

AS TO THE ADMISSIBILITY OF

Application No. 21212/93  
by C.K. and OTHERS  
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 2 September 1994, the following members being present:

MM. A. WEITZEL, President  
C.L. ROZAKIS  
F. ERMACORA  
E. BUSUTTIL  
A.S. GÖZÜBÜYÜK  
Mrs. J. LIDDY  
MM. M.P. PELLONPÄÄ  
B. MARXER  
B. CONFORTI  
N. BRATZA  
I. BÉKÉS  
E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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 December 1992 by C.K. and OTHERS against Germany and registered on 21 January 1993 under file No. 21212/93;

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

Having deliberated;

Decides as follows:

THE FACTS

The facts, as they have been submitted by the applicants, may be summarised as follows.

The first applicant, born in 1956, is a Turkish national who in 1966 joined his family living in Germany. The second applicant, a German national, born in 1956, has been his spouse since December 1981. The third to sixth applicants are their children, born in 1976, 1980, 1989 and 1990, respectively. The applicants are residing in Bergkamen.

Before the Commission, they are represented by Mr. H.H. Heidmann, a lawyer practising in Frankfurt/Main.

On 23 July 1981 the Dortmund Regional Court (Landgericht) convicted the first applicant of drug trafficking, and sentenced him to ten years' imprisonment. The second applicant was convicted of having acted as an accessory, and sentenced to two years' imprisonment.

On 6 October 1982 the Head of the Soest County Administration (Oberkreisdirektor) requested the first applicant to leave Germany and ordered his deportation to Turkey on the day of his release.

On 20 May 1983 the Arnsberg Regional Governor (Regierungspräsident) dismissed the first and second applicant's administrative appeal (Widerspruch). The Governor, referring to S. 10 para. 1 (2) of the Aliens Act (Ausländergesetz), confirmed the first applicant's expulsion. Having regard to his criminal conviction of 23 July 1981 and the seriousness of the offences committed by him, the public interest in the prevention of disorder and crime outweighed the first applicant's interests in staying in Germany.

On 25 January 1984 the Arnsberg Administrative Court (Verwaltungsgericht) dismissed the first and second applicant's action to have the decision of 6 October 1982 set aside.

On 3 June 1986 the Arnsberg Administrative Court of Appeal (Oberverwaltungsgericht), upon the first and second applicant's appeal (Berufung), quashed the deportation order on the ground that the administrative authorities had not established whether the first applicant risked a second punishment in respect of the above offences, and, if so, what treatment in the course of criminal proceedings he would have to face upon his return to Turkey. However, the Court of Appeal confirmed the reasoning of the lower instances as regards the order to leave the territory of Germany. The first applicant's long stay and his family ties in Germany could not outweigh the public interests. The considerations relating to a possible further punishment in Turkey would not affect the order to leave the territory.

On 10 June 1987 the first applicant, having served two thirds of his prison sentence, was released on probation, the period of probation being four years. He took residence with his family.

On 1 December 1987 the Federal Administrative Court (Bundesverwaltungsgericht), upon the first and second applicant's appeal on points of law (Revision), quashed the Administrative Court of Appeal's judgment to the extent that his appeal against the order to leave the territory of Germany had been dismissed, and referred the case back to that Court. The Federal Administrative Court considered that the conditions under S. 10 para. 1 (2) of the Aliens Act to order the first applicant to leave the territory were met. The administrative

authorities had correctly considered that his stay in Germany since 1966 was not decisive. Furthermore, taking into account that the first applicant constituted a serious threat to important public interests, his wish to live in Germany together with his family could not take priority. However, when exercising their discretion in ordering the first applicant to leave Germany, the authorities had failed to investigate into the question whether or not he risked further punishment, in particular capital punishment or inhuman or degrading treatment, upon his return to Turkey.

On 3 July 1991 the Arnsberg Administrative Court of Appeal, having taken further evidence as regards the risk of a further punishment in Turkey, dismissed the first and second applicant's appeal against the order to leave the territory. The Court of Appeal observed that its examination of the case was, in accordance with the judgment of the Federal Administrative Court, limited to the question whether there was such a risk of further punishment which might render the order to leave the territory unlawful, considerations relating to the first applicant's family life could not again be taken into account.

The Court of Appeal concluded that, with regard to the offences of which he had been convicted in 1981, the first applicant would not risk that criminal charges be again brought in Turkey, or that he be again punished or that he would be subjected to inhuman treatment in the course of criminal investigations. In this respect the Court of Appeal noted that the Turkish authorities had been informed about the first applicant's conviction. However, it was unlikely that they would institute criminal proceedings. The Court of Appeal referred to the provisions of the Turkish Penal Code relating to the punishment, in Turkey, for offences committed by a Turkish national abroad, and had also regard to information provided by the Freiburg Max-Planck-Institute for Foreign and International Penal Law. Moreover, it was also improbable that the first applicant would be prosecuted in Turkey on the suspicion of having, at the time, exported the drugs from Turkey, which would be regarded as a separate offence committed in Turkey. Having regard to several cases of such a nature, as stated in information provided by the Max-Planck Institute and the Foreign Office, the Court of Appeal noted that prosecution presupposed clear indications in the German proceedings that the drugs had been exported from Turkey. Consequently, mere presumptions about the origin of drugs, such as mentioned in the first applicant's case, did not suffice. The Court of Appeal did not admit an appeal on points of law.

On 18 December 1991 the Federal Administrative Court refused the first and second applicant's request for leave to appeal on points of law (*Beschwerde gegen die Nichtzulassung der Revision*). The Administrative Court of Justice considered that the Court of Appeal's establishment of the relevant facts could not be objected to.

On 10 July 1992 the Federal Constitutional Court (*Bundesver-*

fassungsgericht) refused to admit the applicants' constitutional complaint (Verfassungsbeschwerde) on the ground that it offered no prospect of success. The Constitutional Court, referring to its constant case-law, considered in particular that the constitutional right to respect of marriage and family did not generally exclude that the foreign spouse of a German national be ordered to leave Germany and deported. The administrative authorities and courts had taken the applicants' interests to continue their common life in Germany duly into account. However, with regard to the serious nature of the criminal offences committed by the first applicant, namely drug trafficking resulting in a penalty of ten years' imprisonment, these private interests were outweighed by the public interest in his leaving Germany. The decision was served on 27 July 1992.

On 31 August 1992 the Soest Aliens Office dismissed the first and second applicant's request to limit the first applicant's expulsion in time. On 24 November 1992 the Aliens Office again ordered the first applicant to leave the German territory.

It does not appear that the first applicant has left Germany.

## COMPLAINTS

1. The applicants complain under Article 8 of the Convention about the first applicant's expulsion. They submit that the first applicant was brought up in Germany, and that his family is living here. After his departure, his wife and children would have to live on social welfare. They consider that the first applicant's probational release was based upon a positive prognosis for his future; his previous criminal behaviour did, therefore, no longer justify his expulsion.

2. The applicants further submit that upon his return to Turkey the first applicant risks to be arrested and convicted a second time for the same drug offences. He also risks prosecution on the ground that he had not complied with his duty to do military service. The first applicant states that he fears to be subjected to inhuman treatment by the Turkish police.

## PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 December 1992. On 17 December 1992 the applicants requested the Commission to take interim measures in order to stop the first applicant's expulsion. On 15 January 1993 the Commission decided not to apply Rule 36 of the Commission's Rules of Procedure. The application was registered on 21 January 1993.

## THE LAW

1. The applicants complain that the order to leave the territory of

Germany, issued against the first applicant by the Head of the Soest County Administration in October 1982, will separate the first applicant from his family in Germany. They rely on Article 8 (Art. 8) of the Convention which states, so far as relevant:

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

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 ... for the prevention of disorder or crime, ... "

The Commission recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed in Article 8 para. 1 (Art. 8-1) (see Eur. Court H.R., Moustaquim judgment of 18 February 1991, Series A no. 193, p. 18, para. 36; No. 9203/80, Dec. 5.5.81, D.R. 24 p. 239).

The Commission finds that the order issued against the first applicant to leave Germany interferes with the applicants' right to respect for family life within the meaning of Article 8 para. 1 (Art. 8-1). Such interference is in breach of Article 8 (Art. 8), unless it is justified under Article 8 para. 2 (Art. 8-2) of the Convention.

As regards the lawfulness of the interference, the Commission observes that the German authorities, when ordering the first applicant to leave Germany, relied on Section 10 para. 1 (2) of the Aliens Act. The interference was therefore "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2).

Moreover, when ordering the first applicant to leave Germany, the German authorities considered that the applicant had been convicted of serious drug offences and that the impugned measure was in the interest of the prevention of disorder and crime. This is a legitimate aim mentioned in Article 8 para. 2 (Art. 8-2).

As regards the question whether the interference complained of was "necessary in a democratic society", the Commission recalls that the Contracting States enjoy a certain margin of appreciation in assessing whether such a need for an interference exists, but it goes hand in hand with European supervision (see, Eur. Court H.R., Berrehab judgment of 21 June 1988, Series A no. 138, p. 15, para. 128; Funke judgment of 25 February 1993, Series A no. 256-A, p. 24, para. 55).

The Commission notes that the administrative authorities had regard to the first applicant's private and family situation. The

German administrative courts also considered the first applicant's long stay in Germany and the situation of his family, and weighed his private and family interests against the public interest in his leaving the country, based on his conviction for serious drug offences and punishment to ten years' imprisonment. This reasoning was confirmed by the Federal Constitutional Court.

In these circumstances, the Commission considers that there are relevant and sufficient reasons for the challenged order to leave Germany. Weighing the applicants' private and family interests, and the public interests at stake, the Commission finds that the German authorities did not overstep the margin of appreciation left to them.

The Commission further observes that the first applicant continued to stay in Germany in the course of his appeal proceedings which were successful as regards the deportation order of October 1982. Having served two-thirds of his prison sentence, he was released on probation in June 1987, and there is no indication of any subsequent criminal proceedings against him. However, the first applicant had the possibility to request the competent authorities to limit his expulsion in time. The applicants did not show that they exhausted the administrative court remedies against the refusal of their request, and against the renewed order of November 1992 that the first applicant should leave Germany.

Consequently, the interference with the applicants' right to respect for their private and family life was justified under Article 8 para. 2 (Art. 8-2) in that it can reasonably be considered "necessary in a democratic society ... for the prevention of disorder and crime." Thus there is no appearance of a violation of Article 8 (Art. 8) 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 further submit that upon his return to Turkey the first applicant risks prosecution in respect of the same drug offences, and also on the ground that he had not complied with his duty to perform military service. The first applicant states that he fears to be subjected to inhuman treatment by the Turkish police.

The Commission recalls that the expulsion by a Contracting State of a foreigner may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is returned (see Eur. Court H.R., *Vilvarajah and Others* judgment of 30 October 1991, Series A no. 215, p. 34, para. 103).

In the present case, the German Courts carefully investigated into the first applicant's fears that, upon his return to Turkey he might be prosecuted a second time for the drug offences of which he had already been convicted in Germany in 1981, and that he might be ill-treated in the course of such criminal proceedings. Having regard to information provided by the Freiburg Max-Planck-Institute for International and Foreign Penal Law and by the German Foreign Office, the Administrative Court of Appeal concluded that, in the circumstances of the first applicant's case, there was no risk of further criminal charges in Turkey. While the first applicant continues to refer to his fears of a second set of criminal proceedings in Turkey, he failed to demonstrate that there is a definite and serious risk of his being prosecuted, and, if so, of being exposed to treatment contrary to Article 3 (Art. 3) in the course of such criminal proceedings.

Moreover, as regards the alleged risk of punishment for failure to complete his period of military service in Turkey, the Commission observes that the first applicant failed to raise this argument in the course of the domestic proceedings. In any event, the Commission recalls that prosecution for desertion from the army does not in itself constitute treatment contrary to Article 3 (Art. 3) of the Convention (cf. No. 12364/86, Dec. 17.10.86, D.R. 50 p. 280).

The Commission therefore concludes that the applicants' submissions do not disclose any real risk that the first applicant would be subjected to ill-treatment upon his return to Turkey. In this respect, the Commission also notes that the deportation order was quashed by the Arnsberg Administrative Court of Appeal on 3 June 1986.

It follows that this part 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 First Chamber    President of the First Chamber

(M.F. BUQUICCHIO)

(A. WEITZEL)