



Administrative detention followed by hasty removal of two children having unlawfully entered Mayotte from the Comoros: several violations of the Convention

In today's **Chamber** judgment¹ in the case of **Moustahi v. France** (application no. 9347/14) the European Court of Human Rights held that there had been:

unanimously, **a violation of Article 3** (prohibition of inhuman or degrading treatment), of the European Convention on Human Rights, in respect of the second and third applicants on account of the conditions of their detention;

unanimously, **a violation of Article 3**, in respect of the second and third applicants on account of the conditions of their removal to the Comoros;

unanimously, **no violation of Article 3** in respect of the first applicant;

unanimously, **a violation of Article 5 § 1** (right to liberty and security), in respect of the second and third applicants;

by a majority, **a violation of Article 5 § 4** (right to a speedy decision on the lawfulness of detention), in respect of the second and third applicants;

by a majority, **a violation of Article 8** (right to respect for private and family life), in respect of all three applicants;

unanimously, **a violation of Article 4 of Protocol No. 4** (prohibition of collective expulsions of aliens), in respect of the second and third applicants;

unanimously, **no violation of Article 13** (right to an effective remedy) **in conjunction with Article 3** as regards the complaint of a lack of effective remedies against the conditions of removal of the second and third applicants;

by a majority, **a violation of Article 13 in conjunction with Article 8, and of Article 13 in conjunction with Article 4 of Protocol No. 4**, as regards the complaint of a lack of effective remedies against the removal of the second and third applicants.

The case concerned the conditions in which two children, apprehended when they unlawfully entered French territory in Mayotte, were placed in administrative detention together with adults, arbitrarily associated with one of them for administrative purposes, and expeditiously returned to the Comoros without a careful and individual examination of their situation.

The Court was persuaded that the administrative association of the two children with an unrelated adult had not sought to preserve the children's best interests but rather to ensure their speedy removal to the Comoros. Placing them in a detention centre could only have caused them stress and anxiety, with particularly traumatic repercussions for their mental state. The French authorities had not provided for the effective protection of the children and had not taken account of the situation that they risked facing on returning to their country of origin.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The Court further observed that no remedy had been available to the children for the purpose of having the lawfulness of their detention reviewed.

It reiterated that the fact of placing certain family members in a detention centre, while others were free, could be regarded as an interference with the effective exercise of the right to family life, regardless of the duration of the measure.

The circumstances of the case, taken as a whole, led the Court to find that the removal from Mayotte of the children, who were very young (five and three at the time) and were not known to or assisted by any adult, had been decided and implemented without the safeguard of a reasonable and objective examination of their situation and had breached Article 4 of Protocol No. 4.

Principal facts

The three applicants are Mohamed Moustahi and his children Nadjima Moustahi and Nofili Moustahi, who were aged five and three at the relevant time. They are Comorian nationals, who were born in 1982, 2008 and 2010, and now live in Mayotte.

Mr Moustahi entered the territory of Mayotte in 1994 and he has since lived there lawfully and continuously with a temporary residence permit that has been extended. The two children were born in Mayotte to an unlawfully resident Comorian mother. In 2011 a removal order was issued against the mother, who was sent back to the Comoros with the two children; she entrusted them to their paternal grandmother and returned to Mayotte.

On 13 November 2013 the two children travelled on a makeshift boat bound for Mayotte. The 17 people on board were intercepted at sea by the French authorities on the morning of 14 November 2013. At 9 a.m. they underwent an identity check on a beach, then a health check at Dzaoudi hospital, and finally an administrative removal procedure was initiated against them on the same day. Pending their removal they were detained for approximately one hour and 45 minutes on the premises of the Pamandzi gendarmerie. The two children were administratively associated with Mr M.A., one of the migrants present on the boat, who had reportedly declared that he was accompanying the children. The children's names were entered on the removal order issued to M.A.; however, they were placed in detention without their names appearing on any detention order.

Mr Moustahi was notified of the presence of his children at the gendarmerie, in a holding cell, but was unable to make contact with them. The same day at 3 p.m. he lodged an appeal with the prefect requesting the suspension of the removal order and at 5.30 p.m. he referred the matter to the urgent applications judge of the Administrative Court of Mayotte.

The two children were placed on board a ship at 4.30 p.m. and returned to the Comoros.

On 18 November 2013, two days after the expiry of the time-limit laid down by Article L. 521-2 of the Code of Administrative Justice, the urgent applications judge of the Administrative Court of Mayotte dismissed Mr Moustahi's request. On 3 December 2013 he appealed against this order to the urgent applications judge of the *Conseil d'État*. The Defender of Rights (Ombudsman), the GISTI and the CIMADE intervened to support him. On 10 December 2013 the *Conseil d'État* dismissed the appeal.

On 13 January 2014 Mr Moustahi submitted an application for family reunification to the consular authorities in the Comoros. In August 2014 long-stay visas were issued to the two children, who have been living with their father since September 2014.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman and degrading treatment), the second and third applicants complained about their detention in the company of unknown adults, and the fact that

they had been arbitrarily associated with one of them for administrative purposes, followed by their immediate return to the Comoros, without any individual and careful examination of their situation. Under Article 3, the first applicant complained of feelings of fear, anxiety and helplessness in relation to the treatment suffered by his children. Relying on Article 5 § 1 (right to liberty and security), the second and third applicants complained that they had been deprived of their liberty unlawfully and unjustifiably. Under Article 5 § 4 (right to a speedy decision on the lawfulness of detention), they complained that there had been a violation of their right to judicial review of a custodial measure, as there had been no legal act formalising their detention that they could appeal against. Relying on Article 8 (right to respect for private and family life), the three applicants complained of the French authorities' refusal to entrust the children to their father rather than placing them alone in administrative detention and to allow contact between them during the children's detention. Under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), the second and third applicants claimed to have been subjected to a measure of collective expulsion without any individual examination of their situation. Lastly, relying on Article 13 (right to an effective remedy) in conjunction with Articles 3 and 8 and with Article 4 of Protocol No. 4, they submitted that they had not had an effective remedy by which to complain about their removal. They alleged that the removal had been implemented without the authorities having taken any precautions to ensure that they would return to their country of origin in safe conditions, that it had breached their right to respect for their family life and that there had been no examination of their individual situation.

The application was lodged with the European Court of Human Rights on 20 January 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra O'Leary (Ireland), *President*,
Gabriele Kucsko-Stadlmayer (Austria),
André Potocki (France),
Yonko Grozev (Bulgaria),
Mārtiņš Mits (Latvia),
Lətif Hüseynov (Azerbaijan),
Lado Chanturia (Georgia),

and also Victor Soloveytchik, *Deputy Section Registrar*.

Decision of the Court

[Article 3 \(in respect of the second and third applicants\)](#)

The Court, regarding the second and third applicants as unaccompanied minors, found that they had been arbitrarily associated with M.A. It was persuaded that this formality had not sought to preserve the children's best interests but rather to ensure their speedy removal to the Comoros.

The Court observed that the conditions of the two children's detention had been the same as those of the adults apprehended at the same time as them. Having regard to the age of the children and to the fact that they had been left to cope on their own, it concluded that their detention could only have caused them stress and anxiety, with particularly traumatic repercussions for their mental state.

The Court took the view that the authorities had failed to ensure that the children were treated in a manner compatible with the Convention provisions and found that this treatment exceeded the threshold of seriousness for the purposes of Article 3. There had therefore been a violation of this Article.

Furthermore, the French authorities had not ensured that the children were effectively protected and had failed to take account of the situation which they risked facing on their return to their

country of origin. The Court was of the view that their removal in such conditions must necessarily have caused them extreme anxiety and demonstrated a flagrant lack of humanity towards them in view of their age and their situation as unaccompanied minors, such that it reached the threshold required to be characterised as inhuman treatment. In removing them the French authorities had also failed to comply with their positive obligations, as they should have taken the necessary steps and precautions.

There had been a violation of Article 3 on account of the conditions of the children's return to the Comoros.

Article 3 (in respect of the first applicant)

The Court had no doubt that the first applicant, as a father, had suffered distress and anxiety. However, it noted that the children's detention had been of a short duration. It further observed that their journey between the Comoros and Mayotte had been made on the initiative of the first applicant, who had arranged the children's illegal and dangerous crossing from the Comoros on a makeshift boat without ensuring that they were accompanied by a responsible adult. In contrast, the return journey had been made in satisfactory conditions on board a ferry belonging to a company that frequently operated the crossing between Mayotte and the Comoros. Moreover, the applicant knew that his own mother would take care of the children on their arrival.

In those conditions, the Court found that the threshold of seriousness required by Article 3 had not been reached and there had been no violation under this head.

Article 5 § 1 (in respect of the second and third applicants)

The Court noted that the children had not been placed in a detention centre with the aim of keeping them together with a relative. On the contrary, they had been arbitrarily associated with M.A. to enable their detention pending removal, even though this was not permitted by the domestic law applicable at the time. The urgent applications judge of the Mayotte Administrative Court had precisely noted the manifest unlawfulness of the measure.

The Court failed to find any legal basis to justify the decision to deprive the two children of their liberty. There had thus been a violation of Article 5 § 1.

Article 5 § 4 (in respect of the second and third applicants)

There had been no administrative detention order or removal order issued specifically against the two children; their names had simply been mentioned in the removal order issued to M.A. The children had not been placed in a detention centre with a relative, but had been arbitrarily associated by the authorities with an unrelated adult. The Court found that the children, in the company of a stranger, had fallen into a legal vacuum, as they had had no means of using the remedy that was available to M.A. The children had not been accompanied in the detention centre by someone who had the legal authority to act on their behalf in the domestic courts and who had their interests at heart.

The Court thus found that the second and third applicants had not been guaranteed the protection required by this Article, since no remedy had been available to them for the purpose of having the lawfulness of their detention reviewed. There had thus been a violation of Article 5 § 4.

Article 8 (all three applicants)

The Court took the view that the fact of placing certain members of a family in a detention centre, while other members of the family were free, could be regarded as an interference with the effective exercise of the right to family life, regardless of the duration of the custodial measure.

Having regard to its finding of a violation of Article 5 § 1, the Court found that the interference with the applicants' family life was not in accordance with the law. That was sufficient in itself to find a violation of Article 8.

This violation of the right to respect for family life had been aggravated by the fact that the national authorities had arbitrarily placed the children in the company of a stranger who had no authority over them, without enquiring as to whether there was any connection between them. The Court was convinced that the refusal to reunite the applicants had nothing to do with the best interests of the children but served to fulfil the authorities' aim of ensuring that their removal would take place expeditiously, in breach of the domestic law. The Court could not accept this as a legitimate aim for the purposes of Article 8 § 2.

[Article 4 of Protocol No. 4 \(in respect of the second and third applicants\)](#)

In the Court's view, where a child was accompanied by a relative or the like, the requirements of Article 4 of Protocol No. 4 could be met if that adult was in a position to submit, meaningfully and effectively, arguments against the expulsion on behalf of the child.

The particular circumstances of the case, taken as a whole, led the Court to find that the removal of the children, who were very young (five and three at the time) and were not known to or assisted by any accompanying adult, had been decided and implemented without affording them the safeguard of a reasonable and objective examination of their situation. The Court thus found that the children's expulsion had breached Article 4 of Protocol No. 4.

[Article 13 in conjunction with Articles 3 and 8, and in conjunction with Article 4 of Protocol No. 4 \(in respect of the second and third applicants\)](#)

Article 13 in conjunction with Article 3

The Court emphasised that the present complaint concerned the practical arrangements of the removal measure: the fact that the children were unaccompanied, the failure to make arrangements at their destination and their late time of arrival. The scope of the States' obligation under Article 13 varied depending on the nature of the complaint.

The Court was mindful of the fact that the practical arrangements for the removal of aliens to another State would often remain unknown to the authorities until just before the implementation of the measure and that those arrangements would not usually, in themselves, constitute a violation of Article 3. Article 13 did not require any remedies to have suspensive effect. The possibility of a remedy that could be used by the applicant at a subsequent stage would thus suffice under this Article and there was no evidence from the exchanges between the parties that such a remedy was ineffective or inexistent in the circumstances of the present case.

The Court thus found that there had been no violation of Article 13 in conjunction with Article 3.

Article 13 in conjunction with Article 8 and Article 4 of Protocol No. 4

Having regard to the sequence of events, the Court found that no judicial examination of the applicants' requests had been possible. While the urgent application procedures could, in theory, enable the judge to examine arguments and to order, if necessary, the suspension of the removal measure, any such possibility had been precluded by the excessively short time frame. The urgent applications judge of the Mayotte Administrative Court could only reject, for lack of urgency, the application lodged by the first applicant, even though he noted that the decision in question was "manifestly unlawful". Thus the removal of the children was carried out purely on the basis of the decision taken by the administrative authority in respect of a third party who was unrelated to them. Consequently, the Court took the view that the haste with which the removal measure had been implemented had had the effect of rendering any existing remedies ineffective and thus unavailable to the applicants.

The Court found that the applicants had not had any effective remedies available to them in respect of their complaints under Article 8 and Article 4 of Protocol No. 4 when their removal was being implemented. That failure could not be remedied by the subsequent issuance to them of residence permits.

The Court thus found that there had been a violation of Article 13 taken in conjunction with Article 8 and Article 4 of Protocol No. 4.

[Articles 41 \(just satisfaction\) and 46 \(binding force and enforcement\)](#)

The Court noted the positive legislative and jurisprudential developments that had taken place since the time of the removal in question.

The urgent applications judge of the *Conseil d'État* had found that the administrative authority was obliged to verify the identity of foreign minors placed in administrative detention and deported as a result of a removal measure adopted against a third party, having verified whether there was any connection between them. It had also been emphasised that the administrative authority was obliged to verify the conditions in which the minors would be received on arrival at their destination. Compliance by the authorities with these judge-made requirements was intended to prevent the repetition, in respect of other minors, of most of the violations that had been found by the Court in the present case.

The Court held that France was to pay the applicants 22,500 euros (EUR) in respect of non-pecuniary damage, consisting of EUR 2,500 for the first applicant and EUR 10,000 for each of the other two applicants.

Separate opinion

Judge Grozev expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.