

APPLICATION/REQUÊTE N° 10893/84

C. v/the FEDERAL REPUBLIC OF GERMANY
C. c/RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

DECISION of 2 December 1985 on the admissibility of the application

DÉCISION du 2 décembre 1985 sur la recevabilité de la requête

Article 5, paragraph 1 of the Convention : *The words "in accordance with a procedure prescribed by law" refer essentially to domestic law, which must be compatible with the Convention. The decision at issue must not be arbitrary.*

Detention is not improper solely because the person detained was handed over by the authorities of a foreign State outside extradition proceedings.

Article 2, paragraphs 2 and 3 of Protocol No. 4 : *Lawful detention, to serve a sentence is a legitimate restriction on the freedom to leave a country.*

Compétence ratione materiae : *Expulsion is not, as such, one of the matters dealt with by the Convention, save Articles 3 and 4 of Protocol No. 4.*

Article 5, paragraphe 1, de la Convention : *Les termes « selon les voies légales » renvoient pour l'essentiel à la législation nationale. Il faut que celle-ci soit conforme à la Convention et la décision litigieuse exempte d'arbitraire.*

La détention d'une personne n'est pas irrégulière du seul fait qu'elle a été livrée par des autorités étrangères en dehors de toute procédure d'extradition.

Article 2, paragraphes 2 et 3, du Protocole N° 4 : *La détention régulière d'une personne pour purger une peine est une restriction licite à la liberté de quitter le pays.*

Compétence ratione materiae : *L'expulsion ne compte pas, en elle-même, au nombre des matières régies par la Convention, hormis les articles 3 et 4 du Protocole N° 4.*

THE FACTS

(français : voir p. 204)

The applicant is a German citizen born in 1918 who at the time of introducing the application was detained in the prison of Neumünster (Schleswig-Holstein). He is represented by Mr. Jürgen Rieger, a lawyer practising in Hamburg.

The applicant is a journalist and was convicted on three occasions for criminal offences including insult of the constitution (Verunglimpfung des Staates) and dissemination of propaganda for unconstitutional organisations (Verbreitung von Propagandamitteln verfassungswidriger Organisationen).

By a decision of 22 February 1979 by the Regional Court of Flensburg, the sentences were combined into a global sentence of 9 months' imprisonment. The execution of the global sentence was first suspended on probation, but its suspension was subsequently revoked.

The applicant fled to Belgium before the sentence could be executed and took up residence at L. He duly reported his address to the police and was granted a temporary residence permit in Belgium until 27 August 1983. It could not be renewed because the validity of the applicant's German passport and of his identity card had in the meantime expired.

The German authorities knew the applicant's address but did not request his extradition from Belgium in view of the fact that his convictions did not concern extraditable offences covered by the German-Belgian extradition treaty.

Because of the expiry of his residence permit in Belgium, the applicant had intended to leave the country on 26 August 1983 via Luxembourg to France where he wished to apply for political asylum. However, before he could do so, he was arrested on the same day in Belgium and transported to the German border where he was handed over to the German police. This despite the fact that he had told the Belgian authorities that his residence permit was still valid and that if he was to be expelled, he wished to be brought to the Luxembourg border.

At the border, the German police arrested the applicant and it was stated by the authorities of Schleswig-Holstein that he had been caught at the attempt of crossing the German border without valid travel documents. The applicant claims, however, that this was not the real reason for his arrest. In reality, the German authorities had instigated the Belgian authorities to arrest and expel him unlawfully towards the Federal Republic of Germany, although he still had a valid residence permit in Belgium and had not breached any provision of Belgian law.

The applicant was brought to the prison of Neumünster for the purpose of serving his above prison sentence. He then applied for an interruption of the execution of the sentence on the ground that the conditions of his arrest made the detention illegal.

However, the Regional Court of Kiel rejected the application on 18 October 1983. It held that the continued execution of the sentence did not constitute a hardship incompatible with the aim of the penalty (Articles 458 (3) and 456 c (2) and (3) of the Code of Criminal Procedure). The alleged unlawfulness of the applicant's expulsion from Belgium was considered as being irrelevant in this context.

The applicant appealed on the ground that his application was not based on a hardship, but aimed at establishing the lawfulness of his detention, in particular whether it was affected by the unlawfulness of his expulsion. This question should have been decided before the sentence was actually executed.

However, the Court of Appeal of Schleswig-Holstein confirmed the Regional Court's decision on 9 November 1983. It held that although German authorities were not allowed to expel a person in circumvention of extradition proceedings, for the purpose of enabling another State to execute a criminal sentence, they were not prevented from arresting a convicted person found on German territory and detaining him for the execution of his sentence. The applicant had not submitted concrete evidence showing that German authorities had instigated the Belgian authorities to arrest and expel him unlawfully, there was also nothing in the file and no other indication that this was what had actually happened. In any event the German court was not called upon to judge the lawfulness of the Belgian authorities' behaviour. The circumstance that the applicant had been expelled to Germany as an undesirable alien was to be seen as a simple fact. The applicant also could not derive any right not to be expelled from the Belgian-German extradition treaty because this treaty produced effects only between the States and did not create subjective rights of the individual. Accordingly, the applicant's expulsion was not contrary to public international law and the power of the German State to execute the sentence was not limited in any way.

The applicant lodged a constitutional complaint alleging that his constitutional rights under Articles 2 (1) (free development of his personality), 3 (1) (principle of equality before the law), 16 (right of a German national not to be extradited to a foreign country) and 20 (3) of the Basic Law (principle of the rule of law) had been violated. He further invoked the European Convention on Human Rights.

However, on 25 January 1984, a committee of three judges of the Federal Constitutional Court decided not to accept the complaint on the ground that it was inadmissible insofar as it was based on the Convention, and that it lacked sufficient prospects insofar as it was based on constitutional provisions of the Basic Law. It held that the Court of Appeal had rightly refused to examine the lawfulness of the applicant's expulsion under Belgian law, because this was a matter exclusively reserved to the Belgian State under a general rule of international law. The allegation that the execution of the applicant's sentence was unconstitutional because of a

circumvention of the extradition treaty was unfounded. It was true that the offences in question were not extraditable, but the extradition treaty did not create subjective rights for the individual. The Basic Law did not require the interpretation of this treaty as creating subjective rights, nor did it prevent the German authorities from asking a foreign State to extradite a convicted person even though there existed no legal obligation for that State to extradite the person in question under an extradition treaty. The attempts of the German State to get hold of the convicted person, even in such a case did not violate Article 16 of the Basic Law (which only prohibited extradition of a German national to a foreign State) nor the principle of the rule of law (which required the State organs to enforce final sentences) nor the principle of equality before the law (which required the enforcement of sentences against every convicted person in the same way). The applicant had not substantiated that the actions of the German authorities in the present case had been based on unjustified reasons. There was no rule of international law prohibiting the expulsion of a person criminally prosecuted in another State nor a rule forbidding the prosecuting State to request such expulsion or contributing to it.

COMPLAINTS

The applicant now complains of a violation of Article 5 of the Convention alleging that it was unlawful to detain him following an expulsion brought about in contravention of the extradition treaty. He also invokes Article 5 para. 4 in this respect.

The applicant further alleges violations of Article 8 (because he was arrested in his home) and Article 10 of the Convention (because the conviction underlying his detention was allegedly unlawful and not justifiable under Article 10 para. 2), and finally of Article 2 of Protocol No. 4 (because he was not allowed to leave the Federal Republic for a country of his choice, nor to visit his wife on her 75th birthday).

THE LAW

The applicant claims that his arrest and detention in the Federal Republic of Germany were contrary to Article 5 of the Convention because he had been brought to the German territory by allegedly unlawful actions of the German and Belgian authorities which circumvented the provisions of the existing extradition treaty.

The Commission notes that the application is exclusively directed against the Federal Republic of Germany and therefore it is not called upon to examine the actions of the Belgian authorities in connection with the applicant's arrest and deportation on 26 August 1983.

As regards the actions of the German authorities, the Commission first notes that the applicant had been convicted by a competent court which imposed a prison sentence of 9 months on him. Insofar as the applicant complains of the conviction for the offence of insulting the constitution, alleging that it was contrary to Article 10 of the Convention, he clearly has not complied with the six month time limit laid down in Article 26 of the Convention, and therefore this part of the application must be rejected under Article 27 para. 3.

The applicant was arrested in the Federal Republic of Germany on 26 August 1983 and his subsequent detention constituted the execution of his above sentence. As such, the deprivation of liberty in question therefore comes within the scope of Article 5 para. 1 (a) of the Convention.

The only questions which can arise in this connection are whether the detention was "lawful" within the meaning of this provision, or whether the applicant had been deprived of his liberty "in accordance with a procedure prescribed by law", as required by the introductory phrase of the second sentence of Article 5 para. 1. The Commission considers that it can limit its examination to the second aspect, i.e. whether the applicant was deprived of his liberty "in accordance with a procedure prescribed by law", because it is essentially the manner in which his arrest was effected which the applicant challenges in his application.

The words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (Eur. Court H.R. Winterwerp judgment of 24 October 1979, Series A no. 33, para. 45).

The fact that the competent German courts found no unlawfulness in the conduct of the procedure is therefore not necessarily conclusive. It must also be examined whether the criteria applied by these courts in assessing the lawfulness were in conformity with basic principles of the Convention law.

The applicant alleges in substance that the procedure applied was improper because he had been brought to the German territory by a "disguised extradition". As there was no extraditable offence under the Belgian-German extradition treaty he had instead been deported from Belgium to the Federal Republic at the instigation of the German authorities.

The German courts held that the procedure followed was not improper. They stated that neither the extradition treaty nor any other rule of international law prevented the German authorities from enforcing a final prison sentence against the

applicant once he had actually been returned to the national territory. Whether or not the Belgian authorities had acted lawfully in deporting the applicant was considered as irrelevant and in any event as being outside the control of the German courts. The extradition treaty did not create subjective rights of the individual and therefore could not be invoked by the applicant. The fact that the Federal Republic of Germany did not have a right under international law to obtain the extradition of the applicant from Belgium did not prevent the German authorities from nevertheless trying to get hold of him in some other way.

The Commission is of the opinion that there existed no rule of international law preventing the German authorities from seeking the applicant's extradition from Belgium despite the fact that the offences for which he had been convicted were not extraditable under the German-Belgian extradition treaty.

In principle, the question whether or not the offences in question were extraditable or whether they were political offences justifying a refusal of extradition was a matter to be judged by the Belgian authorities on the basis of the applicable Belgian law. The applicant could not have raised these questions *vis-à-vis* the German authorities even if an extradition procedure had in fact taken place (cf. No. 8299/78; Déc. 10.10.80, D.R. 22 pp. 51, 70).

As there was no right for the applicant not to be extradited there could be no question in this case of an inadmissible extradition being circumvented by an expulsion procedure. In this respect the case can be clearly distinguished from Application No. 9990/82 v. France, where the courts had already established the inadmissibility of extradition and the authorities nevertheless proceeded to the expulsion of the applicant to a third country obliged under a treaty to extradite him to his home country. As the Commission found, this way of proceeding might raise an issue under Article 5 para. 1 (f) read in conjunction with Article 18 of the Convention as to the lawfulness of the detention in the expelling state (Dec. 15.5.84, D.R. 39 p. 119).

However, as the Commission also found in its decisions concerning that applicant's subsequent detention in the third country involved (No. 9009/80 v. Switzerland, Dec. 12.7.84, D.R. 39 p. 58) and in his home country (No. 9991/82 v. Italy, Déc. 12.7.84, D.R. 39 p. 147), its lawfulness was not affected by the possible unlawfulness of the actions of the expelling State.

Similarly in the present case, the lawfulness of the applicant's detention in the Federal Republic of Germany could not be affected even if his previous detention and expulsion by Belgium might have been unlawful. There is nothing in the Convention to prevent a State from expelling a person to his home country even if criminal proceedings are pending against him in that country or if he has already been convicted in that country. Nor does the Convention prevent cooperation between the States concerned in matters of expulsion, provided that this does not interfere with any specific rights recognised in the Convention.

In this context the Commission observes that expulsion is not regulated as such in the Convention law, except in Articles 3 and 4 of Protocol No. 4 which manifestly do not apply in the present case. The Commission's case-law has further developed certain restrictions on the Contracting States' power to expel or extradite an alien if this would interfere with his rights guaranteed under Article 3 (prohibition of torture or inhuman and degrading treatment) or Article 8 of the Convention (unjustified interference with private or family life). However, these provisions, too, are clearly inapplicable in the present case; in particular there is no appearance of the applicant's having been subjected to inhuman or degrading treatment in the Federal Republic of Germany. The applicant has invoked Article 8 of the Convention because he was arrested in his home after having been brought there by the police who had taken him over at the German border. Apart from the fact that the applicant has not exhausted any domestic remedies in this respect, the Commission does not consider that there has been any interference with the applicant's rights under Article 8 of the Convention which could not be justified under the second paragraph of this provision.

The applicant finally invokes Article 5 para. 4 of the Convention and Article 2 of Protocol No. 4. However, the Commission observes that the applicant could in fact challenge the lawfulness of his detention in the Federal Republic by court proceedings which were conducted speedily, and the fact that he could not leave the country was merely the consequence of his being lawfully detained as a convicted prisoner. The restriction of his freedom to move was therefore covered by Article 2 para. 3 of Protocol No. 4.

It follows that the applicant's complaints are manifestly ill-founded and must be rejected under Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.