

APPLICATION N° 37681/97

Jilali EL GUARTI v/France

DECISION of 23 April 1998 on the admissibility of the application

Article 26 of the Convention

- a) The obligation to exhaust domestic remedies requires only that an applicant make normal use of effective and sufficient remedies that is those capable of remedying the situation at issue*
- b) Where an individual complains that his deportation to a particular country would expose him to a serious danger appeals without suspensive effect cannot be considered effective*
- c) Where in France an order for a person to be permanently excluded from French territory is made by a Criminal Court and confirmed by a Court of Appeal and the Court of Cassation and where an application for discharge of such an exclusion order made by a Court of Appeal and confirmed by the Court of Cassation is dismissed, it has not been shown that any remedy exists which would have the effect of suspending enforcement of the exclusion order in question*
- d) Regarding the enforcement of an order for a person to be permanently excluded from French territory, the point at which the six month period begins is not the date of the Court of Cassation judgment dismissing the applicant's appeal on points of law against the decision confirming the exclusion order, as this judgment cannot be considered as the final domestic decision which marks the start of the six month period, given that the applicant's state of health deteriorated considerably after this judgment and that his expulsion would make it impossible for him to be treated*

THE FACTS

The applicant is a Moroccan national born in 1952 in Fez, and lives in a residential centre run by a voluntary association called "La balançoire" in Saint-Maur-des-Fossés. He is represented before the Commission by Mr Pierre Maurat, a lawyer practising in Paris.

The facts, as submitted by the parties, may be summarised as follows:

The applicant, who was born with a single kidney, has suffered from diabetes since 1974 and is insulin-dependent. He also has serious neuropathic and renal insufficiency problems.

He entered France lawfully in 1980.

On 22 June 1987 Cambrai Criminal Court sentenced the applicant to a term of imprisonment and ordered that he should subsequently be deported and excluded from French territory for a period. The applicant was deported to Morocco, but came back to France in 1990.

On 29 October 1991 Cambrai Criminal Court convicted the applicant of drug trafficking, sentenced him to six years' imprisonment and ordered that he should subsequently be deported and permanently excluded from French territory.

On 2 April 1992 Douai Court of Appeal upheld the judgment.

On 20 May 1992, the applicant was provided with an insulin pump.

On 17 May 1993 the Court of Cassation dismissed his appeal on points of law.

On 20 July 1993 the applicant applied to Douai Court of Appeal to have the order excluding him from French territory set aside. His request was dismissed on 2 November 1994.

On 24 May 1994 a prison [outreach] worker from MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples* - an organisation working to combat racism and promote friendship between peoples), petitioned the Ministry of Justice for the applicant to be pardoned, and applied to the Ministry of the Interior for the applicant to be granted leave to remain on humanitarian grounds, as an exceptional case.

On 9 June 1994, ADMEF (*Action pour les droits des malades étrangers en France* - an organisation working on behalf of aliens in France with health problems) issued the applicant with a certificate stating that they had taken up his case. URMED (*Urgence malades étrangers en danger* - another organisation working to help aliens in France with health problems) took over his case as from January 1995.

On 20 March 1995 the Court of Cassation dismissed the applicant's appeal on points of law against the Douai Court of Appeal's decision of 2 November 1994.

In the course of 1995 the applicant's health deteriorated

On 4 March 1996 the head of the immigration department of the Ministry of the Interior informed URMED that the prefecture was dealing with the applicant's file and that he would be placed under a compulsory residence order

On 31 December 1996 having served his sentence, he was taken to Choisy-le-Roi detention centre in order to be deported. On the basis of his medical file and the fact that he was fitted with a catheter, the police officer in charge of the detention centre asked for him to be given a medical examination, which resulted in his being admitted to hospital immediately and remaining there until 30 April 1997, when a second attempt to deport him was made

The applicant was taken to Orly but refused to board the plane. The head of DICCILEC (the central directorate for immigration control and for the prevention of the employment of illegal immigrants) decided that the applicant should be given a medical examination. The doctor who carried out this examination was of the opinion that the applicant's state of health was incompatible with his being deported. The public prosecutor ordered him to be released.

In a letter of 26 September 1997 the health department of the Ministry of Employment and Solidarity informed URMED that the only people with chronic renal insufficiency whose medical expenses were covered in Morocco were members of mutual insurance schemes which applied only to very specific professional categories. Moreover, although there were 50 or 60 dialysis machines in Morocco these were available only to the very wealthy.

The applicant currently receives treatment by an artificial kidney several times a week.

COMPLAINTS

The applicant complains that in view of the seriousness of his state of health, deporting him from French territory would contravene Articles 2 and 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 May 1997 and registered on 5 September 1997.

On 19 September 1997 the Commission decided to give notice of the application to the respondent Government, inviting them to submit written observations on its admissibility and merits.

On the same date the Commission indicated to the Government, under Rule 36 of the Commission's Rules of Procedure, that it was desirable, in the interests of the parties and the proper conduct of the proceedings, not to deport the applicant before the

Commission had been able to examine the application in greater detail. The Commission extended the application of Rule 36 on 11 December 1997 and 22 January and 12 March 1998.

The Government submitted their observations on 5 December 1997, after an extension of the time limit and the applicant replied on 12 February 1998, also after an extension of the time limit.

THE LAW (Extract)

The applicant complains that, in view of his state of health, deporting him from French territory would amount to inhuman and degrading treatment, in violation of Article 3 of the Convention, as well as Article 2 of the Convention, which provides that everyone's right to life shall be protected by law.

Article 3 of the Convention provides as follows:

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

The respondent Government submit, primarily, that the applicant has failed to respect the six month time-limit laid down in Article 26 of the Convention for introducing an application to the Commission. They submit that the final domestic decision was the Court of Cassation judgment of 20 March 1995, that is, 26 months before the applicant introduced his application to the Commission.

The applicant argues that the Government's objection that the application is out of time cannot be allowed in the present case. He states that his complaint to the Commission concerns the execution of the order for him to be excluded from French territory by deporting him to Morocco and not the exclusion order or the Court of Cassation judgment as such. Furthermore, he points out that when he lodged his appeal on points of law he was not suffering from renal insufficiency. His state of health deteriorated in the course of 1995 and this deterioration is the cause of his having to undergo dialysis.

The Commission finds that the applicant's complaint does concern the execution of the order for him to be excluded from French territory by deporting him to Morocco, where he would not be able to afford the extensive treatment his state of health now requires. As the applicant's health deteriorated considerably in the course of 1995, and particularly after 20 March 1995 – the date of the Court of Cassation judgment – this judgment cannot be held to constitute the final domestic decision in the present case.

It follows that the Government's objection that the six month time-limit was not observed cannot be allowed.

The Government also submit that the applicant enjoys freedom on French territory, that he has not been deported and that he cannot therefore claim to be a victim within the meaning of Article 25 of the Convention. If a fresh order for his deportation to Morocco was issued, he could challenge it in the Administrative Court. Furthermore, the applicant could benefit from Section 25(8) of the Ordinance of 2 November 1945 (as amended), which provides that an alien suffering from a serious illness requiring medical treatment, the absence of which might have exceptionally serious consequences for him, cannot be deported from French territory.

The applicant rejects this argument, pointing out that the Ministry of the Interior has never promised not to execute the exclusion order and that at the time of the two attempts to execute this order, namely on 31 December 1996 and 30 April 1997, it was the medical authorities who declared that his state of health was incompatible with his being deported.

He points out that the protection afforded by Section 25(8) of the Ordinance of 2 November 1945 cited above is not relevant to the present case as it applies only to deportation or expulsion orders, and not to court orders excluding persons from French territory. An appeal to the Administrative Court against the decision designating the country to which the person is to be deported has no suspensive effect. The applicant is therefore justified in asserting that he is under permanent threat of being deported.

The Commission recalls that the obligation to exhaust all domestic remedies requires only that an applicant make normal use of remedies that are likely to be effective and sufficient, that is those capable of remedying the situation at issue (see No. 14992/89, Dec. 7.6.90, D.R. 66, p. 247). Where a person alleges that his expulsion would expose him to serious danger, appeals without suspensive effect cannot be regarded as effective (see No. 10078/82, Dec. 13.12.84, D.R. 41, p. 103, No. 12461/86, Dec. 10.12.86, D.R. 51, p. 258, Eur. Court HR, H.L.R. v. France judgment of 29 April 1997, Comm. Report 7.12.95, and No. 30930/96, Dec. 8.9.97, unpublished).

In the present case, the action of the State authorities of which the applicant complains is the order for his permanent exclusion from French territory made by Cambrai Criminal Court on 29 October 1991, and confirmed by Douai Court of Appeal on 2 April 1992. The Commission also observes that on 20 July 1993 the applicant applied to Douai Court of Appeal to have the order for his exclusion discharged and that this application was dismissed on 2 November 1994. In a judgment of 20 March 1995, the Court of Cassation dismissed the applicant's appeal on points of law.

The Commission notes that the Government has not pointed to a remedy considered to be effective according to the generally recognised rules of law and capable of suspending the execution of the order permanently excluding the applicant from French territory

This being the case, the Government's objection that domestic remedies were not exhausted must be dismissed