



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

CASE OF B.B. v. FRANCE

(47/1998/950/1165)

JUDGMENT

STRASBOURG

7 September 1998

In the case of B.B. v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr J.M. MORENILLA,

Sir John FREELAND,

Mr A.B. BAKA,

Mr D. GOTCHEV,

Mr K. JUNGWIERT,

Mr M. VOICU,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 29 June and 27 August 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 27 April 1998, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 30930/96) against the French Republic lodged with the Commission under Article 25 by a Congolese citizen (a national of what was formerly Zaïre, hereinafter “the Democratic Republic of Congo”), Mr B.B., on 2 April 1996. The applicant asked the Court not to reveal his identity.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

Notes by the Registrar

1. The case is numbered 47/1998/950/1165. The first number is the case’s position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case’s position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers, Ms H. Clément of the Paris Bar and Mr H.-B. Gouyer, a welfare and legal adviser from the Marseilles office of the *CIMADE* association (an ecumenical mutual-aid organisation), who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Bernhardt, the President of the Court (Rule 21 § 4 (b)). On 29 April 1998, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr J.M. Morenilla, Sir John Freeland, Mr A.B. Baka, Mr D. Gotchev, Mr K. Jungwiert and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted Mr M. Perrin de Brichambaut, the Agent of the French Government (“the Government”), the applicant’s lawyers and Mr J.-C. Geus, the Delegate of the Commission, on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government’s memorial on 16 July 1998 and the applicant’s memorial on 24 July. On 17 August 1998 the latter lodged comments on the Government’s memorial. The Government chose not to communicate any observations on the applicant’s memorial. On 21 August the Secretary to the Commission informed the Registrar that the Delegate did not wish to submit any written observations on those memorials and comments.

5. Meanwhile, on 7 May 1998 the Registrar had received from the Government a request that the Court order the case to be struck out of the list as the applicant could no longer argue that he was a “victim” within the meaning of Article 25 of the Convention (Rule 49 § 2), the Minister of the Interior having on 9 April 1998 made an order against the applicant requiring him to live in the Val d’Oise *département*. On 2 June 1998 the Registrar received the applicant’s observations on the request for the case to be struck out. In a letter of 17 June 1998 the Secretary to the Commission communicated the Delegate’s observations on that request.

6. On 18 June 1998 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the instructions of the President of the Chamber.

7. On 27 August 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met (Rules 26 and 38).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr B.B., a national of the Democratic Republic of Congo, is currently subject to an order requiring him to reside in the Val d'Oise *département*. He is suffering from the Aids virus compounded by Kaposi's syndrome and presents signs of acute immunosuppression.

9. The applicant was born in Kinshasa in 1954. He arrived in France in 1983 and was given leave to remain that was successively renewed until 1988, when, owing to the employment situation, he was refused a further renewal. He returned to Zaïre in December 1988, but came back to France in December 1989 because of the political situation there. Shortly afterwards, he made an application for political refugee status to the French Office for the Protection of Refugees and Stateless Persons (*OFPRA*). His application was rejected in 1993. That decision was confirmed in 1995 after his application had been reconsidered.

The applicant says that his father, an opponent of the Mobutu regime, was executed in 1967 and that his four brothers are all political refugees, two in France and two in Belgium.

A. The applicant's conviction

10. On 22 January 1995 the applicant was charged with transporting, possessing, offering to supply, buying and selling drugs and immigration offences. He was arrested that day and committed to stand trial before the Bobigny Criminal Court.

11. On 8 September 1995 the Bobigny Criminal Court acquitted the applicant on the counts of transporting, offering to supply, and buying and selling drugs but found him guilty of possessing drugs and unlawfully entering and staying in France. It sentenced him to two years' imprisonment and made an order permanently excluding him from French territory.

12. From June to November 1995 the applicant was held in the national public hospital at Fresnes. A medical certificate drawn up on 30 November 1995 during that period of detention reads as follows:

"I, the undersigned Dr Bouchard, certify that Mr [B.B.], who was born on 27 January 1954, is suffering from the HIV infection and acute immunosuppression. He needs an antiviral treatment that is currently available only in Europe and North America. Suspension of the order permanently excluding him from French territory would be desirable on humanitarian grounds. Medical follow-up has been organised at the Pitié Salpêtrière."

13. Between November 1995 and 27 March 1996 the applicant served his sentence at Fleury-Mérogis Prison, where Dr Lemaire certified that:

“Mr [B.B.] is suffering from an illness whose prognosis is currently reserved and which requires biological and clinical follow-up at very regular intervals. Treatment has been started which must under no circumstances be interrupted. Mr [B.B.] is receiving treatment and will continue to do so after his release in a specialised department of the Paris public-health service.”

14. Meanwhile, on 30 January 1996 the Paris Court of Appeal had upheld the decision of the court below to acquit the applicant of some of the offences and reduced his sentence to eighteen months’ imprisonment, but had upheld the permanent exclusion order.

B. The procedure for the applicant’s deportation

1. The decision to expel the applicant to the Democratic Republic of Congo

15. The applicant was released on 27 March 1996. That same day the prefect of the Essonne *département* made an administrative order for the applicant’s detention so that the permanent exclusion order could be enforced. He advised the applicant that he would be deported to his country of origin on a flight departing at 11 p.m. on 2 April.

16. On 28 March 1996 the judge delegated by the President of Évry *tribunal de grande instance* ordered that the applicant should remain in detention until 2 April 1996.

17. On the same day the applicant appealed against that order to the Paris Court of Appeal, which on 30 March 1996 upheld the order for the applicant’s continued detention on the following grounds:

“Neither the appellant’s condition nor the existence of a permanent exclusion order (section 28 *bis* of the Ordinance of 2 November 1945) constitute sufficient grounds to justify as an exceptional measure making a compulsory residence order if no passport or other proof of identity has been produced...

Order upheld.”

2. Compulsory residence order

18. On 1 April 1996 the applicant’s representative applied for a compulsory residence order to be made, to which the Minister of the Interior acceded on 4 April, requiring the applicant to reside at a designated address in Paris.

3. Applications for the prefect's decision to be suspended and quashed

19. Mr B.B. had made several applications to the Versailles Administrative Court for a stay of execution of the prefect's decision of 27 March 1996. He had also sought an order suspending that decision or quashing it.

20. On 4 July 1996 the Versailles Administrative Court ordered that execution of the prefect's decision be suspended for three months, holding:

"The documents on the case file show that Mr [B.B.]'s condition requires treatment that would not be available to him in Zaïre. It follows that the prefect made a clear error of judgment by choosing, further to the permanent exclusion order made against Mr [B.B.] by the Paris Court of Appeal on 30 January 1996, Zaïre as the country of destination.

..."

21. On 26 September 1996 it quashed the prefect's decision of 27 March 1996 for the following reasons:

"The documents on the case file show, firstly, that Mr [B.B.] is in the advanced stages of a serious illness causing a substantial loss of immunity whose progression can only be arrested by appropriate treatment and, secondly, that such treatment is unavailable in his country of origin to which he must be deported under the impugned decision. It follows that the prefect of the Essonne *département* made a clear error in his assessment of the consequences which the impugned decision could have on the applicant's personal situation.

It follows from the foregoing that the impugned decision must be quashed. Consequently, the application for a stay of execution of that decision has become devoid of purpose."

4. Applications for rescission of the exclusion order

22. On 26 February and 12 April 1996 Mr B.B. wrote to the public prosecutor at the Paris Court of Appeal requesting that the exclusion order be rescinded owing to the seriousness of his condition.

On 17 March 1997, as he had received no reply from the public prosecutor, the applicant repeated his request for the exclusion order to be rescinded. That request will be heard on 8 September 1998.

C. The applicant's immigration status since the Commission's report of 9 March 1998

23. On 9 April 1998 the Minister of the Interior made a compulsory residence order pursuant to section 28 of Ordinance no. 45-2658 of 2 November 1945, as amended (see paragraph 27 below). That order, which

rescinded the compulsory residence order made on 4 April 1996 (see paragraph 18 above), provided as follows:

“Having regard to the judgment of the Paris Court of Appeal of 30 January 1986 in which an order was made against Mr [B.B.], a national of the Democratic Republic of Congo, ... permanently excluding him from French territory for an offence under the drug-trafficking legislation,

Having regard to the new information that has been obtained;

Considering that Mr B.B. is not currently able to leave French territory;

Having regard to the compulsory residence order made against the above-named on 4 April 1996;

ORDERS

ARTICLE 1: The compulsory residence order referred to above is rescinded.

ARTICLE 2: Until he is able to comply with the order made against him, the above-named shall reside where required to by the prefect of the Val d’Oise *département*.

ARTICLE 3: In that *département* he shall report periodically to the police or gendarmerie in accordance with conditions to be laid down by decree of the prefect of the Val d’Oise *département*.

...”

24. On 9 April 1998 the Minister of the Interior also wrote to the prefect of the Val d’Oise *département* and to the prefect of the Paris *département* to give them instructions as to how his decision was to be enforced. His letter to the former read as follows:

“Further to your fax and the telephone conversations referred to in the reference to this letter, I would inform you that, in view of Mr [B.B.]’s personal circumstances, I have today issued an order requiring him to reside in your *département*, where he is now living, instead of at his Paris home. You will find enclosed for service and enforcement an official copy of that order. Please send me a formal note to confirm that service has been effected. Would you please also provide Mr B.B. with any safe conduct that he may need to enable him to attend the Salpêtrière Hospital in Paris, where he is being treated.”

D. The applicant’s condition since the Commission’s report was adopted

25. A medical certificate dated 29 May 1998 contains the following conclusions:

“I, the undersigned, doctor of medicine, certify that Mr [B.B.], who was born in Kinshasa on 27.01.54, has been receiving regular treatment in this department for infection with the HIV virus compounded by a Kaposi skin disease that is currently progressive. That disease now makes it necessary to restart chemotherapy with a combination of Adriamycin-Vincristine-Bleomycin. His HIV infection is now insufficiently arrested by antiretroviral triple therapy combining Stavudine-Lamivudine-Indinavir, as he presents a large viral load of 100,000 copies/ml and acute immunosuppression with lymphocytes CD4 at 25/mm³.

Mr [B.B.]’s clinical, biological, immunological and virological condition therefore means that he must attend a specialised service as regularly as possible and that he be given care and treatment that is unavailable in his country of origin.

Dr Valantin – Pitié-Salpêtrière Hospital.”

E. Situation in the Democratic Republic of Congo

26. The applicant has produced a number of medical certificates referring to the fact that it is impossible for his illness to be treated in his country of origin. In a report of 28 January 1997 on the situation in what was formerly Zaïre, the Commission on Human Rights of the Economic and Social Council of the United Nations noted:

“Statistics show that no progress has been made; instead, the situation has worsened for lack of appropriate policies... A study carried out by the Association for the Protection of the Local Heritage of the Bas-Fleuve reported that in this region, in addition to many epidemic illnesses ..., there is a serious ... Aids problem and a lack of effective, realistic official programmes to combat that disease...”

II. RELEVANT DOMESTIC LAW

A. Ordinance no. 45-2658 of 2 November 1945

27. The applicant's situation is governed by Ordinance no. 45-2658 of 2 November 1945 on conditions of entry and residence of aliens, as amended by Law no. 93-1027 of 24 August 1993. The relevant provisions, in the wording applicable at the date the order excluding the applicant from French territory was made, are as follows.

Section 27 *bis*

“An alien who is the subject of a deportation order or who has to be removed from France shall be sent to:

(1) the country of which he is a national unless the French Office for the Protection of Refugees and Stateless Persons or the Refugee Appeals Board has granted him refugee status or has not yet ruled on his application for asylum; or

(2) a country which has delivered him a travel document which is currently valid; or

(3) a country which he may lawfully enter.

An alien shall not be sent to a country in which he shows that there is a danger that he will lose his life or liberty or that he will there be exposed to treatment contrary to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.”

Section 28

“An alien subject to a deportation order or an order for his removal who, by showing that he can neither return to his country of origin nor travel to any other country, proves that it is impossible for him to leave France may, by way of derogation from section 35 *bis*, be ordered to reside in a specified place where he must report to the police and the gendarmerie at regular intervals.

A like measure may be taken in cases of urgent necessity against aliens whom it is proposed to deport. In such cases the measure shall not last for more than one month.

The decision shall be taken by decree of the Minister of the Interior if deportation was ordered by the Minister of the Interior or a court exclusion order was made and by decree of the State representative in the *département* or the prefect in Paris in cases concerning removal or exclusion under section 22 or deportation under the third paragraph of section 23. Where deportation is envisaged the decision shall be taken by the authority that is competent to order deportation.

Aliens who do not take up residence where required within the prescribed time-limit or who subsequently leave the stipulated place of residence without permission from the Minister of the Interior or the State representative in the *département* or the prefect in Paris, as the case may be shall be liable on conviction to three years’ imprisonment.”

Section 28 *bis*

“An application to have an exclusion order lifted or a deportation or removal order rescinded that is made after the time allowed for an administrative appeal has expired may only be granted if the foreign national is resident outside France. This provision shall not, however, apply while the foreign national is serving an immediate custodial sentence in France or is the subject of a compulsory residence order made under section 28.”

28. Ministerial Circular of 8 February 1994 on the application of the Law of 24 August 1993, in particular, the part concerning compulsory residence orders, reads as follows:

“... I draw your attention to the need to use the power to make compulsory residence orders sparingly. It must remain clear that compulsory residence is an exceptional and provisional measure. It must not be resorted to through inability on the part of the authorities to ensure compliance with a deportation order, but because it is objectively impossible for the alien to leave. You must therefore make a compulsory residence order only in the following cases: ... (3) cases in which the alien establishes that he will be exposed in the country of destination to ill-treatment or that his life or liberty will be at risk there (new section 27 *bis* of the Ordinance).

Under no circumstances must a compulsory residence order following an order for removal be made for any length of time. It is necessary to avoid creating a category of ‘tolerated’ aliens whose papers will be considered to be in order on checks, but who are deprived of any prospect of integration and normal life in France. The monthly statistics on removal orders shall be supplemented by statistics on the number of residence orders you make and the number of such orders you rescind...”

29. Section 12 *bis* of the Ordinance of 2 November 1945, as worded following the Law of 11 May 1998, provides:

“Unless [the alien’s] presence constitutes a threat to public order, the temporary residence permit bearing the annotation “private and family life” shall be delivered as of right to:

...

(11) Aliens habitually resident in France whose condition requires medical attention without which they may suffer exceptionally serious harm provided that no appropriate treatment is effectively available to them in their country of origin...”

B. The Criminal Code

30. Article 55-1 of the Criminal Code provides:

“...

Any person who has incurred a disability ... as an automatic consequence of a criminal conviction or on whom such disability ... has been imposed by the convicting court in its judgment ... may request the court which convicted him ... to rescind the disability ..., in whole or in part, or to vary its duration.”

31. Article 131-30 of the New Criminal Code provides:

“When provided for by law, an order of exclusion from French territory, either permanently or for a maximum period of ten years, may be made against any alien found guilty of a serious crime (*crime*) or other major offence (*délit*).

An exclusion order entails *ipso iure* the convicted person's removal, after serving any term of imprisonment that may have been imposed.

..."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr B.B. applied to the Commission on 2 April 1996. He relied on Article 3 of the Convention, complaining that if he was deported to what was formerly Zaïre that would amount to treatment contrary to Article 3 of the Convention as it would reduce his life expectancy because he would not receive the medical treatment his condition demanded. He also argued that his deportation would infringe his right to respect for his family life as guaranteed by Article 8 of the Convention.

33. The Commission declared the application (no. 30930/96) admissible on 8 September 1997. In its report of 9 March 1998 (Article 31), it expressed the opinion that there would be a breach of Article 3 (twenty-nine votes to two) and that no separate issue arose under Article 8. The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment¹.

AS TO THE LAW

34. The Government invited the Court to strike the case out of the list. They relied on two factors of which the Commission had been unaware since the relevant information had been communicated to it on the day its report had been adopted: the Versailles Administrative Court had on 26 September 1996 quashed the prefect of the Essonne *département's* decision to enforce the order excluding the applicant from French territory (see paragraph 21 above) and a compulsory residence order had been made against the applicant on 9 April 1998 (see paragraph 23 above). Those measures meant that the applicant no longer risked being deported to the Democratic Republic of Congo and was no longer a "victim". The Government invoked Rule 49 § 2 of Rules of Court A, which provides:

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

“When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary, the Parties, the Delegates of the Commission and the applicant, strike the case out of the list.”

35. The applicant invited the Court to proceed with the consideration of the case. He said, firstly, that the Government’s arguments were not new as, when on 8 September 1997 the Commission had ruled on the admissibility of the application, the Versailles Administrative Court had already delivered the judgment relied on by the Government in support of their request for the case to be struck out. In addition, the fact that an order had been made requiring the applicant to reside in the Val d’Oise *département* had not changed his situation as he had already been subject to such an order since 4 April 1996 (see paragraph 18 above).

On the contrary, he remained bound by the court order permanently excluding him from French territory (see paragraph 11 above), which, by law, entailed his being deported to his country of origin. The Commission had accordingly been right to consider in its decision on admissibility that “the act of the authorities of the respondent State adversely affecting the applicant is the order made by the Bobigny *tribunal de grande instance* and upheld by the Paris Court of Appeal on 30 January 1996 permanently excluding him from French territory”. The compulsory residence order was simply a step in the implementation of the court order excluding him from French territory and could be rescinded at any time by the Minister of the Interior.

The fact that a compulsory residence order had been made did not therefore mean that he had lost the *locus standi* he had had and continued to have as a “victim”. That measure was not appropriate in view of the seriousness of his condition as it necessitated his filling in applications for a safe conduct to attend the Salpêtrière Hospital in Paris and reporting at regular intervals to the gendarmerie and the police. Only a residence permit, even if only temporary, would give him full rights under the social welfare system. In that connection, the Law of 11 May 1998 amending the Ordinance of 2 November 1945 (see paragraph 29 above) constituted a definite improvement in the protection of those aliens whose condition required essential medical attention, and should have been applied in the applicant’s case.

36. The Delegate of the Commission shared the Government’s view that the fact that a compulsory residence order had been made on 9 April 1998 meant that the applicant was no longer a “victim”, since no steps were being taken to expel him to his country of origin and he continued to receive treatment in France.

37. The Court notes that there has been no friendly settlement or arrangement in the instant case. The compulsory residence order made on 9 April 1998 was unilateral in character and issued by the French authorities after the Commission had adopted its report. It considers, however, that the order constitutes an “other fact of a kind to provide a solution of the matter”.

In his initial application to the Convention institutions, the applicant’s main argument was that if he was deported to what was formerly Zaïre there would be a considerable risk of his being exposed to treatment which was contrary to Article 3 of the Convention, as he would not be able to receive in his country of origin the treatment his serious medical condition required.

The Court accepts that the compulsory residence order dated 9 April 1998 (see paragraph 23 above) does not signify that there has been a change in the applicant’s situation since it merely rescinds a similar measure imposed in April 1996 in order to restore it with effect in a different *département*. It appears, however, that as regards Article 3 of the Convention the measure reflects, through its continuity and duration, the French authorities’ intention to allow Mr B.B. to receive the treatment his present condition requires and to guarantee him, for the time being, the right to remain in France. In that connection, it should be noted that in their memorial of 16 July 1998 the Government indicated that they “[had] not shown any intention of actually deporting Mr B.B.”.

The Court sees that as tantamount to an undertaking by the French Government not to expel the applicant to his country of origin, the risk of a potential violation therefore having ceased, at least until such time as any new factors emerge justifying a fresh examination of the case.

38. The applicant had also complained of a violation of Article 8 in that, if deported, he would be deprived of the moral support afforded by the presence of his family and friends.

The Court considers that that complaint concerns the effects of enforcement of the exclusion order and does not raise any independent issue requiring separate examination.

39. The Court sees no reason of public policy to proceed with the case (Rule 49 § 4 of Rules of Court A). In that connection, it points out that it has had occasion to rule on the risk that a person suffering from Aids would run if expelled to his country of origin in which he would be unable to receive the medical care that was absolutely necessary for his condition (see the *D. v. the United Kingdom* judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 793–94, §§ 51–53). In that decision, the Court explained the nature and extent of the obligations under the Convention.

40. Accordingly, it is appropriate to strike the case out of the list. The Court, however, reserves the power to restore it to the list if new circumstances arise justifying such a measure (see, *mutatis mutandis*, the *Rubinat v. Italy* judgment of 12 February 1985, Series A no. 89, p. 23, § 17, and the *Pressos Compania Naviera S.A. and Others v. Belgium* judgment of 3 July 1997 (*Article 50*), *Reports* 1997-IV, pp. 1297–98, § 14).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides, subject to the reservation set out at paragraph 40 above, to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 55 § 2, second sub-paragraph, of Rules of Court A on 7 September 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the concurring opinion of Mr Pettiti is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

The Court has struck the case out of the list on the basis and in the light of the Government's undertaking not to deport Mr B.B. The Court has not said in the judgment that Mr B.B. has definitively lost *locus standi* as a "victim", as his initial application concerned the exclusion order with all its consequences with regard to both Article 3 and Article 8.