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

FIRST SECTION

CASE OF HÉNAF v. FRANCE

(Application no. 65436/01)

JUDGMENT

STRASBOURG

27 November 2003

FINAL

27/02/2004

In the case of Hénaf v. France,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr J.-P. COSTA,
Mr G. BONELLO,
Mrs F. TULKENS,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 24 January 2001 and 6 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 65436/01) 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 French national, Mr Albert Hénaf, ("the applicant"), on 13 November 2000.

2. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged that he had been subjected to treatment contrary to Article 3 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

6. By a decision of 24 January 2002 the Chamber declared the application admissible, while noting that the objections raised by the Government were inseparable from the examination of the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, who was born in 1925, is currently in prison in Nantes.

8. During the past few years he has been convicted of various criminal offences. In particular, he was sentenced on 9 November 1992 by the Assize Court for the *département* of Cher to ten years' imprisonment for armed robbery; on 2 September 1998 by the Bernay Criminal Court to six months' imprisonment for making off without payment; on 14 January 1999 by the Nevers Criminal Court to five years' imprisonment for armed robbery; and on 20 January 1999 by the Rouen Court of Appeal to six months' imprisonment for making off without payment. He was due for release from September 2001 onwards according to him, and from 17 February 2002 onwards according to the Government.

9. In February 1998 the applicant was also sentenced to six months' imprisonment by the Nevers Criminal Court for failing to return to prison on time after his last period of leave in 1998, having complied with the arrangements on the previous four occasions. The experts who examined him on the subject concluded that "at the material time" he had been suffering from a "psychological disorder" that had temporarily "impaired his judgment" and that prison could not be "therapeutic" for him, especially in view of his advanced age.

10. The applicant subsequently underwent a medical examination in prison and was found to have swollen glands in the throat area. The relevant service accordingly prescribed medical treatment. It was decided that the applicant would undergo an operation on 8 November 2000 after being taken to hospital on 7 November 2000 at 2.30 p.m.

11. On 6 November 2000 the governor of Eysses Prison informed the prefect that the prisoner needed to be taken to hospital and requested the presence of a police escort to supervise and guard him throughout his stay. As regards the security risk, the prison staff were issued with instructions that the applicant was to be kept under normal and not heightened supervision, left to the discretion of the senior escorting officer but in principle not requiring the permanent use of handcuffs and restraints.

12. On 7 November 2000, the day before the operation, the applicant was transferred, in handcuffs, to Pellegrin Hospital in Bordeaux in a prison van. Two police officers were waiting for him at the hospital in order to supervise and guard him throughout his time there. For the rest of the day the applicant remained handcuffed but not shackled.

13. During the night, a restraint was used on the applicant, consisting of a chain attaching one of his ankles to the bedpost. The Government assert that the restraint left him considerable freedom to move about in the bed,

whereas the applicant maintains that the tension of the chain made any movement difficult or painful and sleep impossible.

14. On 8 November 2000, in the morning, the applicant stated that, if he could not be kept in humane conditions in hospital, he would prefer to be operated on once he had been released from prison. After a meeting with the hospital staff, he returned to prison on the same day at 11.45 a.m.

15. On 9 November 2000 the applicant lodged a criminal complaint, together with an application to join the proceedings as a civil party, with the senior investigating judge at the Agen *tribunal de grande instance*, alleging "serious ill-treatment", "assault" and "torture". In the complaint, lodged against the two police officers who had guarded him while he was in hospital, he alleged a violation of Article 803 of the Code of Criminal Procedure and of Article 3 of the Convention, on account of the use of a restraint during the night of 7 to 8 November 2000.

16. In an order of 16 November 2000, served on 24 November, the senior investigating judge set the amount of the security payable for costs at 6,000 French francs.

17. On 24 November 2000 the applicant appealed against that order in a registered letter with acknowledgment of receipt to the senior registrar of the Agen *tribunal de grande instance*, and also applied to the legal aid office on account of his limited resources. On the same day, he informed the senior investigating judge that he was appealing because his means were insufficient.

18. The application for legal aid was registered on 8 December and refused on 15 December 2000. In an order of 23 March 2001 the President of the Agen *tribunal de grande instance* confirmed the refusal on the following ground:

> "The Code of Criminal Procedure expressly reserves the use of restraints for persons who are likely to attempt to abscond. That is so in the case of a prisoner who is outside the prison compound."

19. In an order of 15 May 2001, the senior investigating judge declared the applicant's complaint inadmissible for failure to pay the security.

20. In the meantime, on 4 April 2001, the Investigation Division of the Agen Court of Appeal had declared the appeal against the order for payment of a security inadmissible for failure to comply with Article 503 of the Code of Criminal Procedure, by which an appeal by a prisoner must be lodged through the prison governor.

21. On 11 April 2001 the applicant appealed on points of law against that judgment. The proceedings are currently pending before the Court of Cassation.

22. Having been released on 1 October 2001 after completing his sentence, the applicant has subsequently been imprisoned in the context of separate proceedings.

II. RELEVANT DOMESTIC LAW

23. Article 803 of the Code of Criminal Procedure provides:

> "No one may be forced to wear handcuffs or restraints unless he is considered either a danger to others or to himself, or likely to attempt to abscond."

24. A general circular of 1 March 1993 states:

> "... that provision applies to all members of an escort, regardless of whether the person concerned is being held in police custody, brought to court, detained pending trial or detained following conviction.
>
> It is for the public officials comprising the escort to assess, having regard to the circumstances of the case, to the age of the person under escort and to any information obtained about his character, whether there is evidence of any of the dangers which alone may justify the use of handcuffs or restraints, in accordance with the legislature's intention.
>
> Except in special circumstances, ... persons whose mobility is impaired on account of their age or health ... are unlikely to pose the dangers referred to in the Law ..."

THE LAW

25. The applicant complained, on account of his age and state of health, about the conditions of his stay in hospital the day before an operation. He relied on Article 3 of the Convention, which provides:

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

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

A. The parties' submissions

26. The Government submitted that the application was premature in that the appeal on points of law lodged by the applicant in April 2001 against the Investigation Division's judgment was still pending before the Court of Cassation. They observed that a criminal complaint together with an application to join the proceedings as a civil party was in principle a remedy which had to be used by persons claiming to be the victims of ill-treatment (citing the following judgments: *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V, and *Caloc v. France*, no. 33951/96, ECHR 2000-IX). They considered that it had not been established that the applicant had an arguable claim that there had been a violation of Article 3 and that,

in any event, he had not complied with the statutory procedure for lodging civil-party applications. On the last point, the Government noted that the applicant could have been exempted from the statutory requirement to pay a security if he had so requested in view of his financial position, or if he had obtained legal aid before lodging his complaint (referring, by converse implication, to *Aït-Mouhoub v. France*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII). Furthermore, because the applicant had appealed, only the Investigation Division had been competent to determine the issue, but it had had no option but to declare the appeal inadmissible. In the present case, which differed from *Selmouni* (cited above) in that, among other things, it related to a stage of the proceedings prior to the opening of a judicial investigation, a fresh complaint and civil-party application could in any event be lodged until prosecution of the alleged offences became time-barred. Furthermore, no investigation could have been conducted, since, by failing to pay the security, the applicant had not validly set the criminal proceedings in motion.

27. As to the refusal of legal aid, the Government considered it justified because the application was manifestly ill-founded (see *Gnahoré v. France*, no. 40031/98, ECHR 2000-IX, and *Charlier v. France* (dec.), no. 37760/97, 7 November 2000).

28. The applicant stated that the prison clerk had asked him to sign the form for his appeal and that he had therefore complied with the requirements of the Code of Criminal Procedure. He further submitted that the Court of Cassation would be bound to dismiss his appeal. He disputed that he had failed to inform the judge of his income, since he had indicated his lack of resources to him in a registered letter with acknowledgment of receipt on the same day on which the order for payment of a security had been served. As to whether he should have applied for legal aid before or after lodging the complaint, he regarded the issue as secondary, justified the error by his ignorance of the law and criticised the refusal to grant him legal aid, which had prevented him from being assisted by a qualified lawyer and having access to justice.

29. He nonetheless submitted that there were no effective domestic remedies, given that the Government's arguments tended to show that the events in issue were lawful.

B. The Court's assessment

30. The Court points out that the purpose of Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and *Remli v. France*, judgment of 23 April 1996, *Reports* 1996-II, p. 571,

§ 33). Thus, the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic bodies, and in compliance with the formal requirements and time-limits laid down in domestic law (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

31. However, in the instant case, the Court notes that, although the applicant lodged a criminal complaint and civil-party application with the relevant senior investigating judge, he did not apply to be exempted from payment of the security at the time when he lodged the complaint, did not give details of his financial means, did not apply for legal aid until after he had appealed against the order for payment of a security and, lastly, was unable to show that his appeal to the Investigation Division was valid.

32. The Court reiterates, however, that the only remedies Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, the following judgments: *Vernillo v. France*, 20 February 1991, Series A no. 198, pp. 11-12, § 27; *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV, p. 1210, § 66; *Dalia v. France*, 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38; and *Selmouni*, cited above, § 75). In addition, according to the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A no. 40, pp. 18-19, §§ 36-40).

The Court would emphasise that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism (see *Cardot*, cited above, p. 18, § 34). It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see *Van Oosterwijck*, cited above, pp. 17-18, § 35). This means, among other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants (see *Akdivar and Others*, cited above, p. 1211, § 69, and *Selmouni*, cited above, § 77).

33. As regards the shortcomings on the applicant's part, the Court notes, firstly, that he had to defend himself and was, moreover, in a vulnerable

position, being imprisoned and in poor health throughout the proceedings in question. He applied for legal aid on 24 November 2000, the same day on which the order for payment of the security was served on him. Furthermore, not being a lawyer and not having legal assistance, the applicant may not have known that an application to be exempted from payment of a security had to be made independently of an application for legal aid. In addition, he may have been misled by the wording of the order for payment of the security, which could have led him to believe that exemption from the security was conditional on legal aid being granted.

34. The Court accordingly considers that the shortcomings on the applicant's part were due to the particular circumstances of the case.

35. Firstly, the Court observes that the Government, like the legal aid office, considered that the use of restraints had amounted to normal application of national legislation. Consequently, even supposing that the civil-party application had been declared admissible, or would be declared admissible in the context of a fresh complaint, such a remedy was probably bound to fail, in view of the opinion shared by the Government and the legal aid office. In those circumstances, it is of little consequence that the applicant's complaint was declared inadmissible or that he did not lodge another one.

36. Furthermore, seeing that the applicant's complaint relates to Article 3 of the Convention, the Court reiterates that where an individual has an arguable claim that there has been a violation of Article 3 (or of Article 2), the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see, among other authorities, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102, and *Selmouni*, cited above, § 79). The Court considers that the applicant's allegations – which, as was clear from the undisputed fact that he was shackled to his hospital bed the night before his operation, amounted at the very least to an arguable claim – were sufficiently serious, both in respect of the alleged facts and the status of the persons implicated, to warrant such an investigation.

37. The Court is obliged to conclude that the domestic authorities remained passive. Contrary to what the Government maintain, it cannot be said that it was impossible to carry out any investigations because, by not paying the security, the applicant did not validly set criminal proceedings in motion. Under French law, responsibility for conducting a prosecution lies with the public prosecutor's office. While the lodging of a criminal complaint and civil-party application may set criminal proceedings in motion in spite of the prosecuting authorities' inaction or refusal to prosecute, it does not deprive those authorities of their powers in this area. In any event, the Court reiterates that, even where a preliminary investigation is conducted and a judicial investigation opened on the

initiative of the prosecuting authorities, it cannot be ruled out that in certain circumstances an applicant may be dispensed from the obligation to exhaust domestic remedies despite the fact that the domestic proceedings are still pending (see *Selmouni*, cited above).

38. Having regard to the foregoing, the Court considers that the domestic authorities did not take the positive measures required in the circumstances of the case to ensure that the procedural action referred to by the Government was effective.

39. Accordingly, given the lack of a convincing explanation by the Government as to the "effectiveness" and "adequacy" of the remedy they relied on, the Court considers that the remedy available to the applicant was not, in the instant case, an ordinary remedy sufficient to afford him redress for the violation he alleged. While emphasising that its decision is limited to the circumstances of this case and is not to be interpreted as a general statement to the effect that a criminal complaint together with a civil-party application is never a remedy that must be used in respect of alleged ill-treatment in police custody, the Court finds that the Government's objection on the ground of failure to exhaust domestic remedies cannot be allowed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. The parties' submissions

40. With regard to the conditions in which the applicant had been transferred to and kept in hospital, the Government noted, in particular, that the applicant had only been handcuffed while being escorted there. Furthermore, an escort comprising two police officers had been waiting for him at the hospital to supervise and guard him during his stay in the ear, nose and throat department. The written instructions by the prison governor had recommended normal and not heightened supervision, in principle not requiring the permanent use of handcuffs and restraints. Accordingly, the decision to shackle the applicant had been the sole responsibility of the senior escorting officer, who had decided to apply a restraint on him during the night. The measure had been justified on security grounds, in the absence of a secure room, in order to avoid any risk of his absconding or committing suicide. Furthermore, with a view to allowing the applicant a degree of privacy and sparing him the constant presence of police officers during the night, the escort had left his room but, in return, the applicant had been shackled.

41. The Government observed that the applicant had not complained about the conditions in which he had been transferred to hospital while handcuffed, either in his complaint and civil-party application or in his application to the Court.

42. The Government disputed that Article 3 was applicable, arguing that the acts in issue had not attained the minimum level of severity required under the Convention (see *Assenov and Others*, cited above). Lastly, they referred to cases in which the Court had held that handcuffing did not amount to a violation of Article 3 (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, and *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII). In any event, the use of handcuffs, provided for in Article 803 of the Code of Criminal Procedure, had been justified in the instant case by the danger posed by the applicant and the risk of his absconding, in view of his conviction in February 1998 for escaping from prison.

43. The applicant pointed out that he was not complaining about the use of handcuffs and chains during his transfer to hospital – that being a routine if abnormal and degrading practice – since he had simply suffered embarrassment and only mental rather than actual torture.

44. As to his being shackled to his hospital bed, the applicant submitted that this was not warranted by his criminal record and indicated, among other things, that, after sixteen and a half years of successive sentences, he had had only a few more weeks to serve in prison. There had therefore been no risk of his absconding, especially in view of his age and his limited scope for movement with the escort officers present.

45. The applicant explained in particular that, after being transferred to Pellegrin Hospital in handcuffs, including while on the hospital premises in full view of the public, he had remained in bed all day without being shackled. In the evening the police had attached his foot to the bed with a tight chain, thus preventing any movement or sleep. In his submission, this had been done so that the police officers guarding him could sleep. He pointed out that he had not refused the operation but had simply stated that, if he could not be looked after in humane conditions, he would resolve to be operated on once he was released from prison.

46. For a hospital transfer that was supposed to be normal, according to the instructions that had been issued, the use of an extremely tight chain to attach his ankle to the bed, causing him pain each time he moved, had certainly been an abnormal measure entailing an unbearable degree of torture. He reaffirmed that he had voiced his opposition as soon as the restraint had been applied and had stated that he was in pain.

B. The Court's assessment

47. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among

other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III).

Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers*, cited above, § 74).

48. Handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, the danger of the person's absconding or causing injury or damage (see *Raninen*, cited above, p. 2822, § 56), and the particular circumstances of a transfer to hospital for medical treatment (see *Mouisel v. France*, no. 67263/01, § 47, ECHR 2002-IX).

49. In the instant case, the Court notes, firstly, as the Government did, that the applicant's complaint under Article 3 of the Convention concerns only the fact that he was shackled to his hospital bed, and not the manner in which he was taken from the prison to hospital.

50. With regard to the danger posed by the applicant, the Court notes that he had several previous convictions but that there was no explicit reference to acts of violence. In particular, he was granted four periods of prison leave which proceeded normally. Admittedly, following the fifth such period in 1998, he failed to return to prison. However, psychiatric experts attributed his conduct on that occasion to a “psychological disorder” that had temporarily impaired his judgment. Since that single incident, he has not shown any further signs of disorders. Although the 1998 incident cannot be ignored, it was non-violent and isolated.

51. The Court considers that it had not been established that the applicant posed a danger at the material time. That is sufficiently clear from the prison governor's written instructions to the effect that the applicant was to be transferred to and kept in hospital under normal and not heightened supervision. Furthermore, the applicant remained in bed without being shackled during the day and this did not raise a security issue.

52. In any event, the danger allegedly posed by the applicant cannot justify the fact that he was attached to his hospital bed the night before his operation, especially as two police officers remained on guard outside his room.

53. As to the Court's conclusion in *Herczegfalvy*, cited above, in which the shackling of a patient in a psychiatric hospital was considered “worrying” but justified on medical grounds, it cannot be transposed to the instant case or used against the applicant. In the present case, apart from the different context in that the hospital was not a psychiatric one and there was proper police supervision outside the applicant's room, no medical grounds were ever cited.

54. It remains to be determined whether such acts fall within the ambit of Article 3 and, if so, what level of severity they attained.

55. In this connection, the Court reiterates that, "having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'" (see the following judgments: *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, pp. 15-16, § 31; *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 40, § 102; and *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, pp. 26-27, § 71), it has held: "... certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (see *Selmouni*, cited above, § 101). As that statement applies to the possibility of a harsher classification under Article 3, it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity.

56. In the instant case, having regard to the applicant's age, his state of health, the absence of any previous conduct giving serious cause to fear that he represented a security risk, the prison governor's written instructions recommending normal and not heightened supervision and the fact that he was being admitted to hospital the day before an operation, the Court considers that the use of restraints was disproportionate to the needs of security, particularly as two police officers had been specially placed on guard outside the applicant's room.

57. In any event, the Court notes that the general circular of 1 March 1993 concerning Article 803 of the Code of Criminal Procedure expressly states: "Except in special circumstances, ... persons whose mobility is impaired on account of their age or health ... are unlikely to pose the dangers referred to in the Law ..." (see paragraph 24 above). It should also be pointed out that, in its report to the French government on its visit to France from 14 to 26 May 2000, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommended, among other things, that the practice of attaching prisoners to their hospital beds for security reasons be prohibited (see *Mouisel*, cited above, §§ 28 and 47).

58. Lastly, as regards the argument concerning the desire to preserve the applicant's privacy, the Court finds it scarcely conceivable that privacy can really be enjoyed by a person chained to his bed (see paragraph 40 above).

59. In the final analysis, the Court considers that the national authorities' treatment of the applicant was not compatible with the provisions of Article 3 of the Convention. It concludes in the instant case that the use of restraints in the conditions outlined above amounted to inhuman treatment.

60. There has therefore been a violation of Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

62. The Court notes that neither the Government nor the applicant expressed a view. There is no cause for it to examine the question of its own motion.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 3 of the Convention;

3. *Holds* that it is not necessary to apply Article 41 of the Convention in the instant case.

Done in French, and notified in writing on 27 November 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President