

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

FIFTH SECTION

DECISION

Application no. 61835/11
Amulkheir Suleimen ABDULGADIR and
Zemzem Saleh MOHAMEDNUR
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 29 May 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Secton Registrar,*

Having regard to the above application lodged on 6 October 2011,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Amulkheir Suleimen Abdulgadir and Ms Zemzem Saleh Mohamednur, are Eritrean nationals, who were born in 1940 and 1971 respectively. They were represented before the Court by Ms A. Lindblad, a lawyer practising in Stockholm.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

While the applicants, a mother and her adult daughter, are Eritrean nationals they have resided for most of their lives in Saudi Arabia. They arrived in Sweden on 7 September 2008 carrying valid passports and visas valid until 29 October 2008. They had come to stay with the first applicant's son. On 30 October 2008 they applied for asylum and submitted that they would be at risk of ill-treatment and harassment on return to Eritrea. Allegedly, the second applicant would be called up for military service on return. Both applicants also referred to a risk based on their state of health as the first applicant suffered from old age in combination with Alzheimer's disease and the second applicant was diagnosed with Systemic Lupus Erythomathosis (SLE), a chronic rheumatic disease. The second applicant submitted a medical certificate, issued on 4 August 2009 by chief physician E., which stated that she suffered from serious SLE and that she would have to undergo regular treatment and medication for long periods of time.

On 4 September 2009 the Migration Board (*Migrationsverket*) rejected the applicants' request for asylum. The Board noted that they had waited two months before applying for asylum which indicated that they were not in need of international protection. It was further noted that the second applicant had not been called up for military service, but she was likely to be excused from service due to her medical condition. She had visited Eritrea in 2004 without any problems and she had been able to travel legally to and from the country. With regard to the applicants' state of health, the first applicant's condition was not considered sufficiently serious. Furthermore, the Board noted that the second applicant had been admitted to hospital and had received medical treatment in Eritrea in 2004, although a diagnosis could not be established. The Board could not find that the second applicant had made plausible that she would not receive appropriate medical care in Eritrea.

The applicants appealed to the Migration Court (*Migrationsdomstolen*) in Stockholm and submitted additionally that they belonged to a small religious minority and were subject to persecution in Eritrea.

On 27 December 2010 the Migration Court rejected the applicants' appeal. The court found that they had added new circumstances at a late stage of the proceedings and that there was no indication that they would be subjected to persecution due to their religious affiliation in Eritrea. Furthermore, it found no reason to believe that the applicants would be subjected to ill-treatment on the grounds that the second applicant had not done military service. The first applicant's medical condition was not considered to be of such a serious nature as to constitute grounds for asylum. With regard to the second applicant's medical condition, the court

found that the submitted medical certificate did not substantiate that the illness was fatal. Furthermore, there was no indication that adequate care and medical treatment would not be available to the applicant in Eritrea.

On 25 May 2011 the Migration Court of Appeal (*Migrations-överdomstolen*) refused leave to appeal.

The applicants turned anew to the Migration Board and submitted, *inter alia*, a medical certificate concerning the first applicant and some correspondence from a physician working for the World Health Organisation (WHO) in Eritrea and from the Red Cross in Stockholm concerning the second applicant. The medical certificate, dated 17 January 2011, was issued by a general practitioner and stated that the first applicant had an alleged progressive memory problem and could occasionally not remember her daughter. There was no evidence, but strong indications of early Alzheimer's disease. According to the submitted correspondence, not all of the drugs that the second applicant had received in Sweden were available in Eritrea and the management of complications such as thrombosis and, in the long run, renal complications was not possible there. There were allegedly difficulties in having haemodialysis since only two units were available for the whole country and there were regular breaks in service.

On 29 September 2011 the Migration Board refused to review the case as it found no new circumstances which constituted impediments to the enforcement of the expulsion. Concerning the first applicant, it was noted that she had received effective medical treatment and that her Alzheimer's disease had improved. With regard to the second applicant, the only medical certificate submitted had already been considered in the main proceedings.

On 12 October 2011 the Migration Court rejected the applicants' appeal with regard to a review of the case in accordance with Chapter 12, section 19 of the Alien's Act.

The applicants turned again to the Migration Board and submitted an additional medical certificate, issued by a specialist physician on 4 October 2011, concerning the second applicant. The certificate stated that if the necessary medication were stopped this would, within days or weeks, lead to fatal complications.

On 7 October 2011 the Board noted that the medical certificate described the progression of SLE in general terms as well as general treatment methods. It had not been issued by the second applicant's own doctor and the Board noted that no information was submitted concerning the applicant's state of health for the period 2009-2011. The Board did not question the submitted mail correspondence with the WHO, but found that the applicant had failed to substantiate that there were no alternative medicines available in Eritrea. Furthermore, it was considered that the correspondence had taken place in 2009 and there was no new information on the applicant's state of health or required medicines for treatment. The

Board found that the applicants had failed to substantiate any impediments to enforcing the expulsion to Eritrea.

On 13 October 2011 the applicants were deported to Eritrea, but no information has been submitted as to their situation following their return.

B. Relevant domestic law

The provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the Aliens Act (*Utlänningslagen*, 2005:716).

Chapter 5, section 1, of the Act stipulates that 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.

According to Chapter 4, section 1, 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 on grounds of race, nationality, membership of a particular social group, religious or political beliefs, grounds of gender, sexual orientation and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds 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 (Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies, under Chapter 12, section 18, where new circumstances have emerged which imply there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to treatment as referred to in Chapter 12, sections 1 and 2, or that there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out

where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, section 19).

C. Relevant country information

The World Health Organisation report, *Eritrea Country Cooperation Strategy 2009-2013* (pp. 3-5), published in 2009, stated that:

> "Since independence in 1991, Eritrea has made considerable progress in promoting equitable, accessible and affordable health services to the majority of its citizens with the support of its partners. This is demonstrated by the significant improvement of health indicators.
>
> The health infrastructure has made considerable progress. ... Over 60 different medical products are locally produced; key medicines are available in 95% of health facilities and there is no shortage of supplies and equipment. ... Chronic diseases like diabetes, hypertension, mental health and infectious diseases like tuberculosis, HIV/AIDS and other sexually transmitted diseases are treated free of charge.
>
> ...
>
> ...[T]he country still experiences acute shortage of human resources particularly at the peripheral level of the healthcare delivery system."

COMPLAINTS

The applicants complained that, given their illness and the alleged lack of medical treatment in Eritrea, their removal to that country would put them at risk of physical and mental suffering, followed by an early death, in violation of Article 2 and 3 of the Convention. They also complained, under Article 3, that they would risk ill-treatment on return as they had been exposed in Sweden as asylum seekers.

THE LAW

The applicants claimed that their deportation to Eritrea would expose them to a real risk of being killed or subjected to torture or inhuman and

degrading treatment or punishment. They invoked Articles 2 and 3 of the Convention, which read, in relevant parts, as follows:

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. General principles

The Court finds that the issues under Articles 2 and 3 of the Convention are indissociable and it will therefore examine them together.

The Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, *inter alia*, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI).

However, expulsion 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 concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).

The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there

are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005).

In cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see, *N.A. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

With regard to the expulsion of the seriously ill, the Court reiterates that aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case where the humanitarian grounds against the removal are compelling (*N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008).

The Court further reiterates that advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction (*N. v. the United Kingdom*, cited above, § 44).

The Court finds that the above principles apply also in regard to Article 2 of the Convention (see for example, *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

B. Application of these principles to the present case

The Court recognises that the situation in Eritrea poses widespread problems of insecurity and that the applicants, consequently, could arguably claim that their return to that country would breach Article 3 of the Convention (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 151-152, 23 February 2012). However, it must be determined whether, against that background, the applicants' individual asylum claims give reason to believe that, upon return, they could be subjected to treatment contrary to Article 3.

In this respect, the Court observes from the outset that the applicants' asylum application has been comprehensively considered by the Swedish authorities who have provided relevant and adequate reasons for their decision to reject their claims.

With regard to the alleged risk for the second applicant in relation to military service, the reasoning by the domestic authorities is convincing and there is no reason for the Court to deviate from this assessment. Moreover, the applicants' allegation that they would be persecuted for religious reasons in Eritrea was introduced at a late stage of the domestic proceedings and has not been substantiated. Nor have they submitted any reasons why they would be at risk in Eritrea due to the exposure of their asylum case in Swedish newspapers. The Court further notes that they waited almost two months after their arrival in Sweden to apply for asylum, which indicates that their fear of ill-treatment upon return were not so serious. Finally, it appears that the applicants have been able to travel legally to and from Eritrea. In conclusion, it has not been shown that they would risk ill-treatment upon return.

It remains for the Court to consider whether, in view of the applicants' state of health, their deportation involved a violation of Article 2 or 3 of the Convention.

It appears from the submitted medical certificates that the first applicant's Alzheimer's disease is not fatal and that it has not reached a very advanced stage. There is no indication that the deportation as such subjected her to a risk sufficient to reach the threshold under Article 3.

The Court makes the same assessment in regard to the second applicant. It is noted that she was admitted to hospital and treated in Eritrea in 2004. The Court does not question that her SLE disease is serious and that in Eritrea there is limited access to the medication and treatment she received in Sweden. However, the applicant has not been able to substantiate that there are no alternative medicines or methods of treatment available in Eritrea. Furthermore, she has not provided any documentation on the development of her disease since 2009 and, as pointed out by the domestic authorities, the last medical certificate was not issued by her own doctor. While the Court accepts that the quality of the second applicant's life, and

her life expectancy, may be affected after her return to Eritrea, there is no indication that she was unfit to travel or that she was critically ill at the time of her deportation.

For the foregoing reasons, the Court considers that the applicants have failed to demonstrate any real risk of treatment in violation of Articles 2 or 3 of the Convention in Eritrea. It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President