

C.R. AND OTHERS v. AUSTRIA

AS TO THE ADMISSIBILITY OF

Application No. 18101/91  
by C.R. and others  
against Austria

The European Commission of Human Rights sitting in private on  
7 May 1993, the following members being present:

MM. C.A. NØRGAARD, President  
S. TRECHSEL  
F. ERMACORA  
G. SPERDUTI  
E. BUSUTTIL  
G. JÖRUNDSSON  
A. WEITZEL  
J.-C. SOYER  
H.G. SCHERMERS  
H. DANELIUS  
Mrs. G.H. THUNE  
Mr. F. MARTINEZ  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONPÄÄ  
B. MARXER  
G.B. REFFI  
M.A. NOWICKI

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 11 April 1991 by  
C.R. and others against Austria and registered on 19 April 1991 under  
file No. 18101/91;

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 submitted by the parties may be summarised as  
follows.

The applicants are 17 Sri Lankan citizens of Tamil origin (see  
complete list in the Annex). The applicants' present whereabouts are  
unknown. It appears that the applicants all reside in Austria with the  
exception of the fourth and seventh applicants who reside in France.  
The applicants are represented before the Commission by Mr. Wolfgang  
Rainer, a lawyer practising in Vienna.

Particular circumstances of the case

C.R. AND OTHERS v. AUSTRIA

I.

The applicants left Sri Lanka in March 1991 allegedly as they feared that they would be killed by the Sri Lankan army. They travelled to Rome where they had to remain in the transit room of Rome Airport. They were prevented from applying for asylum.

Eventually they arrived at Vienna Schwechat Airport where they remained for several weeks in the airport's transit area.

On 29 March 1991, while still at the airport, the applicants filed requests for asylum with the Security Directorate (Sicherheitsdirektion) of Lower Austria (Nieder-Österreich).

On 5 April 1991 the Schwechat Federal Police Directorate (Bundespolizeidirektion) refused the applicants' requests. Identical decisions were served on each applicant. The applicants had authorised an agent to accept service of the decisions.

According to the decisions the applicants had no right to stay in Austria as, in the view of the authority, they had already fled to another country where they could have asked for asylum. It was also stated that any further measures concerning their requests would be taken in pursuance of the Aliens Police Act (Fremdenpolizeigesetz).

On 9 April 1991 the Security Directorate of Lower Austria decided that the applicants did not meet the requirements of the Geneva Convention relating to the Status of Refugees for which reason they could not be recognised as refugees. At first these decisions did not become final and binding as they had not been served on the applicants' representative.

At a date not specified by the parties the applicants were allowed to leave Vienna airport and enter Austria.

On 29 August 1991 the Security Directorate of Lower Austria quashed the decisions of the Schwechat Federal Police Directorate of 5 April 1991. The decisions stated that the applicants had the provisional right to reside in Austria during the asylum proceedings.

II.

As the decisions of 9 April 1991 had not been served properly, the applicants lodged a devolution request (Devolutionsantrag) with the Ministry of the Interior. When the Ministry failed to decide, the applicants lodged a complaint with the Administrative Court (Verwaltungsgerichtshof) which set a mandatory time-limit for the Ministry.

On 8 May 1992 a hearing was held before the Federal Ministry of the Interior at which the applicants and their lawyer, although convened, did not participate.

On 14 July 1992 the Federal Ministry of the Interior refused the applicants' requests for asylum. The decisions stated that appeals could be filed with the Administrative or the Constitutional Court (Verfassungsgerichtshof) within six weeks.

In the Ministry's opinion, the applicants did not appear interested in pursuing the asylum proceedings, for neither the

C.R. AND OTHERS v. AUSTRIA

applicants nor their lawyer had explained their absence at the hearing on 8 May 1992. The Ministry therefore relied exclusively on the applicants' statements made at Vienna airport.

The Ministry further found that in their statements at Vienna airport the applicants had not referred to any particular religious, ethnic, political or armed group in Sri Lanka to which they belonged. They had furthermore stated that they were not wanted by the authorities. Thus, it was extremely improbable that upon return to their home country they would be persecuted or, as the applicants had stated, arrested.

The Ministry noted in this context that the applicants had left Sri Lanka from the only airport which was under Government control. The applicants would not have been able to leave the country in such a manner if they were threatened with persecution. The fact that the applicants generally referred to a war in their country did not suffice.

Relevant domestic law

According to Section 5 para. 1 of the Austrian Asylum Act (Asylgesetz) a person requesting asylum has the right to stay in the country until the final decision in the asylum proceedings has been given, provided the request is filed within two weeks after arrival in Austria.

Section 5a of the Aliens Police Act (Fremdenpolizeigesetz) in force since 1 January 1991 states, insofar as relevant:

<Translation>

"(1) Whoever has been placed in detention, or is detained, awaiting expulsion is entitled to appeal to the independent Administrative Tribunal, alleging the illegality of arrest and detention.

(2) The appeal can also be lodged with the authority who has ordered, or is responsible for, the detention awaiting expulsion.

...

(4) If the applicant's detention has not already been terminated, the authority with which the appeal has been lodged (para. 2) must ensure that the appeal is brought before the independent Administrative Tribunal within two days after it has been received. The authority detaining the applicant must immediately inform the independent Administrative Tribunal of the termination of detention during the appeal proceedings.

(5) If the detention of the foreigner ends before the expiry of the time-limit referred to in para. 4, the authority with which the appeal has been lodged (para. 2) must without unnecessary delay forward the appeal to the independent Administrative Tribunal."

<German>

"(1) Wer in Schubhaft genommen oder angehalten wird, hat das Recht, den unabhängigen Verwaltungssenat mit der Behauptung der Rechtswidrigkeit der Festnahme oder Anhaltung anzurufen.

C.R. AND OTHERS v. AUSTRIA

(2) Die Beschwerde kann auch bei der Behörde eingebracht werden, die den Schubhaftbescheid erlassen hat oder der die Anhaltung zuzurechnen ist.

...

(4) Die Behörde, bei der die Beschwerde eingebracht worden ist (Abs. 2), hat dafür zu sorgen, dass diese, sofern die Anhaltung des Beschwerdeführers nicht schon vorher geendet hat, dem unabhängigen Verwaltungssenat spätestens zwei Tage nach dem Einlangen vorliegt. Die Behörde, die den Beschwerdeführer anhält, hat dem unabhängigen Verwaltungssenat ein Ende der Anhaltung während des Beschwerdeverfahrens unverzüglich mitzuteilen.

(5) Hat die Anhaltung des Fremden hingegen schon vor Ablauf der Frist des Abs. 4 geendet, so ist die Behörde, bei der die Beschwerde eingebracht worden ist (Abs. 2), verpflichtet, die Beschwerde dem unabhängigen Verwaltungssenat ohne unnötigen Aufschub vorzulegen."

Section 5a para. 6 (2) requires the independent Administrative Tribunal to decide within one week, "except if the detention of the foreigner would have ended before" ("es sei denn, die Anhaltung des Fremden hätte vorher geendet").

According to Section 13a of the Aliens Police Act, execution of an expulsion is inadmissible if there are pertinent grounds that the person concerned will suffer in particular inhuman treatment.

Section 9 para. 1 of the Austrian Act on the Service of Documents (Zustellgesetz) provides that, if a person living in Austria is authorised to receive documents from an authority, the latter must as a rule determine this person as the addressee. If this is not the case, the document is regarded as having been served on the date when the person authorised to receive the document actually received it.

#### COMPLAINTS

The applicants complain under Article 3 of the Convention that they would be subjected to inhuman or degrading treatment if they were to be returned to Sri Lanka. All applicants submit in identical terms that they left Sri Lanka as they feared persecution. In this respect they allege a massacre by Sri Lankan soldiers of the Tamil population. They submit that as a member of the Tamil minority there would be an immediate danger for the applicants' health and life. The applicants refer to the situation of other Tamils who were sent back to Sri Lanka.

The applicants fear that while in Austria they will be detained and then deported as the decision on deportation may be enforced with immediate effect.

They also fear that, if expelled to Italy, they would immediately be sent to Sri Lanka. They submit that, like others, they will be treated as "deportees in transit". They deny that they could have requested asylum in Rome where they had landed before arriving in Vienna.

#### PROCEEDINGS BEFORE THE COMMISSION

C.R. AND OTHERS v. AUSTRIA

The application was introduced on 11 April 1991 and registered on 19 April 1991.

On 19 April 1991 the Commission decided not to give an indication under Rule 36 of its Rules of Procedure. The Commission further decided to communicate the application with a request for information to the respondent Government according to Rule 48 para. 2 (a) of the Rules of Procedure.

The Government submitted their information on 13 May 1991, and the applicants replied on 27 May 1991.

On 11 July 1991 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

Following a request by the Government, the Commission decided on 13 September 1991 to prolong the time-limit for the Government to submit their observations.

The Government's observations were submitted on 4 December 1991, and the applicants' observations in reply on 20 February 1992.

On 31 August 1992 the Commission decided again to communicate the application.

The Government's further observations were submitted on 19 October 1992 and the applicants' observations on 23 November 1992.

THE LAW

1. The applicants complain under Article 3 (Art. 3) of the Convention that they would be subjected to treatment contrary to that provision if they were expelled to Sri Lanka. The applicants fear that, if expelled to Italy, they will also be deported to Sri Lanka.

Article 3 (Art. 3) of the Convention states:

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

In the applicants' view, there is an obvious danger that they will be expelled to the country from which they entered Austria, i.e. Italy, without consideration of any ban on expulsion to Sri Lanka. In Italy, however, they would be in transit and for that reason have no possibility to apply for asylum there.

In the applicants' submissions an appeal against the decisions of the Federal Ministry of the Interior of 14 July 1992 would have been ineffective. Reference is made here to the fact that in their proceedings the revised Asylum Act of 1991 was applied. In applying this law the Federal Ministry of the Interior had concluded that the applicants had failed to demonstrate individual acts of persecution. As a result, a further appeal would have had no prospects of success as the revised law was considerably stricter with respect to the granting of refugee status.

The applicants further point out that in almost all cases where a person is to be deported under the Asylum Act, the Aliens Police do not grant suspensive effect to an appeal which has been lodged.

C.R. AND OTHERS v. AUSTRIA

Moreover, in almost all cases the authorities regularly order the person's detention pending deportation. However, the persons detained who mostly have no written or oral command of German are unable to appeal against the orders made by the authorities.

The Government submit the applicants failed to file an appeal against the decisions of the Ministry of the Interior of 14 July 1992. They have therefore failed to exhaust domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

The Government further note that the applicants have now lost their provisional right to stay in Austria and must leave. If they fail to do so, the Aliens Police will order their expulsion. An appeal under the Asylum Act against the order has suspensive effect. Should the applicants not comply with the order, they would have to be taken into custody with a view to deportation under Section 5 of the Aliens Police Act. In these circumstances, the applicants could complain to the independent Administrative Tribunal under Section 5a of the Aliens Police Act.

The Government submit that the applicants can invoke Articles 2 and 3 (Art. 2, 3) of the Convention at any stage of the proceedings. The Government refer to Section 13a of the Asylum Act.

2. The Commission recalls 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 instance where there is a serious fear of treatment contrary to Article 2 or 3 (Art. 2, 3) of the Convention (see No. 10564/83, Dec. 10.12.84, D.R. 40 p. 262; *mutatis mutandis* Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 32 et seq., para. 81 et seq.).

In the present case the applicants submit that, if expelled from Austria, they will be sent to Italy. As in Italy they will have no possibility of applying for asylum, they will be sent to Sri Lanka where they will be subject to measures of persecution contrary to Article 3 (Art. 3) of the Convention.

3. The Commission notes that the fourth and seventh applicants currently reside in France and do not risk expulsion from Austria. They can therefore no longer claim to be victims of a violation of the right invoked within the meaning of Article 25 (Art. 25) of the Convention. In respect of these applicants, the application is therefore inadmissible under Article 27 para. 2 (Art. 27-2) of the Convention.

4. As regards the remaining applicants, the Commission recalls that under Article 26 (Art. 26) of the Convention it may only deal with a matter "after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

In the present case the decisions of the Federal Ministry of the Interior of 14 July 1992 refused the applicants' requests for asylum on the ground that it was extremely improbable that, upon their expulsion, they would suffer ill-treatment in their home country. The decisions also stated that appeals could be filed with the Administrative or the Constitutional Court within a time-limit of six weeks.

In the applicants' submissions such appeals would have had no prospects of success under the revised Asylum Act which is considerably stricter with respect to the granting of refugee status.

C.R. AND OTHERS v. AUSTRIA

It is true that according to the Commission's case-law an applicant may be dispensed from raising a complaint before the domestic courts if there is well established domestic case-law showing the futility of an appeal (see No. 10027/82, Dec. 5.12.84, D.R. 40 p. 100). However, in the Commission's opinion the applicants have not demonstrated that the revised Asylum Act has been interpreted by the Constitutional and Administrative Courts so as to exclude in such cases the possibility of granting refugee status.

As a result, the applicants have failed to substantiate that the appeals at their disposal lacked sufficient prospect of success. They have not therefore complied with the requirement as to the exhaustion of domestic remedies, and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

5. In any event, the application would also be inadmissible as being manifestly ill-founded for the following reasons.

The applicants complain that in Sri Lanka they would be subjected to treatment contrary to Article 3 (Art. 3) of the Convention. They submit that the Sri Lankan army has committed massacres among the Tamil population and that, upon their return, they would also be persecuted.

The Commission recalls that the mere possibility of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 (Art. 3) of the Convention (see Eur. Court H.R., Vilvarajah and others judgment of 30 October 1991, Series A no. 215, p. 37, para. 111).

In the present case, the applicants have not referred to any concrete incidents which would demonstrate that before their departure from Sri Lanka they had been subjected individually to treatment contrary to Article 3 (Art. 3) of the Convention. They have furthermore not provided any concrete evidence indicating that upon their return they would be subjected to such treatment. Indeed, the Commission notes that in their applications to the Commission all applicants raised their complaints under Article 3 (Art. 3) of the Convention in identical terms.

The Commission finds therefore that the applicants have failed to show that they would face a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention if expelled to Sri Lanka.

In respect of the remaining applicants the application would therefore also have to be declared inadmissible 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

President of the Commission

(H.C. Krüger)

(C.A. Nørgaard)

ANNEX

C.R. AND OTHERS v. AUSTRIA  
List of applicants

1. C.R. born in 1971
2. S.T. born in 1966
3. T.T. born in 1955
4. M.S. born in 1973
5. I.S. born in 1965
6. R.I. born in 1964
7. M.J. born in 1970
8. J.R. born in 1950
9. K.M. born in 1965
10. S.P. born in 1968
11. M.P. born in 1971
12. K.J. born in 1969
13. J.J. born in 1971
14. P.V. born in 1970
15. P.S. born in 1960
16. A.N. born in 1971
17. M.V. born in 1954