerspruch), the Minister of Interior (Senator für Inneres) of Berlin, on .. June 1968, confirmed the Police President's decision. The Minister stated that between 1950 and 1968 the applicant had been convicted seven times for theft, and had been sentenced to a total of 8 years and 11 months' imprisonment (Gefängnis) and to 1 year's imprisonment (Zuchthaus). Consequently the conditions laid down in Article 10, paragraph (1), fig. 2 of the Aliens' Act were fulfilled providing that an alien might be expelled if he had been convicted for a crime. The Minister further appreciated that the applicant was recognised as a political refugee and that consequently he might be expelled under Article 1, paragraph (2) of the said Act only if this was necessary for important reasons of public security and order. The Minister stated that the applicant had been convicted numerous times and that usually he committed new crimes immediately after his release from prison, consequently only the applicant's expulsion could effectively protect public security in Germany. Insofar as a likely expulsion to Poland was concerned, the Minister declared that Article 14, paragraph (1) in fine, of the said Act provides in conformity with Article 33, paragraph (2) of the Geneva Convention relating to the status of refugees, that a refugee, where there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country, might be expelled also to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The Minister stated furthermore that the applicant, who had been convicted in 1949 of desertion, would no longer be prosecuted in Poland, since he had visited Poland in 1961 for several months without having been arrested.

The applicant then asked for legal aid in order to lodge an appeal (Klage) with the Administrative Court (Verwaltungsgericht) of Berlin against this decision. By decision (Beschluss) of .. December 1968 the Administrative Court rejected the applicant's request for the reason that this appeal offered no reasonable prospects of success. The Court held that the Minister of the Interior had not misused his discretion

when applying the provisions of the Aliens Act. The Court also stated that the applicant constituted a danger to the community and that there existed no prospects of his forthcoming integration into the community.

On the applicant's appeal the Administrative Court of Appeal (Oberverwaltungsgericht) of Berlin by decision of .. April 1969 confirmed the lower Court's decision. The Court held that the prison terms, to which the applicant had been sentenced had not made him keep away from committing further crimes and he had revealed an inclination to commit criminal acts. His conduct constituted a grave danger to public security and order and thus justified his expulsion.

On May 1969, the applicant lodged with the Commission an application under Article 25 of the Convention. He complained about his forthcoming expulsion to Poland, which was scheduled for .. November 1969 and alleged violations of the Convention, since he has to expect a term of imprisonment for political reasons in Poland.

II. History of the proceedings before the Commission

On .. July 1969, a group of three members of the Commission reported to the Commission that this application appeared to be admissible under Article 3 of the Convention and that the respondent Government should be invited to submit its observations on the admissibility of the application. By the President's order of .. July 1969, the application was communicated to the Government of the Federal Republic of Germany for the submission of its observations.

On .. September 1969, the Government of the Federal Republic of Germany submitted their observations and stated in their opinion that this application was manifestly ill-founded.

On .. October, the applicant filed with the Commission his reply to these observations of the Government.

On .. October, another group of three members of the Commission examined the application in the light of the submissions of the parties.

III. Submissions of the parties

1. Submissions of the parties with regard to the circumstances of the applicant's flight from Poland and the consequences of his forthcoming expulsion to Poland

The applicant alleges that he had left Poland in 1949 in order to avoid his arrest after having been convicted of desertion and having been sentenced in his absence to 15 years' imprisonment for political reasons. Since he could not settle down in West Germany he intended to return to Poland. His brother, who allegedly then held a fairly high post in Poland, ensured him that in the case of his returning to Poland the above sentence would not be enforced. Consequently the applicant travelled to Poland in 1967. However, he states that he was arrested upon arrival and alleges that:

"After a thorough interrogation by the Polish political police, my identity papers, including my residence permit and my exit permit, were taken away from me. I was told that criminal proceedings had been instituted - or reopened - against me. After I had given a sympathetic picture of the Federal Republic to some Polish workers I was accused of subversive activities on behalf of the Federal Republic of Germany. Since it was thought that I could be - and had been - effectively prevented from leaving the country by the withdrawal of my papers, I was released. After my brother had once more learned that my arrest was imminent I decided to take refuge once again in the Federal Republic.

I made my way to the "Western frontier" of Poland and swam the Neisse.

A short way beyond Plauen, near the line of demarcation, I was arrested by the East German frontier police and sentenced by the District Court of Chemnitz (Karl-Marx-Stadt) to two years and six months' imprisonment for illegal crossing of the frontier and espionage. It was thought in East Germany that I had come into the Democratic Republic from the Federal Republic, via Hof. That was how I escaped being handed over to Poland."

With regard to his scheduled expulsion to Poland the applicant states the following:

"From letters received before my arrest I learned from my brother that the Polish authorities are proceeding against me;

- for illegal exit from Poland;
- for betrayal of secrets and military information to the USA, Great Britain, France and the Federal Republic of Germany;
- for desertion from the Polish army;
- for subversive activities stirring up Polish workers, wooing them away and inciting them to leave Poland.

The amnesty to which the Federal Republic refers does not apply to me since I left the Polish Republic illegally more than once. The Polish authorities say that by my behaviour I have forfeited all favour from the Polish people. I am in any case sure, if handed over to the Polish authorities, even if all the other charges fail, of going to prison for fifteen years, since that sentence has already been passed."

2. In their observations, the respondent Government stated as follows:

"The applicant has submitted in his two letters to the Commission that he deserted from the Polish army in 1949, that he was sentenced in his absence to 15 years' imprisonment (Haft) and that he would have to expect the enforcement of that sentence if he were to be expelled.

In this connection it should, first, be mentioned that also in the States Members of the Council of Europe, desertion is quite generally subject to prosecution. Therefore, the mere fact that this offence will be prosecuted and punished, cannot be regarded as inhuman treatment within the meaning of Article 3 of the Convention. There are, moreover, no concrete indications from which it might appear that the applicant, as alleged by him, would be in danger of having to serve a sentence of 15 years' imprisonment (Haft) if he were to be expelled to Poland. What is peculiar in the first place is the fact that the applicant has never named the court which allegedly sentenced him or the date when the alleged sentence of "Haft" was imposed. His other allegations in this connection also are very vague. He has not given any further details about the reason for which he was sentenced. In his letter of .. May 1969, to the Commission (page 1), he has merely said that he had been sentenced in criminal proceedings of a political nature. Nor has the applicant, so far as is known up to now, stated anything regarding the manner in which he learned about his alleged conviction and sentence.

In these circumstances it must seriously be doubted that he was actually sentenced to 15 years' imprisonment.

Apart from all this, the danger of an enforcement of a sentence allegedly pronounced as far back as 1949, cannot be regarded as being particularly great. The applicant himself has observed in his letter to the Commission of .. May 1969, (page 1) that this sentence has been remitted in 1956 under an amnesty.

The applicant himself has quite patently assumed later on that there would be no danger for him to travel to Poland, for in 1961 he visited his brother in Danzig and stayed there for several months.

The allegation he made in his letter to the Commission of .. July 1969,

that he had been interrogated by the political police a few days after his arrival in Danzig and that he had been told that his sentence had not been remitted, is not worthy of belief. It is inconsistent with the above-mentioned statement contained in his letter to the Commission of .. May 1969, according to which the sentence had been remitted under an amnesty. There is, further more, no reason for assuming that the Polish political police would have abstained for several months from arresting him after the alleged interrogation in 1961, if the enforcement of a prison sentence of 15 years had still been outstanding against him. The further circumstances that the East German authorities expelled him to West Berlin suggest the steps against him to enforce that sentence. For in view of the well-known relations between the Soviet Zone of Occupation and Poland it would otherwise have suggested itself that the applicant would be handed over to Poland.

Probably there will be no danger of an enforcement of a sentence allegedly imposed in 1949 for the further reason that a statutory limitation has become applicable in the meantime. Under Article 89, paragraph 1 (b) and (c) of the Polish Penal Code of 1932, which Article is still in force today, a sentence to penal servitude (Zuchthaus) can no longer be enforced after 20 years have elapsed since the judgment became final and in the case of all other prison sentences the enforcement comes under the statute of limitations after 15 years from the date on which the judgment became final (see Les Codes Pénaux Européens, Paris, 1958, Vol. 3, page 1487). If the alleged conviction of the applicant took place at all, it must be assumed that it came under the statute of limitations at any rate by the time of his expulsion.

It is not to be expected that the entry into force of the new Polish Penal Code - which, by the way, will not enter into force until 1 January 1970 - will alter the situation with regard to the applicant's case, if there ever has been such a case."

3. Submissions of the parties with regard to the admissibility of this application

The respondent Government observes that this application appears to be manifestly ill-founded on the following grounds:

"To begin with, it may be allowed to point out that according to the Commission's constant practice (see Application No. 3040/67, Collection of Decisions, Vol. 22, page 133 [136 with further references]), the Convention does not guarantee to a foreigner the right to live in a foreign State or the right not to be expelled from that State. The only point of view from which the application must be considered is, therefore, whether, because of the presence of exceptional circumstances, the intended expulsion of the applicant might be regarded as inhuman treatment within the meaning of Article 3 of the Convention.

The Federal Government is of the opinion that the rights and freedoms guaranteed by the Convention cannot be expected to continue according to the applicant asylum. In the past, the applicant has violated the laws of the Federal Republic of Germany often and severely, grossly abusing thereby the privilege of being a guest of this country. All in all, he has lived in the Federal Republic of Germany for 16 years. As is proved by the appended extract from the criminal records, he was convicted nine times for major crimes (Verbrechen) alone during that time. He was sentenced to prison sentences of more than ten years all together and to a term of penal servitude (Zuchthaus) of one year. This shows that he spent about two-thirds of his stay in the Federal Republic of Germany in penal establishments.

The last offence for which he was tried was committed by him before four weeks had passed since his release from a term of penal servitude (Zuchthaus). It is therefore to be expected that the applicant will go

on committing crimes even after his release from the detention he is undergoing at present. A further stay of the applicant in the Federal Republic of Germany, therefore, constitutes a considerable danger to the security of the community.

In these circumstances, the proposed expulsion of the applicant is not inconsistent with the Convention relating to the status of refugees of 29 July 1951. Article 33, paragraph 2, of that Convention expressly provides that a political refugee whose life or freedom is threatened, may nevertheless be expelled or returned if for reasonable grounds he must be regarded as a danger to the security of the country in which he is or if, having been convicted by a final judgment of a particularly serious crime, he constitutes a danger to the community of that country.

The Convention relating to the status of refugees, which was concluded on a worldwide level, thus recognises expressly that even political refugees are not entitled to unlimited asylum. On the contrary, it follows from Article 33, paragraph (2), that the great number of parties who have acceded to this Convention, do not regard the expulsion or return of a refugee as inhuman in circumstances such as those prevailing in the applicant's case.

A limitation of the right to asylum has also been recognised within the framework of the Council of Europe. On the initiative of the Consultative Assembly, the Committee of Experts on Human Rights has prepared and presented to the Committee of Ministers a draft resolution on the right of asylum. The Committee of Ministers has adopted this draft by its Resolution (67) 14 of 29 June 1967. This resolution which refers expressly to the principle guaranteed by Article 3 of the Human Rights Convention that no-one shall be subjected to inhuman treatment, provides under No. 3 that keep a political refugee in their country if expulsion or any other measure is necessary for protecting the national security or the community from serious danger.

It follows from this that Article 33, paragraph 2, of the Convention relating to the status of refugees, which conforms to a considerable extent with No. 3 of Resolution (67) 14, has been considered consistent with Article 3 of the Convention on Human Rights.

For the above-stated reasons the Federal Government is of the opinion that the application is manifestly ill-founded and therefore applies for the application to be declared inadmissible under Article 27, paragraph (2), of the Convention."

The applicant replied to these statements as follows:

"On .. September 1953 I was recognised by the Federal Republic as a foreign refugee but received no identity papers until .. July 1956.

As a result I could not look for work or settle down in the community. I was forced to linger on in foreign refugee camps and hence was particularly prone to turn to crime for a bare living. I was sent to prison five times - three of them for serious theft. It is not correct to say that I was warned by the Aliens Office of Soest; that authority realised that I was only been driven to crime for lack of identity papers and so made me out an alien's passport.

Even with the alien's passport I could not get work. My convictions and my ignorance of German administrative formalities meant that employers rejected me. I was again forced to live in camps for foreigners and to apply for unemployment relief. Then I was once more sentenced to two years' imprisonment for theft. After my discharge on .. August 1960 I succeeded in getting work with the English Defence Forces as a dogkeeper at M. After a short time I lost my job because in the meantime it had been discovered that I had several convictions. There were no possibilities of work offering.

It is not correct as stated by the Berlin Senate and the Government of the Federal Republic that I was given opportunities of work. On the contrary, every effort was made to prevent me from working. Every chance of leading the life of a normal citizen was refused me the Federal German authorities from the start. That is why I found myself back in the vicious circle of the courts. My fresh crimes were committed to keep myself alive. I do not say this as an excuse but so that my present situation may be better understood.

Finally, the applicant states that the crimes which he had committed were all of minor importance and that they would not justify the application of Article 33, paragraph (2) of the above cited Geneva Convention relating to the status of refugees.

THE LAW

Whereas, the applicant complains that his imminent expulsion to Poland would result in his being arrested in order to serve a 15 years' sentence which he received in 1949 for desertion from the Polish army; Whereas the applicant also complains that, in the event of his being expelled to Poland, he would be prosecuted for having left that country illegally, for betraying secrets and military information to the USA, Great Britain, France and the Federal Republic of Germany, for desertion from the Polish army and, finally, for subversive activities by inciting Polish workers to leave Poland; whereas it is to be observed that, although the right to political asylum and the right for a person not to be expelled are not as such included among the rights and freedoms set forth in the Convention, the Contracting Parties nevertheless have agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the Convention; whereas, therefore, the expulsion of a person may, in certain exceptional cases, be contrary to the Convention and, in particular, to Article 3 (Art. 3) thereof (see the Decisions of the Commission on the admissibility of Applications Nos. 2396/65 of 22 December 1967 and 3354/68 of 30 May 1968);

Whereas the only issue arising in this application which might fall within the scope of the Convention is the question whether or not the applicant's expulsion to Poland might constitute inhuman treatment within the meaning of Article 3 (Art. 3) of the Convention by grossly violating or entirely suppressing the applicant's basic human rights (see the constant jurisprudence of the Commission, eg applications Nos. 1802/63, Yearbook, Vol. VI, p. 463, 2396/65, S. v. the Federal Republic of Germany and 3040/67, Collection of Decisions, Vol. 22, p. 136, 4050/69);

Whereas the question whether or not the decision of the German authorities were covered by the Geneva Convention of 1951 on the Status of Refugees is not an issue as such to be examined by the Commission;

Whereas it is true that the applicant alleges that if expelled to Poland, he would be prosecuted on certain charges;

Whereas the Commission notes that, with the exception of the crime of subversion all the said offenses are held to be offenses in almost all the countries of the Council of Europe; whereas, even supposing that the applicant's allegations were well-founded, it could hardly be maintained that the punishment for these offenses as such would constitute a violation of Article 3 (Art. 3); whereas, as regards the applicant's allegation that he would be prosecuted for subversion, the applicant has not submitted any proof in this respect in spite of various requests by the Commission; and whereas, in particular, the applicant does not allege that he expects discriminatory treatment by the Polish authorities by reason of his political opinions, his

religion or his race, whereas an examination made ex officio, does not therefore disclose any appearance of a violation by the Federal Government of the rights and freedoms set forth in the Convention ; whereas, in these circumstances, the applicant's expulsion to Poland would not constitute a violation of Article 3 (Art. 3);

Whereas it follows that the application is manifestly ill-founded within the meaning of Article 27, paragraph (2) (Art. 27-2), of the Convention;

Now therefore the Commission **DECLARES THIS APPLICATION INADMISSIBLE**