

AS TO THE ADMISSIBILITY OF

Application No. 16846/90
by Z.Y.
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private
on 13 July 1990, the following members being present:

MM. S. TRECHSEL, Acting President
J.A. FROWEIN
F. ERMACORA
G. SPERDUTI
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ RUIZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
A.V. ALMEIDA RIBEIRO

Mr. J. RAYMOND, Deputy 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 5 July 1990
by Z. Y. against the Federal Republic of Germany and registered
on 11 July 1990 under file No. 16846/90;

Having regard to the report provided for in Rule 40 of the
Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Kurd, is a Turkish citizen, born in 1952.
He is represented by Messrs. Hecker and Partners, a law firm in
Munich.

According to his statements and the documents submitted he
has been living in the Federal Republic of Germany since 1971. His
wife is Turkish and they have three children, two of whom were born in
the Federal Republic of Germany. The family is living in Ingolstadt.

On 28 October 1982 the applicant was convicted of drug
trafficking and sentenced to twelve years' imprisonment. Conviction
and sentence became final on 16 March 1983. He served two-thirds of
the sentence and was released on probation on 16 December 1988.

On 15 April 1983 the competent authorities ordered the
applicant's expulsion after his release.

In the appeal proceedings the authorities declared on
23 September 1987 that the applicant would not be expelled as long as
there was a danger that a death penalty, which might be imposed on him
in Turkey for the drug trafficking offences which led to his conviction
in Germany, would in fact be executed.

On 27 June 1988 the competent authorities in Ingolstadt informed the applicant that the execution of the expulsion order was no longer stayed as according to available information there was no longer a risk that he would receive a death penalty in Turkey. The applicant brought an action before the Administrative Court in Munich which decided in his favour on 14 December 1988. The Court held that the risk of an execution of a possible death penalty was, in the sense of legal guarantees, excluded only if the offence in question was no longer subject to capital punishment or if the Turkish Government had made a binding declaration that it would not execute a death penalty in the applicant's case. As these requirements were not met the authorities were bound by their declaration of 23 September 1987.

On appeal, this judgment was set aside by the Bavarian Court of Appeal (Bayerischer Verwaltungsgerichtshof) and the applicant's action dismissed on 3 October 1989. This Court considered that, in view of the sentence already imposed on him in the Federal Republic of Germany, it could not be expected that the applicant have a death penalty imposed on him in Turkey for the same offences. In any event the nearly unanimous opinion prevailed in Turkish legal writing that the death penalty should be abolished and death penalties were in fact no longer executed since 1984 as followed from a publication of Dr. F. Yenisey of the University of Istanbul. A report of 20 January 1988 by the Foreign Office, so the Court added, confirmed this situation. Since 1960 no offender in drug trafficking had received a death sentence.

Insofar as the applicant had also alleged that he risked being tortured in Turkey the Court pointed out that torture was, according to the new Turkish penal law, a punishable offence. It added that under the Özal Government criminal proceedings were instituted on the suspicion that public officials had committed the offence of torture. Even if according to press reports offences of the kind in question still risked occurring, this did not mean that such a risk existed in the applicant's case.

The applicant's complaint against the appellate court's refusal to grant him leave to appeal on points of law (Revision) was rejected by the Federal Administrative Court (Bundesverwaltungsgericht) on 7 February 1990.

The applicant then lodged a constitutional complaint which was rejected by a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) on 8 June 1990 as offering no prospects of success. In the Court's view the applicant had not shown that the reports relied on by the Administrative Court of Appeal were incorrect. He had submitted no proof for his allegation that he risked torture in connection with prosecution for a non-political offence. Insofar as the applicant invoked the right to protection of family life the group of three judges stated that he failed to exhaust ordinary remedies as he did not pursue this particular complaint in the previous proceedings.

The applicant submits a letter dated 12 December 1988 addressed by Amnesty International to his counsel stating that death sentences may still be imposed in case of conviction for organised drug trafficking and that it cannot be said whether such a sentence would receive ratification by the Turkish National Assembly. The letter refers to an Amnesty International report of 1 June 1987 in which it is stated that no executions have taken place since 1984 and that the majority of death sentences in Turkey have been passed by military courts. The applicant has also submitted press cuttings according to which Amnesty International investigations proved that persecution and torture for political reasons still occurred in Turkey.

COMPLAINTS

The applicant considers that his expulsion would amount to a violation of Articles 2 para. 1, 3, 6 and 8 of the Convention, Article 1 of Protocol No. 6 and Article 4 of Protocol No. 7. He requests the Commission to apply Rule 36 of the Commission's Rules of Procedure in his case.

THE LAW

The applicant complains of his imminent expulsion to Turkey, where allegedly he risks being sentenced to death and executed and/or tortured.

1. The Commission has constantly held 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 (see No. 12102/86, Dec. 9.5.86, D.R. 47 p. 286).

The Commission is not called upon to examine whether the applicant's submissions concerning the danger of a death sentence might raise an issue under Article 3 (Art. 3) as according to the findings of the German courts, uncontested by the applicant, no death penalty has been pronounced in Turkey in cases concerning drug trafficking and no death penalties have been executed since 1984 and in legal writing in Turkey the opinion prevails that the death penalty should be abolished. There is nothing to show that these findings are arbitrary and not corroborated by reliable evidence. The German courts refer to an article written by a member of the University of Istanbul and to reports of the Foreign Office of the Federal Republic of Germany.

The letter and report of Amnesty International, referred to by the applicant, do not constitute any *prima facie* evidence to the contrary. While Amnesty International is of the opinion that the death penalty may still be imposed by Turkish courts in drug trafficking matters, as it has not yet been abolished, it admits that since 1984 no executions have occurred and therefore concludes that no prediction can be made as to whether or not a possible death penalty would in fact be executed.

Insofar as it is reported by Amnesty International that torture still occurs, the Commission further notes that these reports are related to prosecution for political offences.

In these circumstances the Commission cannot find that the applicant's expulsion would be contrary to Article 3 (Art. 3) of the Convention on account of a risk of a death sentence or ill-treatment in Turkey.

In any event the Commission notes that after his return to Turkey the applicant can bring an application before the Commission under Article 25 (Art. 25) of the Convention in respect of any violation of his Convention rights by the Turkish authorities.

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

2. Insofar as the applicant invokes the right to protection of family life (Article 8 para. 1) (Art. 8-1), the Commission notes that the Federal Constitutional Court rejected this complaint for non-exhaustion of ordinary remedies. It follows that the applicant cannot be considered as having exhausted domestic remedies and the application must in this respect be rejected under Articles 26 (Art. 26)

and 27 para. 3 (Art. 27-3) of the Convention.

3. Insofar as the applicant further complains about his expulsion under Article 6 (Art. 6) of the Convention, Article 1 of Protocol No. 6 (P6-1) and Article 4 of Protocol No. 7 (P7-4), the Commission has examined these remaining complaints as they have been submitted. However, after considering these complaints as a whole, the Commission finds that they do not disclose any appearance of a violation of the provisions invoked by the applicant.

The application is to this extent again manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission

Acting President of the Commission

(J. RAYMOND)

(S. TRECHSEL)