

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

THIRD SECTION

DECISION

Application no. 9602/15
Kader BENCHEREF
against Sweden

The European Court of Human Rights (Third Section), sitting on 5 December 2017 as a Chamber composed of:

Branko Lubarda, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 18 February 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Kader Bencheref, was born in 1985 and lived in Växjö until his expulsion to Algeria in February 2017. He was represented before the Court by Ms E.-M. Lindhe, a lawyer practising in Växjö, and later by Mr I. Vita, a lawyer practising in Stockholm.

2. The Swedish Government ("the Government") were represented by their Agent, Ambassador A. Rönquist, and then by Ambassador E. Hammarskjöld, both of the Ministry for Foreign Affairs.

The circumstances of the case

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

1. Background

4. On 24 July 2006 the applicant applied for asylum and a residence permit in Sweden. He claimed to be of Moroccan nationality and complained about the conditions there.

5. On 21 September 2006 the applicant was detained on remand as he was suspected of committing several crimes: attempted rape, physical assault, making unlawful threats, attempted theft, and sexual molestation. On 13 December 2006 the District Court (*tingsrätten*) convicted the applicant of the above-mentioned crimes, sentenced him to three years and six months' imprisonment, ordered his expulsion from Sweden and banned him from returning to Sweden for life. The applicant's sentence was mitigated by the District Court because of his upcoming expulsion. The Migration Agency (*Migrationsverket*) had submitted to the court that there were no impediments to the applicant being expelled to Morocco.

6. The applicant appealed to the Court of Appeal (*hovrätten*), which, on 27 February 2007, reduced the sentence to three years' imprisonment and limited the ban on the applicant's return to ten years. On 2 April 2007 the Supreme Court (*Högsta domstolen*) refused the applicant leave to appeal.

7. As a consequence of the criminal conviction and the expulsion order, the Migration Agency struck out the applicant's application for asylum and a residence permit on 25 May 2007. Subsequently, the applicant lodged repeated applications for asylum and a residence permit with the Migration Agency, but these were rejected and, upon appeal, the migration courts upheld the decisions.

2. The detention proceedings

8. On 19 September 2008 the Police Authority (*Polismyndigheten*) decided to detain the applicant with a view to expelling him to Morocco. This decision was enforced on 21 September 2008, the same date on which the applicant was released on probation. From that date on, in accordance with Swedish law, the Police Authority reconsidered the decision of the applicant's detention every other month.

9. Given that the applicant's mental health was fluctuating, he was occasionally transferred from the detention centre to psychiatric care facilities and the administrative courts decided, on a few occasions, to commit him for compulsory psychiatric care (*tvångsvård*) for shorter periods. Between 7 and 16 July 2010, when placed in a psychiatric care facility, the applicant was temporarily released from detention. However, as soon as he was discharged, the Police Authority detained him again.

10. On 22 January 2013 the District Court convicted the applicant of assaulting several officials working in the detention centre where he had been detained and inflicting damage on the detention centre's facilities. He was fined a total of 6,000 Swedish *kronor* (SEK) (approximately 640 euros (EUR)) and he was ordered to pay damages to the victims. This judgment was not appealed against and it thus became final on 12 February 2013.

11. On 16 April 2014 the Police Authority again reconsidered its decision to keep the applicant in detention. Initially it noted that the applicant had not cooperated with the Police Authority in order to clarify his identity or facilitate the enforcement of his expulsion order; indeed, he had obstructed the investigations by providing the authorities with as little information as possible, and he had been acting in a threatening manner against the officials who were handling the matter. The Police Authority considered that all possible measures to enforce the expulsion order had not yet been exhausted. The Police Authority also noted that, according to a note written by the officials working for the Prison and Probation Board, the applicant had indicated that if the expulsion order were enforced, he would try to hurt any person getting in his way in order to avoid being expelled to Morocco.

12. The applicant appealed against the decision to the Migration Court (*Migrationsdomstolen*), requesting the court to quash the decision and release him immediately or, in the alternative, place him under supervision (*ställa honom under uppsikt*). The applicant referred to Article 5 of the Convention and claimed, *inter alia,* that it was disproportionate to keep him in detention since there was no realistic possibility of enforcing the expulsion order.

13. On 19 May 2014 the Migration Court rejected the appeal, mainly reiterating the reasoning of the Police Authority. However, the court also added, referring to the Court's case-law, that (i) for the detention of a person for the purpose of the enforcement of an expulsion order to be lawful under Article 5 of the Convention, the national authorities had to be actively working on the enforcement of the expulsion order and (ii) it did not appear impossible that the enforcement order would be enforced within the foreseeable future. The court stressed that the authorities were still working actively on the enforcement of the expulsion order and it did not appear impossible that the expulsion order would be enforced within the foreseeable future. Thus, the continued detention of the applicant did not constitute a violation of Article 5 of the Convention.

14. The applicant requested the Migration Court of Appeal (*Migrationsöverdomstolen*) for leave to appeal, which, on 19 June 2014, granted him leave to appeal.

15. In the meantime, on 4 June 2014, the District Court convicted the applicant of molesting and assaulting the officials working in the detention centre where he had been held and of inflicting damage to the detention

centre's facilities and sentenced him to four months' imprisonment. This judgment was not appealed against and thus became final.

16. The applicant started to serve the prison sentence immediately and, in accordance with Swedish law, the detention order was therefore revoked.

17. Consequently, on 4 July 2014, the Migration Court of Appeal struck the case out of its list of cases. However, in its decision the court noted that the question of whether there were exceptional reasons to keep the applicant in detention was a principled and important question that needed to be assessed by the court. The court noted that the applicant had been detained for an extraordinarily long time and even if it could be established that the authorities had been taking measures in order to enforce the expulsion order, it could also be noted that there had been periods of time when the authorities had been inactive. Moreover, contacts with the Moroccan authorities had not led to any concrete results and it could therefore on reasonable grounds be questioned whether the expulsion order actually could be enforced within the foreseeable future. The court stated that, even though the matter was being dealt with at a high political level, it still appeared unclear if and when the expulsion order could be enforced, and that it was hard to see what measures could be taken in order to enforce the expulsion order. Considering all of these circumstances, the court found, by two votes to one, that the continued detention of the applicant would not be proportionate.

18. On 11 September 2014 the Police Authority once again decided to detain the applicant in order to expel him. Upon the release of the applicant on probation, on 14 September 2014, the decision was enforced.

19. The applicant appealed against the decision to the Migration Court, requesting that he be released immediately or, in the alternative, that he be placed under supervision. The applicant once again referred to Article 5 of the Convention and claimed, *inter alia,* that it was disproportionate to keep him in detention since there was no realistic possibility of enforcing the expulsion order.

20. The Police Authority contested the applicant's appeal, stating that it had intensified its work and that it had had a meeting with the Ministry of Justice to discuss what measures could be taken, and that the Minister of Justice had also handed over a letter to the Moroccan Minister of Internal Affairs. Moreover, the Ministry for Foreign Affairs and the Ministry of Justice had been in contact with the Moroccan Embassy in Stockholm.

21. On 16 September 2014 the Migration Court dismissed the appeal. Firstly, the court noted that there was a real and manifest risk that the applicant, upon release, would commit crimes and that there were legal grounds under Swedish law to detain him pending his expulsion. Moreover, the court found that the authorities had recently intensified their work and that the matter had been discussed between the Swedish and Moroccan Ministers for Foreign Affairs and that, in the light of those discussions, it

appeared more probable that the expulsion could be executed within the foreseeable future. Given this, a continued detention could not be considered disproportionate and it was thus legitimate to detain the applicant. The court also noted that the interest in keeping the applicant in custody outweighed the applicant's right to liberty and that it was not a sufficient measure merely to subject the applicant to supervision.

22. The applicant applied to the Migration Court of Appeal for leave to appeal against the judgment, maintaining his claims. On 29 September 2014 the Migration Court of Appeal refused him leave to appeal.

23. On 14 January 2015 the Police Authority once again reconsidered its decision and found that there were still reasons to keep the applicant in detention. The Police Authority stated that there were reasons to believe that the applicant, if released, would commit crimes of violence and that the Police Authority, even though it had been a long time since the applicant had initially been detained, had still actively been taking measures in order to enforce the expulsion order. Moreover, it noted that the applicant had not cooperated at all with the Swedish authorities in order to clarify his identity and facilitate the expulsion.

24. The applicant appealed against the decision to the Migration Court, requesting that the Police Authority's decision be quashed and that he be released immediately or, in the alternative, that he be placed under supervision.

25. On 30 January 2015 the Migration Court rejected the appeal, mainly reiterating the reasoning of the Police Authority. However, the court noted, in particular, that the Swedish authorities, after the Migration Court of Appeal's decision of 4 July 2014, had on several occasions tried to contact the Moroccan authorities and other international organs in order to investigate the applicant's identity; it also noted that the period of time that had elapsed since the authorities had begun to deal with the matter at the highest political level was not unreasonably long, considering the extraordinary circumstances of the present case. It also noted that, since the authorities had continuously been taking measures to enforce the expulsion order, it could not be considered impossible to enforce the expulsion order within the foreseeable future. Moreover, considering that the applicant had not cooperated with Swedish authorities at all (for example he had not signed documents to facilitate the enforcement) and that he had been acting violently towards the officials, the court found that the time he had spent in detention could not be considered disproportionate. The court also noted that the applicant had indicated that he would use violence to stop a future expulsion of him.

26. The applicant lodged a request for leave to appeal against the judgment with the Migration Court of Appeal, which, on 17 February 2015, refused him leave to appeal.

3. Measures taken in order to expel the applicant

27. As noted above, the applicant was initially detained with a view of expulsion on 21 September 2008. Between 21 January 2009 and 7 September 2016, numerous measures were taken by the Swedish authorities in order to enforce the expulsion order to Morocco.

28. By letters dated 31 October 2016 and 16 February 2017 the Government informed the Court about the following developments: On 24 October 2016 the applicant had submitted new information regarding his identity and country of origin to the Swedish police, stating that he was in fact an Algerian citizen. This information had made it possible for the Swedish and Algerian authorities to subsequently confirm his statement.

29. On 12 February 2017 the expulsion order was enforced and the applicant was expelled to Algeria.

30. A letter was sent to the Court by the applicant's lawyer on 20 February 2017. The lawyer confirmed that the applicant was of Algerian nationality and had been expelled, and stated that he maintained the application.

COMPLAINT

31. The applicant complained under Article 5 § 1 (f) of the Convention that his continued detention was arbitrary and completely disproportionate, given that at the time of his submitting his complaint he had been detained in Sweden since 21 September 2008 without the authorities being able to enforce the expulsion order against him.

THE LAW

32. The applicant complained that his detention under Article 5 § 1 (f) of the Convention had been arbitrary and excessive in length. Article 5 § 1 (f) of the Convention reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. The parties' submissions

1. *The Government*

33. The Government maintained that the decisions taken by the domestic authorities and courts had been in accordance with the relevant procedural provisions of the Aliens Act. The detention order had been re-examined every other month, and it had been subject to appeal to the relevant courts. Nor did the domestic legislation in itself give rise to concerns about the risk of arbitrariness of the detention. Moreover, there was nothing in this case that indicated that the place and conditions of detention had not been appropriate.

34. As to the enforcement of the expulsion order, the Government did not contest that the applicant had been detained for an exceptionally long period of time overall but argued that actions with a view to enforcing the expulsion order had been constantly taken by the Swedish authorities throughout the period of detention. The numerous contacts with Interpol had led to the confirmation that the applicant was known to be a Moroccan citizen. The purpose of the applicant's detention – namely the enforcement of the expulsion order – had remained valid throughout the entire period of detention. Moreover, the Government emphasised that the applicant had refused to cooperate with the Swedish authorities, which had complicated the enforcement of the expulsion order.

2. *The applicant*

35. The applicant claimed that there had been a violation of Article 5 § 1 (f) of the Convention since the long deprivation of his liberty had not protected any individual or other interests. The Swedish State should have tried to use less restrictive measures in his case. In his case the actions undertaken by the domestic authorities under domestic law had not been in conformity with the Convention and there had been several periods of inactivity.

36. He maintained that it had already been apparent for a long time that the deportation of the applicant was bound to fail since the Moroccan authorities had made it clear that they did not want to receive the applicant. The grounds for the applicant's detention and the actions taken in order to try to enforce it had not been proportionate.

B. The Court's assessment

37. The Court reiterates that an application may be rejected as abusive under Article 35 § 3 (a) of the Convention, among other reasons, if it is knowingly based on untrue facts with a view to deceiving the Court (see *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; and, especially

in the immigration context, *Bagheri and Maliki v. the Netherlands* (dec.), no. 30164/06, 15 May 2007). This type of abuse may also be committed by omission, where the applicant fails to inform the Court at the outset of a factor essential for the examination of the case (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; and *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006). Likewise, an application may be rejected as being an abuse of the right of application if new, important developments occur during the proceedings before the Court and – despite the express obligation under the Rules of Court – the applicant fails to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts. Incomplete and therefore misleading information may amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Poznanski and Others v. Germany* (dec.), no. 25101/05, 3 July 2007; *Predescu v. Romania*, no. 21447/03, § 25, 2 December 2008; and *Gross v. Switzerland* [GC], no. 67810/10, §§ 32-34, ECHR 2014).

38. The Court notes that the applicant had indicated in his initial asylum application to the Swedish authorities in July 2006 that he was of Moroccan nationality. Subsequently, the Swedish authorities decided to expel him to Morocco and took numerous measures to enforce that expulsion order. The applicant refused to cooperate with the Swedish authorities in order to clarify his identity or facilitate the enforcement of his expulsion order. Only on 24 October 2016 did the applicant submit new information regarding his identity and country of origin to the Swedish authorities. On the basis of this information the expulsion order could be enforced and the applicant was expelled to Algeria on 12 February 2017. The Government informed the Court about these developments by letter dated 16 February 2017.

39. In a case such as the present one, where the applicant alleged that his detention pending extradition had been too long and where the Swedish authorities were in contact over a lengthy period with their Moroccan counterparts on the understanding that the applicant was a national of that country, the question of the applicant's nationality – and therefore the question of the country of destination – had a real impact on the length of the detention. In his application to the Court in February 2015, the applicant claimed to be of Moroccan nationality. In his observations to the Court he claimed, *inter alia*, that his expulsion "[was] bound to fail. The Moroccan authorities had made it clear that they did not want to have the applicant back in Morocco", thereby confirming to the Court his contention that Morocco was his country of origin. Only after the closure of the written proceedings and after the applicant had been expelled to Algeria did the applicant's lawyer inform the Court on 20 February 2017 that the applicant had an Algerian nationality. The applicant gave no explanation as to why he had initially claimed to be Moroccan and not revealed that he was Algerian,

why he had not disclosed the information earlier, why he had decided to disclose it to the Swedish authorities on 24 October 2016, or why the Court should consider the application notwithstanding the applicant's incomplete information. For the Court, the only explanation for the applicant's behaviour is that he intended to deceive the Court as to a core element in the case.

40. It follows that the present application must be rejected as an abuse of the right of application pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 11 January 2018.

Fatoş Aracı
Deputy Registrar

Branko Lubarda
President