

AS TO THE ADMISSIBILITY OF

Application No. 28987/95  
by Amaro ZAPATA SALAZAR and Family  
against Sweden

The European Commission of Human Rights sitting in private on  
7 March 1996, the following members being present:

MM. S. TRECHSEL, President  
C.L. ROZAKIS  
E. BUSUTTIL  
G. JÖRUNDSSON  
A.S. GÖZÜBÜYÜK  
A. WEITZEL  
J.-C. SOYER  
H.G. SCHERMERS  
Mrs. G.H. THUNE  
Mr. F. MARTINEZ  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONPÄÄ  
B. MARXER  
M.A. NOWICKI  
I. CABRAL BARRETO  
I. BÉKÉS  
E. KONSTANTINOV  
D. SVÁBY  
G. RESS  
A. PERENIC  
C. BÍRSAN  
P. LORENZEN  
K. HERNDL

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 6 October 1995 by  
Amaro Zapata Salazar and family against Sweden and registered on  
26 October 1995 under file No. 28987/95;

Having regard to the reports provided for in Rule 47 of the Rules  
of Procedure of the Commission;

Having regard to the observations submitted by the respondent  
Government on 7 December 1995, the observations in reply submitted by  
the applicants on 10 January and 6 February 1996 and the Government's  
additional observations of 12 February 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are a Peruvian family. The husband,  
Mr. Amaro Zapata Salazar, was born in 1955, the wife,  
Mrs. Cecilia Lopez Espinoza, in 1958 and the children, Rogger, Mario  
and Carlos Zapata Lopez, in 1977, 1978 and 1980. All except Rogger are  
currently in hiding in Sweden, while Rogger is residing in Peru.

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

summarised as follows.

#### Particular circumstances of the case

Mr. Zapata Salazar entered Sweden on 29 July 1992 and requested asylum on 3 August 1992. In his asylum request he stated that he and his family had been continuously harassed by representatives of the Peruvian guerilla organisation Sendero Luminoso ("Shining Path") and unknown persons, possibly representatives of the Peruvian National Police. He himself had been working as a farming adviser, helping cooperatives to sell their products at higher prices without intermediaries. On 20 February 1989 he had been arrested and assaulted by unknown persons, as a result of which his right collarbone had been broken. In August 1989 his wife and his brother had been falsely accused of illegal penetration of certain premises, but the accusations had later been withdrawn. In October 1989 a colleague of his had been assaulted and killed, following which he had left his post.

On 11 June 1992 Mr. Zapata Salazar had allegedly received an anonymous death threat as a result of a song which he had composed, named "Basta de tanta violencia" ("Enough of so much violence"). This threat he had reported to the authorities. He had first left the family for another area in the Peruvian countryside but, since he had not felt safe there either, he had gone to stay in Lima. On 11 December 1992 Mrs. Lopez Espinoza had been tortured and raped by four men apparently because of his activities. After this incident she and the children had moved in with a relative. On 22 January 1993 the children had received a written death threat from Sendero Luminoso, stating that "if they wanted peace, they would die". The children had previously participated in a competition about peace. Mr. Zapata Salazar had reported the threat to the authorities and had hired a private security service to protect the children.

On 14 April 1993 Mrs. Lopez Espinoza and the children entered Sweden. They requested asylum on 21 April 1993.

On 19 November 1993 the National Immigration Board (statens invandrarverk) rejected the family's request for asylum. The Board noted that all family members had left Peru legally, holding valid passports. None of them had claimed to have been politically active or subjected to any deprivation of liberty, and they therefore appeared to have no reason to fear reprisals from the Peruvian authorities on their return. Moreover, Mr. Zapata Salazar had not asked for asylum immediately on his arrival in Sweden, and the other family members had stated on their arrival that they had come to visit Sweden as tourists.

In their appeal to the Aliens Appeals Board (utlänningsnämnden) the family underlined that they had been harassed also by police officers. Mr. Zapata Salazar's brother-in-law A, a teenager, had furthermore been tortured and subjected to sexual violence. They also referred to Mr. Zapata Salazar's statements to Swedish media and other actions in Sweden whereby he had criticised the human rights situation in Peru.

In February 1994 Mr. Zapata Salazar appeared on Swedish television, referring to the human rights violations which he and his family had allegedly been subjected to. He was later interviewed by several Swedish newspapers. In this connection he criticised the human rights situation in Peru and expressed fears of ill-treatment, should he and his family be returned there.

In March and April 1994 Mr. Zapata Salazar carried out a hunger strike during which he again criticised the human rights violations in Peru for which he held President Fujimori responsible.

On 4 and 11 October 1994 a Peruvian newspaper published articles about "Peruvian terrorists" on hunger strike in Sweden, attempting to

avoid being expelled back to Peru. The articles did not specify any of the applicants by name, but named another Peruvian asylum seeker, N.

In November 1994 the applicant family supplemented their appeal to the Aliens Appeals Board by referring to the above newspaper article and the fate of N, who had been expelled to Peru in September 1994. He had allegedly been arrested on his arrival and accused of terrorism.

On 28 November 1994 Mrs. Lopez Espinoza's father was allegedly interrogated by the Peruvian National Police in regard to the political activities carried out by Mr. Zapata Salazar in Sweden.

On 28 December 1994 A was allegedly interrogated and again tortured by the Peruvian National Police. Police officers searched his home and indicated that Mr. Zapata Salazar was being accused of terrorism and treason. It appears that A arrived in Sweden shortly thereafter.

From 22 April to 21 May 1995 Mr. Zapata Salazar carried out a further hunger strike during which he was brought to hospital for care.

On 23 May 1995 the Aliens Appeals Board rejected the applicant family's appeal. It noted that in their submissions of 4 February 1994 the family had emphasised that they did not risk persecution by the Peruvian authorities. Subsequently they had stated, however, that the Peruvian authorities were considering all hunger striking Peruvian refugees as "terrorists". Mr. Zapata Salazar's activities in Sweden could not change the Board's finding that there were no grounds for granting asylum.

The Aliens Appeals Board further noted that the fear of ill-treatment expressed by the family was not connected to the Peruvian authorities. It accepted that grounds for asylum could nevertheless exist, depending on, for instance, the effectiveness of the protection afforded by the receiving State and the possibility for someone to find refuge within his or her own country. The Board did not find any reason to question the account of the death threats and the physical assaults to which the family had referred. Nor was there any reason to question that these actions had been taken by illegal organisations. The Board noted, however, that Mr. Zapata Salazar had left the countryside for Lima in June 1992, and that he had not received any death threats after that. Moreover, the rest of the family had moved in with a relative in December 1992, and after that they had not received any such threats either. It was also known to the Board that Peruvian organisations were assisting persons wishing to relocate within the country.

The Aliens Appeals Board did not question that Mrs. Lopez Espinoza had been raped in December 1992. It noted, however, that she had sought psychological treatment already in Peru and that her mental state had begun to improve already before her arrival in Sweden.

On 28 May 1995 Mr. Zapata Salazar was allegedly summoned to appear, on 2 June 1995, before the Anti-Terrorist and Anti-Drug Board ("Dincote") of the Peruvian National Police to face accusations of treason. The summons referred to his "violent political activities" in Peru from 1989 to 1992 as well as to his campaigns in Sweden which had been intended to tarnish the international reputation of Peru by using the media and by carrying out hunger strikes. The summons was allegedly handed over to his father-in-law in Peru on 29 May 1995.

On 7 June 1995 the applicant Carlos was caught shoplifting and later attempted to commit suicide by consuming pills. According to a medical report of 12 June 1995, Carlos had explained that he had shoplifted so that he would be put in prison in Sweden and thus not be returned to Peru. The doctor found, however, that the suicide attempt had been "half-hearted".

According to the applicants, they were informed of the National Immigration Board's decision of 25 May 1995 only on 30 May 1995.

On 9 June 1995 the applicant family lodged a further request for a residence permit on humanitarian grounds, invoking a copy of the summons of 28 May 1995, which in their view showed that Mr. Zapata Salazar would incur a risk of torture or extrajudicial killing, should he be returned to Peru.

The applicant family's further request was rejected by the Aliens Appeals Board on 26 June 1995. The Board noted, inter alia, that Mr. Zapata Salazar had not previously claimed to have been "politically active" in Peru and therefore seriously questioned the contents of the summons of 28 May 1995. It also noted that he "had not explained why he had been summoned to the police in these circumstances".

On 13 July 1995 an article in the Swedish socialist newspaper "Norrskensflamman" voiced suspicions that the Aliens Appeals Board was systematically informing the Peruvian authorities of its decisions in regard to asylum claims lodged by Peruvians, although such decisions were confidential. It was suspected, inter alia, that the Board's decision of 23 May 1995 in the applicant family's case had immediately been communicated to the Peruvian authorities. The newspaper found no other explanation for the issuing of the summons of 28 May 1995.

On 18 August 1995 the applicant family lodged a further request for a residence permit on humanitarian grounds, now invoking an alleged warrant of arrest concerning Mr. Zapata Salazar issued on 26 June 1995. This request was rejected by the Aliens Appeals Board on 21 August 1995, considering, inter alia, that Mr. Zapata Salazar "had not explained the reasons behind the warrant of arrest".

On 15 October 1995 the applicant Rogger was found by the Swedish police and detained with a view to being expelled. Having been requested to co-operate so as to enable the police to enforce the expulsion order concerning the whole family, he told the police that he and the rest of his family had decided to separate in order to obstruct enforcement. He did not appeal against the detention order.

On 16 October 1995 a person requested permission to visit Rogger, showing the detention centre staff an authority form signed by him. According to the Government, it was not possible to grant permission for a visit at the relevant time. The person was therefore recommended to contact the detention centre by telephone so that a visit could be arranged somewhat later. The detention centre was not contacted to this end. Instead the person returned to the centre in the evening of the same day, leaving a bag for Rogger. According to the applicants, several persons attempted to visit Rogger during his detention but were refused permission. The police also refused to indicate to the applicant family which plane Rogger would be arriving on at the Lima airport. The family was therefore unable to see to it that he was met on his arrival there.

On 16 October 1995 a further request for a residence permit on humanitarian grounds was lodged on behalf of Rogger. Reference was made to threats which he had received from a Peruvian and purported asylum seeker, who had been staying in the same refugee centre in the summer of 1994. This man, allegedly an undercover officer in the Peruvian police force, had threatened to hand over tapes, photographs and articles concerning the applicant family's political and cultural activities to the Peruvian Embassy in Sweden. The man had later returned to Peru.

On 17 October 1995 the Aliens Appeals Board decided not to stay enforcement of the expulsion order as far as it concerned Rogger. On 18 October 1995 his expulsion was enforced. According to the

Government, Rogger was accompanied by two Swedish officials throughout his return to Peru. At Lima airport he passed through the passport and customs controls without any problems. In Lima the Swedish officials contacted representatives of a church who promised to help Rogger get in touch with a humanitarian aid organisation.

On 30 October 1995 the Aliens Appeals Board rejected Rogger's new request of 16 October 1995, since it could not legally be granted in view of the enforcement which had already taken place.

On 20 November 1995 the National Immigration Board decided to stay enforcement of the expulsion order in so far as it concerned the other family members. The Board also ordered that these applicants should be detained pursuant to the Aliens Act, if apprehended.

In a letter of 3 January 1996 the non-governmental organisation "Human Rights Watch/Americas" urged the Aliens Appeals Board not to expel "Peruvians making credible asylum claims in Sweden". The organisation expressed particular concern about three Peruvians facing a possible return to Peru, among them N (see above). These persons "merit[ed] refugee status and [could] reasonably fear harm, if forced to return to Peru because of the threat of unfair trial under current Peruvian anti-terrorism law which depends on a systematic violation of human rights". An expulsion would therefore put these individuals "in serious danger".

As regards the case of N, the organisation stated as follows:

"N ... left Peru to begin his studies in the Soviet Union in 1984, where he remained until 1994. During that time, several of his family members took part in public political activities in Peru. A brother, ... , a Peruvian policeman, took part in protests against police abuses while a sister, ..., was accused of belonging to the Communist Party of Peru - Shining Path and was killed while incarcerated in 1992. We have documented several cases where individuals whose family members have taken part in guerilla activities have themselves been persecuted.

While in Europe, N was accused by the Peruvian Government of being a member of a Shining Path support network, a charge N denies. For this crime, N was tried in absentia by a "faceless court" along with sixty-seven other people. Meanwhile, N was arrested for being an illegal resident in Sweden in 1994. At that time he applied for asylum, arguing that he faced danger in Peru. His petition was denied and he was forcibly returned to Peru in September, where he was arrested in the airport.

Beaten by anti-terrorism police, he was then transferred to a jail in the Palace of Justice, where he was subjected to further beatings, shortages of food and medical care, and substandard living conditions. Like other individuals, he was transferred to a maximum-security prison and subjected to an extremely punitive prison regime, including restricted visits with his lawyer and family members and little to no medical care.

Despite an acquittal on 18 January 1995, N continued to suffer harassment in Lima. For that reason, N chose to return to Sweden and reapply for asylum. He now suffers from lasting pain as a result of beatings by anti-terrorism police."

Relevant domestic law

According to the 1989 Aliens Act (utlänningslag 1989:529), a

residence permit may be granted to an alien for humanitarian reasons (chapter 2, section 4, subsection 1 (2)). Up to 1 July 1995 a so-called new request for a residence permit could only be granted if the request, lodged by an alien who was to be refused entry or expelled by a decision which has acquired legal force, was based on new circumstances and provided the applicant was either entitled to asylum or there were weighty humanitarian reasons for allowing him or her to stay in Sweden (chapter 2, section 5, subsection 3). As from 1 July 1995 a new request for a residence permit may be granted if it is based on new circumstances and provided the applicant is entitled to asylum, or it would otherwise be in conflict with humanitarian demands to enforce the decision on refusal of entry or expulsion (chapter 2, section 5b).

When considering whether to refuse an alien entry or to issue an expulsion order, the authorities must examine, pursuant to chapter 8, sections 1-4, of the Aliens Act, whether the alien can be returned to a particular country or whether there are other special obstacles to the enforcement of such a decision. Any necessary instructions regarding the enforcement order shall be given by the Government, the Aliens Appeals Board or the National Immigration Board in their decisions (chapter 4, section 12).

If the enforcement meets no obstacles under chapter 8, an alien is to be expelled or returned to the country of origin or, if possible, to the country from which he or she came to Sweden. If the decision cannot be enforced in one of these manners or if special reasons exist, the alien may be sent to another country (chapter 8, section 5).

If the enforcing authority finds that the enforcement cannot be carried out or that further information is needed, it shall notify the National Immigration Board accordingly. In such a case, the Board may decide on the question of enforcement or take such other measures as are necessary (chapter 8, section 13).

If an expulsion order or a decision refusing entry contains no instructions regarding its enforcement or if it is evident that the instructions cannot be complied with, the enforcing authority shall decide how to carry out the enforcement, provided it does not proceed in accordance with chapter 8, section 13 of the Aliens Act (chapter 7, section 2 of the 1989 Aliens Ordinance (utlänningsförordning 1989:547)).

When considering a new request for a residence permit lodged by an alien who is to be expelled according to a decision which has acquired legal force, the National Immigration Board (and in certain cases also the Government) may stay the enforcement of that decision. For particular reasons the Board may also otherwise stay enforcement (chapter 8, section 10). Similarly, the Aliens Appeals Board may decide to stay the enforcement of a previous expulsion order.

An at least sixteen-year-old alien may be detained if, for instance, there are reasons to believe that he or she would evade enforcement of an expulsion order (chapter 6, section 2 of the Aliens Act). Such a detention order may be appealed against to an administrative court of appeal and the Supreme Administrative Court (chapter 7, section 7). A detained alien shall be allowed such facilities as are permissible with due regard to the order and safety of the detention premises (chapter 5, section 13 of the Aliens Ordinance).

## COMPLAINTS

Those family members who have not yet been returned to Peru complain about their forthcoming expulsion to Peru, where they fear that their personal liberty and lives would be in great peril. They refer in particular to the wide-scale criticism which Mr. Zapata

Salazar has expressed about the present regime in Peru both before and after his arrival in Sweden. They stress that he has been composing and singing for Peruvian farmers, demanding social progress and justice for the poor. The offence of treason of which he is allegedly now accused carries a minimum punishment of 20 years' imprisonment.

On behalf of Rogger, the other family members also complain about his return to Peru and notably the manner in which the expulsion order was enforced. They consider his detention as part of this enforcement.

No particular Convention provision is invoked.

#### PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 October 1995 and registered on 26 October 1995.

On 26 October 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 b of the Rules of Procedure. Pursuant to Rule 36 of its Rules of Procedure, it also decided to indicate to the Government that it would be desirable in the interests of the parties and the proper conduct of the proceedings not to enforce the expulsion order concerning those applicants who still remained in Sweden until the Commission had examined the application at the latest on 8 December 1995.

The Government's written observations were submitted on 7 December 1995, after an extension of the time-limit fixed for that purpose.

On 7 December 1995 the Commission prolonged its indication under Rule 36 until 26 January 1996.

The applicants' observations in reply were submitted on 10 January 1996.

On 25 January 1996 the Commission's indication under Rule 36 was prolonged until 8 March 1996.

Additional observations in reply were submitted by the applicants on 6 February 1996 and by the Government on 12 February 1996.

#### THE LAW

Those family members who have not yet been returned to Peru complain about their forthcoming expulsion to Peru. On behalf of the already expelled family member, Rogger, the other applicants complain about the manner in which his expulsion was enforced.

1. The Commission has first examined whether the return to Peru of those family members who remain in Sweden would violate Article 3 (Art. 3) of the Convention. This provision reads as follows:

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

The Government submit that this complaint is manifestly ill-founded. The applicants left Peru holding valid passports. On arrival in Sweden they did not immediately request asylum but stated that they intended to visit the country as tourists. After their first request for asylum or a residence permit was rejected they dramatically changed the account of Mr. Zapata Salazar's political activities in Peru and the source of the harassment and violence allegedly directed against them. The Government therefore question the trustworthiness of the applicants' submissions and the authenticity of the documents allegedly issued by the Peruvian authorities.

The Government furthermore submit that internal relocation within Peru is available to many persons in situations similar to that which the applicants originally claimed that they had been facing in their country. This well-developed informal mechanism within the non-governmental human rights community can be used not only if the applicants fear pressure or reprisals by Sendero Luminoso, but also if they fear actions initiated by the Peruvian Government. Furthermore, the applicant Rogger appears to have had no problems either with that guerilla movement or with the Peruvian Government after his return to the country. In any case, the guerilla movement has been weakened after the arrest of its leader in 1992, and it now controls only certain isolated parts of Peru.

The applicants submit that they have been targeted by the Peruvian authorities as returning Peruvian asylum seekers. They fear that the Peruvian National Police must have received knowledge of the Aliens Appeals Board's decision even before they did, since it issued a summons already on 28 May 1995. According to reports by human rights organisations, a significant number of innocent Peruvians are facing charges of treason. Because of international attention the Peruvian authorities are now being cautious not to ill-treat returning Peruvians publicly and the reprisals therefore begin only some time after their return.

The applicants finally submit that before leaving Peru for Sweden Rogger had also been performing songs denouncing the mortal violence against innocent Peruvian civilians. After his return he was allegedly ill-treated and his mental condition became unstable.

The Commission recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. The right to political asylum is not protected in either the Convention or its Protocols (Eur. Court H.R., *Vilvarajah and Others* judgment of 30 October 1991, Series A no. 215, p. 34, para. 102). However, expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (Art. 3) of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned would 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 expelled (*ibid.*, para. 103). A mere possibility of ill-treatment is not in itself sufficient (*ibid.*, p. 37, para. 111).

The Commission furthermore recalls that the assessment of the risk of ill-treatment should be made primarily with reference to those facts which were known or ought to have been known to the respondent State at the time of the enforcement of an expulsion order. Regard can, however, also be had to information which has come to light after the enforcement has taken place, as such information may be of value in confirming or refuting the appreciation made by the respondent State or the well-foundedness of the fears of the expelled person (Eur. Court H.R., *Cruz Varas and Others* judgment of 20 March 1991, Series A no. 201, p. 30, para. 76).

(a) In this connection, the Commission notes that the Swedish immigration authorities have not questioned the account of the applicants' background in so far as it concerns the actions for which the applicants hold Sendero Luminoso responsible. The Commission nevertheless considers that regard must also be had to the lapse of time since those actions occurred, the current position of Sendero Luminoso and the undisputed possibility of internal relocation within Peru. Finally, there is no indication that the applicant Rogger has been treated contrary to Article 3 (Art. 3) of the Convention following his return to Peru in October 1995, throughout which he was accompanied by Swedish officials.

In these circumstances the Commission does not find it



established that there are substantial grounds for believing that those applicants who have not yet been returned to Peru would, on account of the treatment to which they may previously have been subjected by Sendero Luminoso, be exposed to a "real risk" of being subjected to treatment contrary to Article 3 (Art. 3) in that country, if now returned there.

It follows that this aspect of the complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

(b) The Commission has next considered whether these applicants might run a "real risk" of treatment contrary to Article 3 (Art. 3) emanating from the Peruvian authorities on account of the alleged treason accusations against Mr. Zapata Salazar. The Commission notes the Swedish authorities' doubts as to whether this part of the applicants' account of their background is a genuine one and as to whether the documents adduced in support of their appeal to the Aliens Appeals Board and their subsequent fresh requests for residence permits are authentic.

The Commission shares the doubts expressed by the Swedish authorities. It observes, in particular, that the alleged summons and warrant of arrest concerning Mr. Zapata Salazar were adduced by the applicants only after their asylum request was finally rejected on 23 May 1995. It also remains open to doubt whether and how they could have obtained these allegedly authentic documents, although at the time they were all residing in Sweden. Finally, there is no indication that applicant Rogger has been treated contrary to Article 3 (Art. 3) of the Convention following his return to Peru in October 1995, throughout which he was accompanied by Swedish officials.

It is true that Mr. Zapata Salazar has taken part in hunger strikes which have been reported in the Peruvian press and that a Peruvian asylum seeker, N, who had also participated in such a hunger strike, appears to have been arrested, ill-treated and accused of terrorism on his return to Peru. However, the Commission notes the significant differences between Mr. Zapata Salazar's account of his background in Peru and the background of N, as reported by Human Rights Watch/Americas. In addition, non-compliance in the receiving State with the guarantees laid down in Article 6 (Art. 6) of the Convention would not in itself, and in the absence of special circumstances, make Mr. Zapata Salazar's return amount to treatment proscribed by Article 3 (Art. 3), even assuming that he might be charged with an offence of a political character (cf. No. 10308/83, Dec. 3.5.83, D.R. 36, pp. 209 et seq., at p. 232).

Bearing all the above-mentioned circumstances in mind, the Commission does not find it established that there are substantial grounds for believing that those applicants who remain in Sweden would, if returned to Peru, be exposed to a "real risk" of being subjected to treatment contrary to Article 3 (Art. 3) on account of Mr. Zapata Salazar's activities.

It follows that this aspect of the complaint must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The Commission considers that an issue might exceptionally arise under Article 6 (Art. 6) of the Convention in circumstances where the person to be expelled would risk suffering a flagrant denial of justice in the receiving country (cf. Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 45, para. 113). The Commission has therefore also examined whether the return to Peru of Mr. Zapata Salazar would violate that provision which reads as follows:

"1. In the determination of ... any criminal charge

against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ... .

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Referring to its considerations above and particularly to the different backgrounds of Mr. Zapata Salazar and N, the Commission does not find that Mr. Zapata Salazar's return to Peru would violate Article 6 (Art. 6) of the Convention.

It follows that this aspect of the application must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The Commission has next examined whether the already enforced expulsion of the applicant Rogger violated Article 3 (Art. 3) of the Convention.

(a) The first question arising is whether Rogger's expulsion violated Article 3 (Art. 3) on account of the alleged risk of ill-treatment on his return to Peru.

Referring to their arguments as summarised at point 1 above, the Government submit that this complaint is also manifestly ill-founded.

The Commission is of the view, in the light of its considerations above at point 1, that the information which was available to the respondent Government at the time when Rogger's expulsion was enforced did not show that he would run a real risk of being subjected to treatment contrary to Article 3 (Art. 3) on his return to Peru (cf. No. 16832/90, Dec. 28.5.91, D.R. 69, p. 321).

It follows that this aspect of the complaint must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

(b) The Commission has next considered whether the enforcement in itself, including Rogger's preceding detention, caused him a trauma exceeding the threshold of treatment proscribed by Article 3 (Art. 3) (cf. the above-mentioned Cruz Varas and Others judgment, p. 31, paras. 83-84).

On this point the Government submit that Rogger did not appeal against the detention order. In the alternative, they argue that the complaint is manifestly ill-founded. The enforcement of the expulsion order was conducted as speedily as possible. Rogger could have received visits during the official visiting hours provided proper requests to this end had been made. From an objective point of view he was thus not placed in isolation. In any case, his detention could have been avoided, had he and his family accepted to co-operate with the authorities responsible for enforcing the expulsion order.

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (the above-mentioned Cruz Varas and others judgment, loc. cit.).

Leaving aside the question of possible non-exhaustion of domestic remedies, the Commission notes that Rogger's alleged isolation lasted about three days. It has not been shown that his detention was of such a character that it could raise an issue under Article 3 (Art. 3). The Commission also notes that Rogger was accompanied by Swedish officials throughout his return to Peru.

The Commission therefore does not find it established that Rogger's detention or the manner in which he was returned to Peru subjected him to treatment contrary to Article 3 (Art. 3) of the Convention.

It follows that this aspect of the complaint must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The Commission has finally considered whether the enforcement of the expulsion order as far as it concerned Rogger was in compliance with Article 8 (Art. 8) of the Convention. This provision reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government submit that this aspect of the application is also manifestly ill-founded. At the time of Rogger's return to Peru all the other applicants had gone into hiding in order to evade enforcement of the expulsion order. The applicants have not shown the existence of any obstacles to continued family life in Peru. In the circumstances of the case the Swedish Government cannot be held responsible for the separation of the family.

The Commission considers that the separation of Rogger from the rest of his immediate family raises the question whether there has been a lack of respect for his family life. It recalls that the essential object of Article 8 (Art. 8) of the Convention is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in effective "respect" for

family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition.

The applicable principles are nevertheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the Contracting State enjoys a certain margin of appreciation. In order to establish the scope of the State's obligations the facts of the particular case must be considered (e.g., Eur. Court H.R., *Gül v. Switzerland* judgment of 19 February 1996, para. 38, to be published in Reports of Judgments and Decisions for 1996; No. 23159/94, Dec. 19.5.94, D.R. 77-A, p. 126).

The Commission further recalls that as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals to its territory. In the field of immigration Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, with due regard to the needs and resources of the community and of individuals (the above-mentioned *Gül* judgment, *loc.cit.*; Eur. Court H.R., *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67). For instance, insisting on family unity when part of the family has gone into hiding to avoid the enforcement of an expulsion order could seriously impede the effectiveness of immigration control (cf. *Cruz Varas and Others v. Sweden*, Comm. Report 7.6.90, para. 101, Eur. Court H.R., Series A no. 201, p. 48).

In the present case the Commission observes that the intention of the Swedish authorities was to keep the whole applicant family together during the enforcement of the expulsion order. Having apprehended Rogger, the enforcing police authority was obliged to choose between, on the one hand, enforcing the order only in so far as it concerned him and, on the other hand, releasing him from detention and awaiting a possible subsequent opportunity to return the applicant family as a whole.

Recalling its reasoning at point 1 above, the Commission finds no indication that the applicants were, at the time of Rogger's return, prevented from pursuing their family life in Peru. Also in view of Rogger's age and his statement to the police that the whole family intended to obstruct possible enforcement, the respondent State cannot be considered to have been obliged under Article 8 (Art. 8) not to return Rogger to Peru once he had been apprehended and detained under the Aliens Act for enforcement purposes. Accordingly, there is no appearance of any lack of respect on the part of the respondent State in the particular circumstances of this case.

It follows that this complaint must also be rejected as being manifestly ill-founded within the meaning 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

(H.C. KRÜGER)

President of the Commission

(S. TRECHSEL)