



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DE SOUZA RIBEIRO v. FRANCE

(Application no. 22689/07)

JUDGMENT

STRASBOURG

30 June 2011

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
13/12/2012**

This judgment may be subject to editorial revision.

In the case of de Souza Ribeiro v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,

Elisabet Fura,

Jean-Paul Costa,

Karel Jungwiert,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 22689/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Brazilian national, Mr Luan de Souza Ribeiro (“the applicant”), on 22 May 2007.

2. The applicant was represented by Ms D. Monget-Sarrail and Ms J. Pépin, lawyers practising in Cayenne. The French Government (“the Government”) were represented by their Agent, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged a violation of Article 8 of the Convention, read alone and in conjunction with Article 13, in particular because he had had no possibility of challenging the lawfulness of a removal order prior to its execution.

4. On 9 February 2009 the President of the Fifth Section decided to communicate the application to the Government. Applying Article 29 § 1 of the Convention, it also decided to examine the admissibility and merits of the case at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, a Brazilian national, was born in 1988 and lives in Remire Montjoly in French Guiana.

6. He arrived on French soil in 1992 at the age of four and remained there until 1994, when he returned to Brazil.

7. In 1995, holding a tourist visa, the applicant returned to Cayenne in French Guiana, where he went to primary school in 1996 and then to secondary school. As he had no valid residence permit and could not apply for one until he came of age, he had to leave school in 2004, at the age of sixteen.

8. In 2005 he was stopped for a drug offence. By an order of 17 May 2006 he was placed under court supervision and barred from leaving French Guiana. On 25 October 2006 the Cayenne Youth Court gave him a two-month suspended sentence and two years' probation.

9. On 25 January 2007 the applicant was stopped for a road check and, being unable to present any valid papers, was taken into custody.

10. A removal order and an administrative detention order were issued against him that same day at 10 a.m.

11. On 26 January, at 3.11 p.m., the applicant lodged an appeal against the removal order with the Cayenne Administrative Court, for abuse of authority, arguing that the order was illegal under Article 511-4 of the Code regulating the entry and residence of aliens and asylum seekers (see the section on "Relevant Domestic Law"). A hearing was scheduled for 1 February 2007. An urgent application was filed at the same time as the appeal, asking the court to suspend the enforcement of the removal order while it examined the validity of the measure. In support of his application for a suspension the applicant relied on Article 8 of the Convention, arguing that he had entered French territory before the age of thirteen, that he had lived there on a habitual basis ever since, that both his parents had residence permits, and that one of his brothers had acquired French citizenship and the other three would be entitled to apply for it at the age of thirteen as they had been born on French soil.

12. On 26 January at 4 p.m. the applicant was removed to Brazil.

13. The same evening the Cayenne Administrative Court declared his urgent application for a suspension of his removal devoid of purpose as he had already been deported.

14. On 6 February 2007 the applicant lodged an urgent application with the Cayenne Administrative Court requesting that the Prefect of French Guiana be instructed to organise his return there within twenty-four hours because of the interference with his family life. The application was rejected

on 7 February as the court had not yet reached a decision concerning the validity of the removal order, and the applicant's return would amount to a permanent measure whereas the urgent-applications judge could only order interim measures.

15. On an unspecified date the applicant returned to French Guiana illegally, by his own means, to live with his family.

16. In a judgment of 18 October 2007 the Cayenne Administrative Court found the removal order illegal on the grounds that the applicant had shown that he had been habitually resident in France since the age of thirteen and could therefore not be deported. The court refused to have the applicant issued with a residence permit, but ordered the Prefect of French Guiana to re-examine his administrative situation within three months.

17. On 16 June 2009 the authorities in French Guiana issued the applicant with a "visitor's" permit, which was valid for one year but did not allow him to work.

18. An investigation revealed that the authorities had issued the "visitor's" permit by mistake. The applicant was accordingly issued, in September 2009, with a new residence permit for "private and family life", backdated to June 2009 and allowing him to work.

19. That residence permit was not renewed upon expiry because of a problem with the documents required for its renewal. In October 2010, however, the applicant was eventually issued with a residence permit valid from June 2010 to June 2011.

II. RELEVANT DOMESTIC LAW

20. Code regulating the entry and residence of aliens and asylum seekers

Article 511-4

"The following persons shall not be required to leave French territory or removed therefrom under the provisions of this chapter:

...

2° Aliens who can prove by any means that they have been habitually resident in France at least since the age of thirteen."

Article L. 514-1

"For the purposes of this part [concerning expulsion measures], the following provisions shall apply in French Guiana and Saint-Martin:

...

2° Without prejudice to the provisions of the preceding paragraph, an alien who has been ordered to leave French territory or against whom a removal order has been issued and who refers the matter to the administrative court may, at the same time, apply for a stay of execution.

Consequently, the provisions of Articles L. 512-1 and L. 512-2 to L. 512-4 [whereby a removal order issued by the prefecture may be challenged before the administrative court within 48 hours, with suspensive effect on the removal order] shall not apply in French Guiana or Saint-Martin.”

Article L. 514-2

“The provisions of Article L. 514-1 shall apply in the *département* of Guadeloupe and in Saint-Barthélemy, for five years from the publication of Law no. 2006-911 of 24 July 2006 on immigration and integration.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

21. The applicant complained of interference with his right to respect for his private and family life as a result of his expulsion to Brazil. He maintained that the removal order was illegal and that he had been left to fend for himself in Brazil, with no income and nowhere to live. He relied on Article 8, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

22. The Court reiterates that an individual cannot claim to be a “victim” within the meaning of Article 34 of the Convention if the national authorities have afforded adequate redress for the alleged violations of the Convention (see, for example, *mutatis mutandis*, the decision on admissibility in the case of *Kaftailova v. Latvia*, no. 59643/00, 21 October 2004). This rule applies even where the person concerned obtains satisfaction when proceedings have already been initiated before the Court; such is the subsidiary nature of the guarantees afforded by the Convention system (see, amongst other authorities, *Mikheyeva v. Latvia* (dec.), no. 50029/99, 12 September 2002).

23. As a general rule, a decision or measure favourable to the applicant is not sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the alleged breach of the Convention (see, amongst many other authorities, *Gebremedhin [Gaberamadhien] v. France* (dec.), no. 25389/05, § 36, 10 October 2006). The Court has explained in this connection that where the person concerned complains in particular of his or her deportation or illegal status in the country, the minimum steps required are, firstly, the setting-aside of the deportation order and, secondly, the issuing or recognition of a residence permit (see, amongst other authorities, the *Kaftailova* and *Gebremedhin* decisions, cited above).

24. The Court observes that in the present case the Cayenne Administrative Court, in its judgment of 18 October 2007, found the removal order at the origin of the applicant’s expulsion to Brazil illegal. As a result he was able to return to live with his family in France. The Court also notes that in 2009 he was issued with a renewable residence permit for “private and family life”, which was renewed on 14 October 2010.

25. The Court accordingly considers that the national authorities acknowledged and redressed the Convention violation concerned.

26. It follows that the applicant cannot claim to be a “victim” within the meaning of Article 34 of the Convention and that this complaint must be rejected as being incompatible *ratione personae* with the Convention pursuant to Article 35 §§ 3 a) and 4.

II. ALLEGED VIOLATION OF ARTICLES 8 AND 13 OF THE CONVENTION TAKEN TOGETHER

27. The applicant complained that he had no effective remedy before the domestic courts, within the meaning of Article 13 of the Convention, in respect of his complaint under Article 8. Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

28. The Government raised a preliminary objection in respect of this complaint, based on the applicant’s lack of victim status. They submitted that the domestic authorities had acknowledged and remedied the alleged violation of Article 8 of the Convention and that he had no arguable claim under that provision.

29. The applicant claimed that he was still a victim within the meaning of Article 34 of the Convention in so far as, when the impugned measure

was set aside, he had not immediately been issued with a residence permit. As a result he had had to live in French Guiana without documentation from October 2007 to July 2009.

30. The Court reiterates that Article 13 of the Convention applies only in respect of grievances which can be regarded as “arguable” in terms of the Convention (see, for example, *Rotaru v. Romania* [GC], no. 28341/95, § 67, ECHR 2000-V, and *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

31. It is not persuaded, however by the Government’s argument that, as Article 13 was inextricably linked to the Articles of the Convention with which it was combined, the applicant could no longer claim to be a victim of a violation of Article 13 taken in conjunction with Article 8, given that he was no longer a victim of the alleged violation of the latter provision (see, *mutatis mutandis*, *Gebremedhin*, cited above, § 56).

32. In the instant case it notes that the Cayenne Administrative Court set aside the removal order on 18 October 2007 – nearly nine months after the applicant’s removal to Brazil – because the applicant was able to prove that he had been habitually resident in France since the age of thirteen, but that he was not issued with a “private and family life” residence permit, enabling him to live legally on French soil, until 16 June 2009. On that basis, the Court is able to note that at the time of the applicant’s removal to Brazil a serious question arose as to the compatibility of his removal with Article 8 of the Convention.

33. That being so, although the Court has found that the applicant no longer has victim status in respect of his complaint under Article 8 of the Convention (see paragraph 22 above), it considers it necessary in the instant case to pursue the examination of the merits of the complaint under Article 13 of the Convention in conjunction with Article 8.

34. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

35. The Government submitted that the scope of the obligation Article 13 of the Convention placed on the Contracting States varied with the nature of the applicant’s complaint and the existence of potentially irreversible consequences for the applicant. They also pointed out that the Contracting States enjoyed a certain margin of appreciation in respect of the manner in which they complied with their obligations under Article 13.

36. The Government explained that following the above-cited *Gebremedhin* judgment, a suspensive remedy was introduced before the administrative courts to enable people facing expulsion to present their Convention complaints to a court before the removal measure was enforced. However, the law provided for an exception to this suspensive effect in French Guiana because of the particular situation in that overseas *département* regarding illegal immigration. French Guiana consisted mainly of thick equatorial forest, which made the borders permeable. The Government estimated that 40,000 of the department's 202,000 inhabitants were illegal immigrants and that introducing a suspensive remedy for each removal order would generate more work than the courts could handle. However, the people concerned did have the possibility of lodging an urgent application for suspension of the removal order at the same time as their appeal on the merits, and this had become common practice in French Guiana.

37. In the instant case the Government stressed that the applicant's removal in spite of his having lodged such an urgent application did not reflect the usual practice in French Guiana but was rather the result of an isolated clerical error specific to this particular case. They did consider, however, that the applicant had had an effective remedy against the removal order in so far as the decision had been set aside and he had been allowed to return to French Guiana and issued with a residence permit. Lastly, the Government noted that the applicant had made no allegation of any risk of ill-treatment under Article 3 and that his removal to Brazil had had no potentially irreversible consequences as he had subsequently been able to return to French Guiana.

38. The applicant argued that the application of Article 13 of the Convention was not limited to cases of violation of Article 3 (see, amongst other authorities, *Čonka v. Belgium*, no. 51564/99, § 76, ECHR 2002-I), and pointed out that in his particular case the State was not to thank for the lack of irreversible consequences as he had returned to French Guiana illegally, by his own means. He further submitted that the remedy set in place by the Government following the *Gebremedhin* judgment only concerned aliens who had been refused entry, not those against whom removal orders had been issued, as in his case.

39. As to the Government's arguments concerning the immigration problem in French Guiana, the applicant considered that they did not justify the denial pure and simple of any suspensive remedy, depriving foreigners of their rights under Article 13 of the Convention. Expulsion procedures in French Guiana were hasty, sometimes to the detriment of the rights of the foreigners concerned, most removals being effected within forty-eight hours of the person's arrest, as in the applicant's case.

40. Lastly, the applicant submitted that, contrary to what the Government suggested, urgent applications for suspension were not so

widespread in French Guiana: according to a 2007 report by CIMADE (an association active in assisting migrants, refugees and asylum seekers), only a minority of foreigners lodged appeals against removal orders or applied for a stay of execution of such orders.

2. *The Court's assessment*

41. The Court reiterates that Article 13 of the Convention guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law. The “effectiveness” of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Gebremedhin*, cited above, § 53).

42. The Court notes that in the instant case the applicant had access to a “remedy before a national authority” that enabled him to challenge the removal measure before the administrative courts. It remains to be determined whether this remedy was “effective” within the meaning of Article 13. The Court reiterates in this regard that Article 13 does not go so far as to require a certain type of remedy – the Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Chahal v. the United Kingdom*, 15 November 1996, § 145, *Reports of Judgments and Decisions* 1996-V).

43. The Court notes that the remedy available to the applicant made it possible for him to have the removal order declared illegal and, subsequently, to obtain a residence permit, but as it had no suspensive effect the applicant was nevertheless removed before the administrative court could examine his complaints. In order to be “effective”, however, the remedy provided for under Article 13 of the Convention does not, in principle, have to be suspensive. The Court has taken a different view, nevertheless, where the implementation of the impugned measure might have potentially irreversible effects contrary to Article 3 of the Convention, for example (see *Gebremedhin*, cited above, § 58, and *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII), or to Article 4 of Protocol No. 4 (see *Čonka*, cited above, § 79).

44. The Court notes that unlike the rights protected by those provisions, the effects on those protected by Article 8 are, in principle, reversible, and this is clear in the present case, where the family ties were not lastingly broken by the applicant’s deportation. On the contrary, the applicant was

later able to return to French Guiana – illegally at first, it is true, but in 2009 he was given a residence permit.

45. Bearing in mind the margin of appreciation the States enjoy in such matters, the Court considers that the remedy open to the applicant to challenge his removal order was “effective” within the meaning of Article 13 of the Convention, even though it had no suspensive effect.

46. Accordingly, there has been no violation of Article 13 of the Convention taken together with Article 8.

FOR THESE REASONS THE COURT

1. *Holds*, unanimously that the applicant cannot claim to be a “victim” within the meaning of Article 34 of the Convention in respect of his complaint under Article 8 of the Convention;
2. *Declares admissible*, unanimously, the applicant’s complaint under Article 13 of the Convention taken together with Article 8 of the Convention and the remainder of the complaint inadmissible;
3. *Holds*, by four votes to three, that there has been no violation of Article 13 of the Convention taken together with Article 8.

Done in French and notified in writing on 30 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Spielmann, Berro-Lefèvre and Power is annexed to this judgment.

D.S.
C.W.

JOINT PARTLY DISSENTING OPINION OF JUDGES SPIELMANN, BERRO-LEFEVRE AND POWER

Unlike the majority, we consider that the applicant did not have an effective remedy in keeping with the requirements of Article 13 of the Convention in respect of his complaint under Article 8, and that there was a violation of these two provisions taken together.

The circumstances of this case are particular, as the *département* of French Guiana is not subject to the same legislation on aliens as other parts of France. In mainland France a foreigner against whom a removal order is issued can appeal to the President of the administrative court to have it set aside, and that appeal has suspensive effect.

In French Guiana, however, an appeal to the administrative court against a removal order does not have suspensive effect. The interested parties do have the possibility of simultaneously lodging an urgent application for a stay of execution, but this urgent procedure does not automatically suspend the measure.

The present case is a perfect illustration of this: after having lodged an appeal for abuse of authority with the Cayenne Administrative Court at 3.11 p.m. on 26 January 2007, together with an urgent application for a stay of execution of the removal order issued the previous day, the applicant was removed to Brazil a mere 49 minutes later, at 4 p.m.!

That same evening, of course, it only remained for the administrative court to rule that the urgent application for a stay of execution was devoid of purpose as the applicant had already been deported.

Subsequently, in October 2007, the Cayenne Administrative Court found that the removal order had been unlawful because the applicant had shown that he had been habitually resident in France since the age of 13 and could therefore not be deported.

This case, which eventually ended well, led the Court to verify whether Mr Luan de Souza Ribeiro had had access to an effective remedy before a national authority in respect of the alleged interference with his family life.

The question raised is whether the effectiveness of the remedy provided for in Article 13 requires it to have suspensive effect when that provision is taken in conjunction with Article 8 of the Convention.

This question has never been decided by the Court, whose judgments have focused mainly on the effectiveness of a remedy in the event of allegations of treatment falling within the scope of Article 3 of the Convention.

According to the Court's well-established case-law, when the applicant complains of a violation of Articles 3 and 13 taken together, the level of effectiveness required of the remedy within the meaning of Article 13 is higher, and requires the remedy to have automatic suspensive effect (*Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII, and *Gebremedhin [Gaberamadhien] v. France* (dec.), no. 25389/05, § 66). This is easy to understand considering the importance the Court attaches to Article 3 and the irreversible nature of the damage likely to be done if the risk of torture or ill-treatment were to materialise.

However, the Court went further in the case of *Čonka v. Belgium* (no. 51564/99, ECHR 2002-I), where, although it found (§ 76) that there was no arguable complaint under Article 3, it nevertheless found (§ 85) that there was no effective remedy within the meaning of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4. In reaching that conclusion it noted that the applicants had not had access to a suspensive remedy in respect of their collective expulsion prior to its implementation. It is clear from the wording of that judgment that what led the Court to find a violation of Article 13 in conjunction with Article 4 of Protocol No. 4 in that case were the evident procedural shortcomings in Belgian law concerning appeals against removal orders.

In our opinion the circumstances of the *Čonka* case are comparable to those of the present case and it is our inclination to confirm the approach taken in that judgment when it comes to protecting fundamental rights. Mr Luan de Souza Ribeiro lodged an arguable complaint under Article 8 with the administrative court, but was deported less than an hour after doing so, without the court having pronounced judgment and therefore without his personal and family situation having been examined.

We therefore believe that the majority was mistaken when it drew a distinction in § 44 of the judgment between these cases and the present case regarding the consequences of the interference with the applicant's rights.

First of all because in *Jabari* and *Gebremedhin* the Court examined the situation *a priori*, in so far as the applicants had not been deported. It was in view of "the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised" that the Court decided that the applicants should have had a suspensive remedy. In the present case, on the other hand, the finding of the majority is based on an *a posteriori* examination of the situation, as the Chamber found no violation after noting that the applicant's removal had not, in practice, had any irreversible effects.

Secondly, because if we accept that a remedy must have suspensive effect in cases where there is a risk of violation of Article 3, there is no logical or legal reason not to apply the same requirement to Article 8.

It should be borne in mind that sudden, brutal and often radical separation from one's family as a result of a removal measure can have a

devastating effect on the individual concerned. Detaining, then deporting a person, sometimes far from their family, can cause suffering, anxiety and distress. Especially if the person has no opportunity to submit arguments to, or be heard by, an appropriate national authority before they are deported.

Lastly, as we have just seen, because this reasoning ignores the *Čonka* case-law. It is quite clear that the procedural rules applicable in French Guiana to appeals against removal orders did not make it possible to ascertain, prior to its enforcement, whether the removal order against the applicant was compatible with the Convention.

Requiring a suspensive remedy in the event of allegations of violation of Article 8 would not oblige the Contracting States to issue residence permits to all illegal aliens. It would simply mean that when non-nationals (had) lived in a State party to the Convention and founded a family there, they could not be expelled without the national authorities having first carefully examined the merits of their complaint under Article 8.

At a time when the Court is faced with a sharp increase in Rule 39 requests (interim measures) – and is increasingly being expected to do the job of the domestic courts, albeit reluctantly – the introduction of suspensive remedies could reverse this trend: it would oblige the States to strengthen the guarantees they offer, and to strengthen the role of the domestic courts, thereby reinforcing the subsidiary nature of the Court's role called for in the Interlaken declaration and further emphasised in the Izmir declaration (section A 3).