APPLICATIONS/REQUÊTES N° 17550/90 et 17825/91
(joined/jointes)

V and P v/FRANCE

V et P c/FRANCE

DECISION of 4 June 1991 on the admissibility of the application

DÉCISION du 4 juin 1991 sur la recevabilité de la requête

Article 3 of the Convention *Expulsion of a person to a country where there are reasons to believe he will be subjected to treatment contrary to Article 3 may raise an issue under this Article (Application declared admissible)*

Article 25 of the Convention *A person who is about to be subjected to a violation of the Convention may claim to be a victim Such is the case of a person who is in the hands of a High Contracting Party which has decided to expel him to a foreign country, when expulsion is imminent and could expose him, in his assertion to treatment contrary to Article 3*

In this case, the question whether the risk of treatment contrary to Article 3 is real or whether it will arise after dismissal of an appeal under the French Law of 10 January 1990 (Article 22 bis of the Order of 2 November 1945) falls to be examined with the merits of the application Applicant s status as victim recognised

Article 26 of the Convention

a) To be effective, a remdy must be capable of remedying the criticised state of affairs directly and not merely indirectly

b) When an individual claims that the enforcement of a deportation order against him violates Article 3 of the Convention, a remedy which has no suspensive effect is not effective

c) Someone who, after rejection by OFPRA and the Refugee Appeals Board (France) of an asylum request, and in the absence of any decision indicating the country of destination, complains of a violation of Article 3 in the event of expulsion to a specific country, is not required to attempt other remedies.

***Article 3 de la Convention** : L'expulsion d'un individu vers un pays où il y a des raisons de croire qu'il sera soumis à un traitement contraire à l'article 3 pourrait soulever un problème sous l'angle de cet article (Requête déclarée recevable).*

***Article 25 de la Convention** : Peut se prétendre victime d'une violation celui qui est sur le point de subir une violation du fait d'une Haute Partie Contractante. Tel est le cas de celui qui se trouve aux mains des autorités d'une Haute Partie Contractante, que celle-ci a décidé d'expulser vers un Etat étranger, dont l'expulsion est imminente et pourrait l'exposer, affirme-t-il, à un traitement contraire à l'article 3.*

En l'espèce, la question de savoir si le risque d'un traitement contraire à l'article 3 est réel ou s'il apparaîtra après un éventuel rejet du recours prévu par la Loi française du 10 janvier 1990 (article 22 bis de l'Ordonnance du 2 novembre 1945) relève de l'examen du bien-fondé de la requête. Qualité de victime reconnue au requérant.

***Article 26 de la Convention** :*

a) Pour être efficace, un recours doit être capable de porter directement remède à la situation critiquée, et non seulement de façon détournée.

b) Lorsqu'un individu se plaint qu'une mesure d'expulsion prise contre lui viole l'article 3 de la Convention, un recours sans effet suspensif est inefficace.

c) Celui qui, après rejet de sa demande d'asile par l'OFPRA et la commission de recours des réfugiés (France), et en l'absence de toute décision indiquant le pays de destination, se plaint d'une violation de l'article 3 en cas d'expulsion vers un pays déterminé, n'est pas tenu d'exercer d'autres recours.

(TRANSLATION)

THE FACTS

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

The first applicant, born in 1962 in Jaffna, is a Sri Lankan national of Tamil origin, resident in Jouarre.

The second applicant is a Sri Lankan national of Tamil origin, born in 1964 and resident in Paris

The applicants are represented before the Commission by Mr. Gilles Piquois, a member of the Paris Bar

1. *The first applicant*

It is alleged that while he was a student at the Jaffna technical college the first applicant participated in the activities of the Tamil Eelam organisation and particularly the publication of leaflets denouncing the actions of the Sri Lankan army. On 10 and 11 May 1983 he boycotted classes and distributed leaflets with his fellow students.

While this distribution was taking place soldiers arrived and arrested the applicant and his comrades, who were then imprisoned, the applicant being released after two weeks.

On 9 April 1984, having discovered that he was wanted by the army, the applicant left to live with his uncle in Karavetty. Following his disappearance the applicant's father was seriously wounded by soldiers on 14 April and had to be admitted to hospital in Jaffna in a very serious condition

On 24 July 1984 Sri Lankan forces were attacked by members of the "Tamil Tigers" movement and two of the applicant's friends and neighbours killed themselves by taking cyanide. The applicant then took refuge with his uncle again. On his return, on 10 August 1984, he was arrested and taken to the Palaly camp, where he was maltreated, as he was suspected of belonging to the "Tamil Tigers"

He was released on 29 August 1984 and treated in a private hospital, only returning to live with his parents in Jaffna on 14 January 1988.

Following the shelling of an army camp situated near his village the applicant was arrested again on 8 October 1988 and taken to the Jaffna Kotai camp. He was released on 20 October 1988 and went to live in Karavetty again. He campaigned on behalf of one of his relatives, who stood as a candidate in the elections of 15 February 1989, and was arrested on 12 March 1989 at his uncle's home, then taken to the Palaly camp and released after 19 days

In November 1989 the applicant's parents, uncle and aunt were questioned and threatened with a view to discovering his whereabouts

The applicant left Sri Lanka on 27 November 1989 and arrived in France on 1 January 1990.

In July 1990 soldiers carried out a bomb attack on his father's home and shop. His sister died in the attack and his father was very seriously wounded and is receiving treatment at the hospital in Kayts. His mother is at present in a refugee camp.

The applicant's request for asylum was rejected on 18 July 1990 by the French Office for the Protection of Refugees and Stateless Persons (OFPRA – Office français de protection des réfugiés et apatrides) and his appeal was dismissed by the Refugee Appeals Board on 9 November 1990, the Board taking the view that there was no evidence in the file to establish the truth of the facts alleged or prove that the fears expressed were well-founded

On 10 December 1990 the applicant was served with an order from the prefecture in Melun requiring him to leave French territory within one month and informing him that if he was still in French territory after the expiry of that limit he would be liable to deportation or a prison sentence and fine.

The applicant produced three certificates, one from a notary in Anaicoddai, one from St. Mary's Church in Kopay and one from a former municipal councillor in Jaffna, all confirming that the applicant had been arrested several times, imprisoned and tortured, and that after he had taken flight his parents' home and office had been destroyed, his sister killed, his father seriously wounded and his mother forced to take refuge in St. Mary's Church

2. *The second applicant*

It is alleged that in 1984, when the second applicant was a student in Kokuvil, his native town, he joined and played an active role in the "Liberation Tigers of Tamil Eelam" movement (LTTE), becoming propaganda secretary for the movement in his region, with responsibility for recruiting young people and collecting funds.

During the offensive of the Indian peace-keeping force in 1987 the applicant's family home was destroyed and his parents took refuge in the neighbouring village of Arigalai, about four kilometres from Kokuvil.

On 4 May 1988 groups collaborating with the Indian armed forces came to look for the applicant at his home, wounding his father in the chest with a knife. The father died because of the loss of blood resulting from this wound while being taken to hospital in Jaffna

Following this incident the applicant s younger brother joined the armed struggle in the ranks of the "Tamil Tigers ', the applicant took refuge in the village of Navatkuly and his mother in the Catholic church in Kopay

In February 1989 the applicant returned to Kokuvil and resumed his activities

On 4 May 1989 he was arrested by the Indian army and imprisoned in Kopay camp, where he was severely tortured The applicant states that his body still bears visible marks of torture He was released thanks to the efforts of the Kopay parish priest so that he could be taken to hospital The applicant then made good his escape His mother was taken to the camp at Kopay by Indian soldiers seeking the applicant

The applicant first went to Colombo before leaving Sri Lanka on 13 August 1989 He made his way to Madras and then, using a false passport, to Thailand and Belgium He entered France on 3 October 1989 and requested political asylum

The OFPRA rejected the applicant's request on 17 May 1990

On 26 June 1990 the applicant appealed against this decision, producing in support of his appeal a certificate from the priest of St Mary's Church in Kopay confirming that he had been persecuted by the Indian army , that his father had been murdered by the armed forces , that his brother had joined the armed struggle , that his mother had taken refuge in the church that the applicant had been arrested by the Indians and released at the cost of a great deal of trouble as a result of his (the priest's) own intervention He also produced a medical certificate, made out in Paris on 2 October 1990, noting the existence of several scars and confirming that all the lesions found were consistent with the applicant's allegations

On 25 October 1990 the Appeals Board dismissed the applicant's appeal for the following reasons

> "Neither the documents in the file nor the oral submissions to the Board in public session adequately establish the truth of the facts alleged or prove that the fears expressed are well- founded , in particular, the documents produced and submitted, such as a medical certificate, issued in Paris on 2 October 1990, or the statement by a priest dated 17 May 1990, are inadequate in that respect "

On 8 January 1991 the applicant asked the director of the OFPRA to re examine his case, pointing out that he had arrived in France in May 1990, that his younger brother had been killed on 17 November 1990 in the fighting between the LTTE and the Sri Lankan army and that his mother had been wounded and was in a serious condition

On 22 January 1991 the Paris Prefect of Police ordered the applicant to leave French territory by 22 February 1991 failing which he would make himself liable to deportation by prefectoral order

In addition to the certificates already submitted to the French authorities, the applicant produced a statement dated 30 May 1990 to the effect that he had participated in all the political and social activities of the LTTE, that he was popular among his fellow students, that his father had been killed by the Indian forces and that his brother had joined the LTTE The statement adds that the applicant fled Sri Lanka to save his life

COMPLAINT

Before the Commission the applicants claim that if they are sent back to Sri Lanka they will immediately be arrested and tortured, or even killed, by the Sri Lankan forces or paramilitary groups

THE LAW

The applicants' complaint is that they are obliged to leave France to go to their country of origin, where they would be in danger of being arrested and tortured

1 The respondent Government point out, first of all, that the purpose of the applications is to secure a right of residence in France and the suspension of any expulsion measures through application of Rule 36 of the Commission s Rules of Procedure, and maintain that they are consequently incompatible with the convention which does not guarantee any right of residence or asylum

The Commission recalls in the first place that, according to its constant case law, the Convention does not guarantee any right of residence or asylum in a State of which one is not a national (cf , for example, Nos 1802/62, Dec 26 3 63, Yearbook 3 pp 463, 479, and 7256/75, Dec 10 12 76, D R 8 p 161)

However, according to the case-law of the institutions of the Convention, a decision to send a person back to his country of origin may in certain circumstances be contrary to the Convention, Article 3 in particular, when there are strong reasons to believe that the person in question may be subjected to treatment prohibited by that Article in the country to which he is to be sent (cf., for example, No 6315/73, Dec 30 9 74, D R 1 p 73 , No 7011/75, Dec 3 10 75, D R 4 p 215 , No 12122/86, Dec 16 10 86, D R 50 p 268 , Eur Court H R , Cruz Varas and Others judgment of 20 March 1991, Series A no 201, paras 69-70) The applicants' complaint that they would be persecuted and possibly killed if they were returned to Sri Lanka therefore falls within the scope of the Convention

Consequently, notwithstanding the applicants' request in their applications that the Commission intervene to secure authorisation for them to reside in France, in so far as the applications concern the return of the applicants to Sri Lanka they are not incompatible with the Convention and the Government's objection relating to this point is invalid

2 The respondent Government also maintain that the applicants have not exhausted domestic remedies, thus failing to comply with Article 26 of the Convention

The Government point out in this connection that the applicants could have appealed to the Conseil d'Etat against the Refugee Appeals Board's rejection decision They emphasise that the Conseil d Etat exercises a considerable degree of supervision over the decisions of the Refugee Appeals Board and that this is one remedy which can lead in certain cases to an annulment of the decision The *Government cite in this connection the case law of the Conseil d Etat, claiming* that it shows how the Conseil d'Etat exercises this supervision particularly in cases involving procedural irregularities, inadequate reasons, errors of law, errors of fact errors in the legal classification of facts or distortion of the facts or documents in the file

The Government also point out that the applicants failed to appeal against the orders requiring them to leave French territory, although this was a remedy available to them

In addition, the Government point out that any alien whose request for asylum has been finally rejected may present an exceptional request for residence to be authorised on the grounds of his integration in France or the risks he would run if he were to return

The applicants maintain that the remedies mentioned by the Government have no suspensive effect and are consequently not effective for the purposes of Article 26 of the Convention.

The Commission recalls, first of all, that the exhaustion of domestic remedies rule is intended to enable the State criticised to remedy the situation of which applicants complain. For that purpose, only remedies which enable the competent national authorities, particularly the courts, to consider the complaint raised and to provide a remedy are to be taken into account. To be effective, a remedy must be capable of remedying the criticised state of affairs directly, and not merely indirectly (cf., for example, No. 10092/82, Dec. 5.10.84, D.R. 40 p. 118).

In this case the applicants' complaint concerns their repatriation to Sri Lanka, not their expulsion from France as such. However, no national decision has yet been taken regarding the country to which the applicants might be sent. Such a decision could only be taken at a later stage, and in any case not before deportation orders have been issued against them. In the absence of any indication of the country to which the applicants are to be sent in the state measures which can be contested by means of the remedies recommended by the Government, a reference to risks of maltreatment in a specified country, namely Sri Lanka, is not a remedy capable of leading to the annulment of the measures in question.

Moreover, the Commission refers to its constant case-law to the effect that a remedy which does not suspend execution of a decision to expel an alien to a specified country is not effective for the purposes of Article 26 of the Convention and there is no obligation to have recourse to such remedy where the applicant alleges a violation of Article 3 of the Convention (cf. No. 10400/83, Dec. 14.5.84, D.R. 38 p. 145 ; No. 10760/84, Dec. 17.5.84, D.R. 38 p. 224 ; No. 10564/83, Dec. 10.12.84, D.R. 40 p. 262). In this case the remedies in question have no suspensive effect.

In the light of the foregoing considerations, the Commission takes the view that the Government's objection relating to the non-exhaustion of the remedies mentioned above is invalid.

3. Lastly, the Government point out that any deportation order against the applicants could be contested by means of an appeal with suspensive effect in accordance with Article 22 *bis* of the Order of 2 November 1945, and that when such an appeal is submitted the Administrative Court considers whether the expulsion measure is likely to have exceptionally serious consequences for the personal or family situation of the person concerned.

The Commission recalls that in this case the applicants have not been served with deportation orders. Consequently, as regards Article 26 of the Convention, they cannot be reproached with failing to avail themselves of a remedy against such an order

Nevertheless, the fact that no deportation order has been issued and the existence of a remedy whereby such an order can be contested may have a bearing on the status of "victim", within the meaning of Article 25 para. 1 of the Convention, which applicants must have in order to be able to introduce an individual petition before the Commission

In this connection the Government point out that, since in the first place no deportation orders have been issued against the applicants and in the second place no decision with regard to the country where they might be sent has been taken, they cannot claim to be victims of a violation of Article 3 of the Convention. The Government also point out that in any case, if deportation orders are issued against the applicants, they will be able to contest these by means of a fully effective and adequate remedy, introduced by the legislator to reinforce the guarantees protecting aliens affected by an expulsion measure on the grounds of unlawful entry or residence by granting them the right to have their situation examined in the context of adversarial court proceedings.

This remedy, provided for by the Law of 10 January 1990 (Article 22 *bis* of the Order of 2 November 1945 on conditions governing entry into and residence in France by aliens) consists in an appeal to the president of the Administrative Court and has an automatically suspensive effect. The appeal must be lodged within the twenty-four hours following service of the prefectoral deportation order and the Administrative Court must decide the issue within forty-eight hours of the lodging of the appeal. These limits were calculated to reconcile respect for the rights of the defence with the legitimate concern of the authorities to be able to ensure execution of the measures taken, since administrative detention may not exceed seven days

The Government further point out that where there is a dispute about the date or time of service of the deportation order it is for the authorities to prove before the court the date of service, the benefit of any doubt being given to the person concerned.

In addition, provision has been made for the assistance of an interpreter where necessary, communication of the file on the basis of which the contested decision has been taken and the possibility of requesting officially appointed legal counsel, in order to guarantee the rights of the defence.

The implementing circular requires the form used for service of the deportation order to state the conditions for appeal by the person concerned and to be written in several languages.

The order cannot be enforced within the twenty-four hours following service or, in the case of an appeal to the Administrative Court, before that court has given its decision, no penalty attaching to failure to decide the appeal within the forty-eight hour limit.

Lastly, the judgment of the president of the Administrative Court may be contested by means of an appeal to the president of the Litigation Division of the Conseil d'Etat, such appeal not having suspensive effect.

With regard to the scope of supervision, the Government point out that it covers firstly the principle of the expulsion measure itself and then the choice of the country to which the person concerned is to be sent

On the question of the expulsion measure itself, the Government point out that, according to the case-law of the Conseil d'Etat, the administrative judge must check that the measure envisaged is not likely to have exceptionally serious consequences for the personal or family situation of the person concerned and is also compatible with the Convention, in particular.

The Government further point out that the Conseil d'Etat has established a clear distinction between the expulsion measure and the choice of the country to which the person concerned is to be sent. They maintain that the decision specifying the country of destination can also in itself give grounds for complaint and supervision by the administrative judge, this appeal being subject to the same conditions as an appeal against the deportation order.

This extensive supervision covers not only procedural irregularities, errors of law, suppression of evidence and factual inaccuracy but also the assessment of the facts, for example the alleged impossibility of returning to one's country of origin

The applicants note that aliens are normally deported to their country of origin They point out that they are unlawfully resident in France and run the risk at any moment of being arrested and served with a deportation order. In the absence of any undertaking by the authorities of the respondent State not to issue such an order or not to send the applicants to Sri Lanka, deportation of the latter to Sri Lanka must be regarded as imminent, particularly because, according to Article 26 *bis* of the 1945 Order, a deportation order is immediately enforceable by the authorities

With regard to the remedy with suspensive effect provided for in Article 22 *bis* of the Order of 2 November 1945, the applicants maintain that this is not an effective remedy They note in this connection the shortness of the period allowed for lodging an appeal, the exceptional nature of the procedure and the fact that the measure contested by means of this appeal, i e the deportation order, does not mention the country to which the person concerned is to be sent. Consequently, the Administrative Court cannot examine the complaints of the person concerned relating to his deportation to a specified country, nor therefore the violation of Article 3 of the Convention.

The Commission recalls that in interpreting the Convention "regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms.

Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective" (Eur. Court H R , Soering judgment of 7 July 1989, Series A no. 161, p. 34, para 87) This consideration is equally valid in respect of the provision contained in Article 25 para 1 of the Convention concerning the system of individual petitions (cf. Soering v United Kingdom, Comm Report 19.1.89, para. 109 . Eur Court H R., *loc. cit*, p. 58). In particular, the conditions of this provision are satisfied not only when an applicant claims that he has suffered a violation but also when he claims that he will suffer an irreversible violation. In the context of a measure which might expose a person to treatment contrary to Article 3, the applicant must prove, to establish his status as "victim" within the meaning of Article 25 para 1 of the Convention, that he is exposed, through a measure which might be taken imminently by the authorities of the State complained of, to the serious danger of such treatment (cf No 10479/83, Dec 12 3 84, D R 37 p 158)

In this case the Commission notes that the applicants are unlawfully resident in France and that they maintain they may be arrested at any moment with a view to their repatriation to Sri Lanka. The question whether this is a real risk or whether, on the contrary, such a risk can arise only after dismissal of the appeal provided for in Article 22 *bis* of the Order of 2 November 1945 raises complex questions of fact and of law which the Commission considers to be closely bound up with the merits of the applications

Consequently, the Commission takes the view that at this stage in the examination of the applications it cannot find that the applicants do not have the status of "victim"

4. With regard to the risk of treatment contrary to Article 3 of the Convention if the applicants are sent back to Sri Lanka, the Government point out, referring to the decisions taken by the OFPRA and the Refugee Appeals Board, that the evidence adduced by the applicants does not constitute conclusive proof of a risk of persecution. They note in particular that none of the documents produced relate to facts specifically concerning the applicants themselves. There is no evidence in the file to show that they personally would be subjected to treatment contrary to Article 3 of the Convention if they had to return to Sri Lanka. The Government also draw attention to the stereotyped nature of the applicants' accounts. Although a risk of maltreatment cannot be totally excluded, it is nevertheless an acceptable risk.

The applicants emphasise the fact that the members of their families have been harshly persecuted and that these acts of persecution have led in some cases to their deaths. In addition to the ill-treatment they have suffered themselves, the applicants draw attention to the everyday reality of the attacks against the Tamil community in Sri Lanka. They refer to the practice of the United Nations High Commissioner for Refugees and point out that their fears are based not only on their personal experience but also on the fate of their relatives, friends and other members of the racial or social group to which they belong. Lastly, the applicants refer to the reports drawn up by Amnesty International, France Terre d'Asile, the French National Assembly and the European Parliament, which describe the situation in Sri Lanka. They maintain that their fears are well-founded and that their expulsion to Sri Lanka would violate Article 3 of the Convention.

The Commission has made a preliminary examination of the applications. It notes that they raise complex questions of fact and of law which necessitate an examination of the merits and can thus not be regarded as manifestly ill-founded. They must therefore be declared admissible, no other ground of inadmissibility having been noted.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATIONS ADMISSIBLE, without prejudging the merits.