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

SECOND SECTION

CASE OF BADER AND KANBOR v. SWEDEN

(Application no. 13284/04)

JUDGMENT

STRASBOURG

8 November 2005

FINAL

08/02/2006

In the case of Bader and Kanbor v. Sweden,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Mrs D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 18 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 13284/04) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Syrian nationals, Mr Kamal Bader Muhammad Kurdi, Mrs Hamida Abdilhamid Mohammad Kanbor and their two minor children ("the applicants"), on 16 April 2004.

2. The applicants, who had been granted legal aid, were represented by Mr K. Larsson, a lawyer practising in Karlskrona. The Swedish Government ("the Government") were represented by their Agent, Ms E. Jagander, of the Ministry of Foreign Affairs.

3. The applicants alleged that, if deported from Sweden to Syria, the first applicant would face a real risk of being arrested and executed contrary to Articles 2 and 3 of the Convention.

4. The application was allocated to the Fourth 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. The President of the Chamber and subsequently the Chamber decided, on 16 and 27 April 2004 respectively, to apply Rule 39, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the applicants pending the Court's decision.

6. By a decision of 26 October 2004, the Chamber declared the application admissible.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

8. The Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1972, 1973, 1998 and 1999 respectively and are currently in Sweden.

10. They arrived in Sweden on 25 August 2002 and applied to the Migration Board (*Migrationsverket*) for asylum on the following day. The first applicant submitted that he was of Kurdish origin, a Sunnite Muslim, and had lived with his family and worked in Beirut (Lebanon) since 1995. He claimed that in December 1999 he and three of his brothers had been arrested by the Syrian security police and imprisoned in Aleppo (Syria) for nine months because the police wanted information about another brother who had absconded while performing military service in 1998. He further alleged that he had been tortured and ill-treated in prison and had only been released after being hospitalised as a result of the ill-treatment. After his release, he returned to Beirut to stay with his family. Between 2001 and 2002 he was arrested four times by the security police, questioned about his brother's whereabouts and beaten. However, on each occasion, he was released after a few days. In 2002 the applicants moved to Aleppo, where they remained until they left Syria in August 2002.

The applicants stated that they had left Syria legally, flying from Damascus to Turkey and then on to Stockholm. They had travelled using their own passports but had destroyed them upon their arrival in Sweden.

11. On 27 June 2003 the Migration Board rejected the family's application for asylum and their request for residence permits and ordered their deportation to Syria. It noted, firstly, that the general situation of Kurds in Syria was not such as to satisfy the requirements for asylum since, *inter alia*, Kurds who were Syrian nationals had the same rights as all other citizens. Moreover, the majority of the population in Syria were Sunnite Muslims. The Migration Board then found that the applicants had not shown that they risked persecution if they were sent back to Syria. It observed that, except for the first occasion in 1999, the first applicant had been released shortly after each interrogation by the security police. Moreover, as the interrogations had concerned his brother and not himself, the Migration Board considered that he was not personally in need of

protection. In this connection, it noted that the first applicant had not been able to explain why his brother had left the army or why the security police was so interested in him. The Migration Board also observed that the applicants had left Syria legally.

12. The applicants appealed to the Aliens Appeals Board (*Utlänningsnämnden*), relying on the same grounds as they had before the Migration Board and adding that Kurds were being persecuted and discriminated against in Syria. They also claimed that they had paid 6,000 United States dollars for false passports which they had subsequently discarded. Furthermore, the second applicant had been admitted to an emergency psychiatric clinic for three days in July 2003 owing to panic attacks.

13. On 16 September 2003 the Aliens Appeals Board dismissed the appeal on the same grounds as the Migration Board, stating that the new reasons advanced by the applicants did not alter the position. The deportation order was also upheld.

14. The applicants subsequently lodged a new application with the Aliens Appeals Board which was rejected on 27 November 2003.

15. Further, during the autumn of 2003, the District Court (*tingsrätten*) of Blekinge convicted the first applicant of threatening behaviour against his four-year-old daughter and a neighbour. It gave him a suspended sentence and made an order for his deportation from Sweden. However, he appealed to the Court of Appeal (*hovrätten*) of Skåne and Blekinge, which on 24 February 2004 upheld the conviction and the suspended sentence but quashed the deportation order as it did not consider that the offence in itself merited deportation.

16. On account of the District Court's decision on deportation, the police authorities had begun preparations to enforce it. In that connection, the Swedish embassy in Damascus ascertained that the applicants had left Damascus legally on 17 August 2002 using their own passports but had in fact travelled via Cyprus, not Turkey.

17. In January 2004 the family lodged a new application for asylum to the Aliens Appeals Board and requested a stay of execution of the deportation order. They referred to a judgment that had been delivered on 17 November 2003 by the Regional Court in Aleppo which stated that the first applicant had been convicted, *in absentia*, of complicity in a murder and sentenced to death pursuant to Article 535 § 1 of the Syrian Criminal Code.

18. On 9 January 2004 the Aliens Appeals Board granted a stay of execution of the deportation order against the applicants until further notice and requested them to submit an original of the judgment and other relevant documents in support of their application.

19. On 26 January 2004 the applicants submitted to the Aliens Appeals Board a certified copy of the judgment in which it was stated that the first

applicant and his brother had, on several occasions, threatened their brother-in-law because they considered that he had ill-treated their sister and paid too small a dowry, thereby dishonouring their family. In November 1998 the first applicant's brother had shot the brother-in-law, after planning the murder with the first applicant, who had provided the weapon. The Syrian court, which noted that the two brothers had absconded, found them guilty of the charges and sentenced them to death. They were also ordered to pay 1,000,000 Syrian pounds to the victim's family and were deprived of their civil rights and all their assets were frozen. The first applicant was also charged with unlawfully possessing a military firearm, a charge which the Syrian court had instructed the military prosecutor to proceed with. Lastly, the court went on to state: "[T]his judgment has been delivered in the accused's absence. [It] can be reopened." It would appear that the judgment has gained legal force.

20. The applicants also submitted some further documents concerning the proceedings in Syria, including a summons dated 10 August 2003 requiring the first applicant to present himself before the court within ten days, failing which he would forfeit his civil rights and the control of his assets. The first applicant claimed that he had not been involved in the murder as he had been in Beirut at the material time. He also explained that he had, in fact, spent nine months in custody in 1999-2000 on suspicion of complicity in the murder and had been released on bail on 9 September 2000. He insisted that he had not mentioned this before because it concerned the family's honour and his sister's humiliation. The applicant was represented by a lawyer in Syria whose contact details had been provided to the Aliens Appeals Board.

21. On 16 February 2004 the Aliens Appeals Board requested the Swedish embassy in Syria to verify whether the judgment was authentic and, if so, whether it was possible to appeal or to have the case reopened. They further enquired if a reprieve was possible and whether death sentences were normally carried out in Syria.

22. By a letter dated 14 March 2004, the Swedish embassy in Syria informed the Aliens Appeals Board that a local lawyer (*förtroendeadvokat*) they had engaged had confirmed that the judgment was authentic. He had also carried out research into the Syrian criminal law on sentences for murder and manslaughter, the results of which were attached to the embassy's letter.

23. The embassy provided the following information in their letter to the Aliens Appeals Board. According to the local lawyer it was probable (*sannolikt*) that the case would be retried in court once the accused were located and it would then be very likely (*troligt*) that new witnesses would be called and the entire case reheard. Further, the fact that a case was "honour related" was usually considered a mitigating factor leading to a lighter sentence. The embassy said that the lawyer had also stated that it was

not unusual for the Syrian courts to impose the maximum sentence possible when an accused failed to appear for trial after being summoned to do so. It added that, according to their sources, it appeared that the accused had to be present in person in order to obtain a retrial. In this respect, the Syrian judicial system was marked by considerable (*betydande*) arbitrariness and the death sentence was carried out for serious crimes such as murder. However, every execution had to be approved by the President. The embassy had no reliable information about how frequently death sentences were enforced as they were normally carried out without any public scrutiny or accountability. However, the local lawyer had claimed that it was very rare for the death sentence to be imposed at all by the Syrian courts today.

24. On 4 March 2004, in response to the information provided by the embassy, the applicants initially noted that the first applicant was wanted in Syria under the judgment. They then observed that the local lawyer had only given his own opinion on the matter and on what he considered was likely to happen. However, there were no guarantees that the case would be reopened or that the outcome would be different. They also stated that it would now be very difficult for the first applicant to find any witnesses to testify on his behalf and that, since the murdered man's family was very wealthy, they would be able to bribe the prosecutor and witnesses and, for that matter, the judge. The first applicant alleged that the murdered man had not been his brother-in-law, contrary to what had been stated in the Syrian judgment (see paragraph 19 above), but that the man's family had relied on forged documents before the Syrian court, stating that the first applicant's sister had been married to him. Thus, the murder was considered to be of the most serious kind. Furthermore, the fact that the first applicant was of Kurdish origin would also expose him to discrimination by the court and possibly to a harsher sentence. The applicants argued that, in view of the fact that the Syrian legal system was arbitrary and corrupt, they had a well-founded fear that the first applicant would be executed if he were returned to Syria and that the family would thereby be destroyed.

25. On 7 April 2004 the Aliens Appeals Board, by two votes to one, rejected the applicants' request for asylum. The majority considered, on the basis of the local lawyer's research, that it had been established that, if the first applicant returned to Syria, the case against him would be reopened and he would receive a full retrial, at the end of which, if convicted, he would be given a sentence other than death, as the case was “honour related”. Under those circumstances, the majority found that the applicants did not have a well-founded fear and were thus not in need of protection.

26. The dissenting member of the Aliens Appeals Board considered that, having regard to all the facts of the case, the applicants did have a well-founded fear that the first applicant would be executed if returned to Syria and the family should therefore be granted residence permits in Sweden.

27. On 19 April 2004, following the Court's indication under Rule 39, the Migration Board granted a stay of execution of the deportation order until further notice. The stay is still in force.

II. RELEVANT DOMESTIC LAW

28. The basic provisions concerning the right of aliens to enter and remain in Sweden are to be found in the Aliens Act (*Utlänningslagen*, 1989:529). An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (chapter 3, section 4 of the Act). The term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, unwilling to avail him- or herself of protection in that country. This applies irrespective of whether or not persecution is at the hands of the authorities of the country, if the authorities cannot be relied on to offer protection against persecution by private individuals (chapter 3, section 2). By "an alien otherwise in need of protection" (chapter 3, section 3) is meant, *inter alia*, a person who has left the country of his or her nationality because he or she has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

29. In addition, when it comes to enforcing a decision to refuse entry to or to deport an alien, regard must be had to the risk of torture and other inhuman or degrading treatment or punishment. According to a special provision on bars to enforcement (chapter 8, section 1), an alien must not be sent to a country where there are reasonable grounds (*skälig anledning*) for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

III. CAPITAL PUNISHMENT IN SYRIA

30. According to Article 535 of the Syrian Criminal Code, a person convicted of intentionally killing another person will be sentenced to capital punishment.

31. In its Concluding Observations on the third periodic report by Syria under Article 40 of the International Covenant on Civil and Political Rights (CCPR/CO/84/SYR, dated 9 August 2005), the United Nations Human Rights Committee expressed its concern about the nature and number of offences which carried the death penalty in Syria. It was further "deeply concerned at the *de facto* reinstitution of death sentences and executions in 2002" and noted that Syria had submitted insufficient information relating

to the numbers of persons whose death sentences had been commuted, and the number of persons awaiting execution.

32. According to Amnesty International (Country Reports 2005: Syria), the Syrian authorities had, on 5 July 2004, announced that sixteen people had been executed in 2002 and eleven in 2003. Moreover, on 17 October 2004, it was reported that two persons had been executed in Aleppo, but no further details had been made public.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION

33. The applicants complained that, if deported from Sweden to Syria, the first applicant would face a real risk of being arrested and executed, as the death sentence against him in Syria had gained legal force. They relied on Articles 2 and 3 of the Convention, the relevant parts of which provide:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3

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

A. The parties' submissions

1. The applicants

34. The applicants submitted that it was established that the first applicant's fear of being executed upon return to Syria was real since the judgment was authentic and enforceable. They stressed that the letter provided by the Swedish embassy in Damascus and the research carried out by the local lawyer it had engaged were uncertain and imprecise, using words such as "probable" and "likely" while at the same time acknowledging that the Syrian judicial system was arbitrary and corrupt.

Furthermore, it had also been acknowledged that there was no reliable information on the frequency with which the death penalty was implemented in that country since executions were carried out without the public being informed. The first applicant further expressed strong doubts about his ability to survive arrest and detention upon his arrival in Syria. The fact that he had applied for asylum in a third country and was of Kurdish origin were both circumstances which would expose him to additional risks upon a forcible repatriation. Moreover, the first applicant contended that it would be very difficult for him to find witnesses and evidence in his favour if his case were reopened in Syria since it was now more than six years since the alleged murder had taken place.

35. The applicants also pointed to the fact that the Aliens Appeals Board had not been unanimous in its decision but that one of the three members had found that the first applicant's fear of being executed if returned to Syria was well-founded and that the applicants should therefore have been granted protection in Sweden.

36. In conclusion, the applicants maintained that the first applicant faced a substantial risk of being executed if he were sent back to Syria, in violation of Articles 2 and 3 of the Convention.

2. The Government

37. The Government observed that Article 2 of the Convention did not prohibit capital punishment but that the protection against the death penalty was guaranteed in all circumstances by Article 1 of Protocol No. 13 to the Convention, a Protocol by which Sweden was bound. Thus, the Government had no objection to the examination of the present case under both Article 3 of the Convention and Article 1 of Protocol No. 13, and they would proceed on that assumption.

38. They recognised that the human rights situation in Syria was still problematic, noting, *inter alia*, that the death penalty was prescribed for, among other crimes, murder. However, since details on the enforcement of capital punishment were never made public, it was difficult to determine whether executions took place. The Government further observed that the Syrian Constitution provided for an independent judiciary but that political connections and bribery sometimes influenced verdicts in the ordinary courts. Defendants in criminal trials had the right to apply for bail and their release from detention on their own recognisance. However, many criminal suspects were held in pre-trial detention for months. Defendants in criminal courts were, moreover, presumed innocent, had the right to legal representation of their own choosing and were allowed to present evidence and to cross-examine their accusers. Furthermore, verdicts could be appealed against to a provincial appeal court and ultimately to the Court of Cassation.

39. On the basis of the above, the Government considered that the circumstances in Syria could not in themselves suffice to establish that the forcible repatriation of the first applicant to that country would entail a violation of Article 3 of the Convention or of Article 1 of Protocol No. 13. In the Government's view, in order for there to be a violation of either Article, it had to be established that the first applicant was personally at risk of being subjected to treatment contrary to those provisions.

40. In that regard, and taking into consideration the information obtained by the Swedish embassy in Syria and the local lawyer it had engaged, the Government referred to the conclusion of the Aliens Appeals Board that the first applicant could not be considered to have a well-founded fear of being sentenced to death or executed upon his return to Syria. Thus, neither the first applicant nor his family was in need of protection. The Government stressed that that conclusion had been reached by the Aliens Appeals Board applying the relevant provisions of the Aliens Act, which were in conformity with the corresponding Convention guarantees.

B. The Court's assessment

1. The relevant principles

41. The Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and deportation of aliens. However, the deportation of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

42. Moreover, the Court has not in earlier cases excluded the possibility that a Contracting State's responsibility might be engaged under Article 2 of the Convention or Article 1 of Protocol No. 6 where an alien is deported to a country where he or she is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise (see among others, *S.R. v. Sweden* (dec.), no. 62806/00, 23 April 2002; *Ismaili v. Germany* (dec.), no. 58128/00, 15 March 2001; and *Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports* 1998-I, opinion of the Commission, pp. 270-71, §§ 75-78).

In *Öcalan v. Turkey* ([GC], no. 46221/99, ECHR 2005-IV), the Grand Chamber of the Court noted that the territories encompassed by the member

States of the Council of Europe had become a zone free of capital punishment and that it could be said that capital punishment in peacetime, having regard, *inter alia*, to the fact that all member States had signed Protocol No. 6 and only two (Russia and Monaco) had yet to ratify it, had come to be regarded as an unacceptable form of punishment which was no longer permissible under Article 2 of the Convention (ibid., § 163; for a survey on the Council of Europe's stance regarding capital punishment, see *Öcalan*, §§ 58 and 59). However, the Grand Chamber considered that:

> "For the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war." (paragraph 165)

The Grand Chamber abstained from reaching any firm conclusion as to whether Article 2 of the Convention could be considered to have been amended so as to prohibit the death penalty in all circumstances (ibid., § 165). At the same time, it considered that it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial as an arbitrary deprivation of life was prohibited (ibid., § 166):

> "... It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the 'execution of a sentence of a court', ... and that the most rigorous standards of fairness be observed in the criminal proceedings both at first instance and on appeal."

Moreover, to impose a death sentence on a person after an unfair trial would generate, in circumstances where there exists a real possibility that the sentence will be enforced, a significant degree of human anguish and fear, bringing the treatment within the scope of Article 3 of the Convention (ibid., §§ 168-69).

In this connection, it should also be noted that the Court has acknowledged that an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 88, ECHR 2005-I, and *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 45, § 113).

It follows that an issue may arise under Articles 2 and 3 of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty.

2. Application of the above principles to the present case

43. The Court notes from the outset that the applicants have not pursued under the Convention their initial submission before the Swedish immigration authorities that the first applicant had been exposed to torture before leaving Syria and risked being subjected to such treatment were he to be sent back there. The Court will not examine that matter of its own motion. It will accordingly limit its examination to the applicants' complaint that there is a real risk that the first applicant will be executed if he is deported to Syria, since he has been sentenced to death under an enforceable judgment.

44. In this regard, the Court attaches particular weight to the fact that, according to a judgment of 17 November 2003 by the Regional Court in Aleppo, the first applicant was convicted, *in absentia*, of complicity in a murder and sentenced to death under Article 535 § 1 of the Syrian Criminal Code. The authenticity of the judgment has been confirmed by the Swedish embassy in Syria. The Court further stresses that, although it might not necessarily be a common occurrence, the death sentence for serious crimes is enforced in Syria.

Moreover, it is stated in the judgment that the first applicant may apply for a reopening of his case and for a retrial. However, this would necessarily entail his surrendering to the Syrian authorities upon his return and he would most certainly be detained while awaiting a decision by the court on whether or not to reopen his case.

45. The Court agrees with the applicants that the information in the report from the Swedish embassy in Syria is vague and imprecise as to whether the case would be reopened and as to the likelihood, in the event of a conviction at a retrial, of the first applicant escaping capital punishment. The report contained only assumptions and no definite answers as to what would happen if the applicants were deported to Syria. In this respect, the Court finds it surprising that the first applicant's defence lawyer in Syria does not even seem to have been contacted by the Swedish embassy during their investigation into the case, even though the applicants had furnished the Swedish authorities with his name and address and he could, in all probability, have provided useful information about the case and the proceedings before the Syrian court. More importantly, the Court notes that the Swedish Government have obtained no guarantee from the Syrian authorities that the first applicant's case will be reopened and that the public prosecutor will not request the death penalty at any retrial (see, among others, *Mamatkulov and Askarov*, cited above, § 76; *Soering*, cited above, pp. 38-39, §§ 97-98; and *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII). In these circumstances, the Swedish authorities would be putting the first applicant at serious risk by sending him back to Syria and into the hands of the Syrian authorities, without any assurance that he will receive a new trial and that the death penalty will not be sought or imposed.

46. Thus, the Court considers that the first applicant has a justified and well-founded fear that the death sentence against him will be executed if he is forced to return to his home country. Moreover, since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause the first applicant considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out.

47. Furthermore, in the instant case, it transpires from the Syrian judgment that no oral evidence was taken at the hearing, that all the evidence examined was submitted by the prosecutor and that neither the accused nor even his defence lawyer was present at the hearing. The Court finds that, because of their summary nature and the total disregard of the rights of the defence, the proceedings must be regarded as a flagrant denial of a fair trial (see, *mutatis mutandis*, *Mamatkulov and Askarov*, cited above, § 88). Naturally, this must give rise to a significant degree of added uncertainty and distress for the applicants as to the outcome of any retrial in Syria.

In the light of the above, the Court considers that the death sentence imposed on the first applicant following an unfair trial would inevitably cause the applicants additional fear and anguish as to their future if they were forced to return to Syria as there exists a real possibility that the sentence will be enforced in that country (see *Öcalan*, cited above, § 169).

48. Thus, having regard to all the circumstances of the case, the Court considers that there are substantial grounds for believing that the first applicant would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3 if deported to his home country. Accordingly, the Court finds that the deportation of the applicants to Syria, if implemented, would give rise to violations of Articles 2 and 3 of the Convention.

49. Having reached this conclusion, the Court does not find it necessary to consider the matter under Protocol No. 13 to the Convention, as the Government suggested it should.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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."

51. After declaring the application admissible, the Court requested the applicants to submit their claims for just satisfaction. No such claims have been received. Accordingly no award by the Court is required.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that the applicants' deportation to Syria would amount to a violation of Articles 2 and 3 of the Convention.

Done in English, and notified in writing on 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Cabral Barreto is annexed to this judgment.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I joined the majority in finding a violation of Article 2 of the Convention as I had no other means of expressing my opinion that there had been a violation not of that provision, but of Article 1 of Protocol No. 13.

Allow me to explain.

In my opinion, this is the first time the Court has plainly stated that the extradition or deportation of a person to a country where he or she risks an unfair trial followed by capital punishment will violate Article 2 of the Convention.

In *Öcalan v. Turkey* ([GC], no. 46221/99, ECHR 2005-IV), the Court (sitting as a Grand Chamber) examined this issue in depth.

In paragraph 166 of its judgment, the Grand Chamber endorsed the following statement by the Section:

> "... Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that '[e]veryone's right to life shall be protected by law'. An arbitrary act cannot be lawful under the Convention ..."

However, despite noting that "[i]t follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible", the Grand Chamber declined to find a violation of Article 2, preferring instead to examine the issue under Article 3.

It went on to say:

> "167. The above conclusion concerning the interpretation of Article 2 where there has been an unfair trial must inform the opinion of the Court when it considers under Article 3 the question of the imposition of the death penalty in such circumstances.
>
> 168. As the Court has previously noted ..., the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (see *Soering*, cited above, p. 41, § 104).
>
> 169. In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention."

The Court said in conclusion in paragraph 175:

> "Consequently, the Court concludes that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 ..."

In the operative provisions of that judgment, the Grand Chamber confined itself to holding that there had been a violation of Article 3 of the Convention as regards the imposition of the death penalty following an unfair trial.

Notwithstanding the conclusions in *Öcalan*, it seems to me (and it is for this reason that I voted with the majority) that the Section is entitled to go a little further on the basis of the Grand Chamber's reasoning with respect to Protocols Nos. 6 and 13.

After noting that Protocol No. 6 could be taken as already signalling "the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1" (§ 163), the Grand Chamber accepted that Protocol No. 13 could be seen as "confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace" (§ 164).

The States that have already ratified Protocol No. 13 wished to replace the obligation arising under Article 2 of the Convention by a stronger one, namely an obligation to abolish the death penalty in all circumstances.

The second sentence of Article 2 has, as it were, been abrogated, or at least rendered redundant, by the entry into force of Protocol No. 13.

The States that have ratified Protocol No. 13 have undertaken not only never to implement capital punishment but also not to put anyone at risk of incurring that penalty.

Consequently, there is no need to examine the trial or the situation of the person sentenced to death prior to the sentence being carried out because there will always be a violation of Article 1 of Protocol No. 13.

Sweden has already ratified Protocol No. 13.

I would therefore prefer to find that, in the instant case, the applicants' expulsion to Syria would entail a violation of Article 1 of Protocol No. 13, in addition to a violation of Article 3 of the Convention.