

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

THIRD SECTION

DECISION

Application no. 40938/09
Noroz OZBEEK
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 9 October 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Egbert Myjer,
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 31 July 2009,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Noroz Ozbeek, is an Afghan national, who was born in 1989 and lives in Borne. He was represented before the Court by Mr J. Verstrepen, a lawyer practising in Oosterhout.

A. The circumstances of the case

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

The applicant applied for asylum in the Netherlands on 27 February 2005. Since May 2005, he is receiving treatment in the Netherlands for a post-traumatic stress disorder (PTSD) combined with depression.

The Netherlands authorities initially considered that – pursuant to the terms of Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") – France was responsible for the determination of the applicant' asylum request as the applicant had already applied for asylum in France on 15 May 2003. Following administrative appeal proceedings in which the last decision was given on 1 February 2006 by the Regional Court (*rechtbank*) of The Hague sitting in Zwolle, the Netherlands authorities eventually accepted to take responsibility for the applicant's asylum request.

In the context of these proceedings, the Medical Assessment Section Bureau (*Bureau Medische Advisering*) of the Ministry of Justice conducted an inquiry into the applicant's state of health. According to its advice of 20 March 2007, the applicant was having serious problems of a psychiatric nature in that he was suffering from a serious form of a PTSD with therapy-resistant anxieties and hallucinations and very disturbing reliving experiences, for which treatment was available in Afghanistan.

The final – for the applicant negative – decision on his asylum request was given on 6 February 2009 by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State.

On 14 July 2009, the Minister of Justice (*Minister van Justitie*) rejected the applicant's request of 26 May 2009 for deferment of removal (*uitstel van vertrek*) on medical grounds under the provisions of section 64 of the Aliens Act 2000 (*Vreemdelingenwet 2000*). The applicant filed an objection (*bezwaar*) against this decision with the Minister on 16 July 2009.

B. Events after the introduction of the application

In the context of the proceedings on the applicant's objection, the Medical Assessment Section drew up a fresh advice on 29 December 2009, which states *inter alia* that the applicant is suffering from a very serious form of PTSD caused by traumatising experiences in Afghanistan and later in France, initially with visual and auditory hallucinations. He had attempted to commit suicide in 2008 and suffers from therapy-resistant anxieties, disturbing reliving experiences and depression. It also states that treatment (medication and therapy) in a general technical sense is available in Afghanistan.

The Minister rejected the applicant's objection on 25 February 2010. Referring to the advice drawn up on 29 December 2009 by the Medical

Assessment Section and an addendum to this advice of 3 February 2010, the Minister held that section 64 was not applicable in the applicant's case as he was fit to travel, provided certain practical conditions (including a physical transfer to medical carers and a continuation of his treatment in a local medical establishment) were met and which could be met whereas his return to Afghanistan would not result in a medical emergency situation in the short term.

The applicant filed an appeal. In its judgment of 29 July 2011, the Regional Court of The Hague sitting in Dordrecht accepted the appeal, quashed the impugned decision and ordered the Minister to take a fresh decision. It considered that the Minister had failed to verify whether, in case of the applicant's effective removal, the practical travel conditions referred to in the advice of the Medical Assessment Section would indeed be complied with. It considered that the determination of this question could not be postponed until the moment of actual removal.

Despite this ruling in his favour, the applicant filed a further appeal with the Administrative Jurisdiction Division. This appeal was dismissed on 23 May 2012. The Administrative Jurisdiction Division upheld the judgment of 29 July 2011.

In a fresh decision taken on 1 June 2012, the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*), the successor to the Minister of Justice, decided to grant the applicant deferment of removal until 1 June 2013 under the terms of section 64 of the Aliens Act 2000.

On 19 June 2012, having been invited to indicate whether in these circumstances he wished to pursue his case, the applicant informed the Court that he wished to pursue his application as he had only been granted a temporary deferment of removal whereas he aspired a decision granting him leave to remain indefinitely in the Netherlands.

COMPLAINT

The applicant complained that his expulsion to Afghanistan, taking into account that he is suffering from serious mental health problems caused by having been exposed to traumatising experiences in Afghanistan where there is a (serious) lack of adequate medical and other care facilities for his treatment, will entail a violation of his rights under Article 3 of the Convention. He further feared that he would be exposed anew to traumatising experiences in Afghanistan on account of his father's role in the Taliban.

THE LAW

The applicant complained that his expulsion to Afghanistan will be contrary to his rights under Article 3 of the Convention, which provides:

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

The Court would reiterate at the outset that 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 expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies.

In so far as the applicant's complaint under Article 3 is based on his state of health, the Court reiterates its case-law in respect of Article 3 and the expulsion of the seriously ill (see *N. v. the United Kingdom* [GC], no. 26565/05, §§ 32-45 with further references, ECHR 2008), in particular 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 provided by the expelling State (see *D. v. the United Kingdom*, 2 May 1997, § 54, *Reports of Judgments and Decisions* 1997-III).

In the very exceptional circumstances of the case of *D. v. the United Kingdom* the Court found that the applicant's removal to St. Kitts would violate Article 3, taking into account his critical medical condition. The Court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (see *D.*, cited above, §§ 51–54).

However, in the circumstances of the present case, the Court does not find it necessary to examine whether the applicant's expulsion to Afghanistan would be contrary to the standards of Article 3 of the Convention in view of his present state of health as it is precisely on the basis of the applicant's medical condition that the Netherlands authorities have granted him a deferment of removal until 1 June 2013. The Court also does not find it necessary to determine whether the applicant, if expelled to Afghanistan, would be exposed to a real and personal risk of treatment in

violation of Article 3 for reasons related to his father's role in the Taliban as, for the time being, he does not risk removal to Afghanistan.

The Court will therefore ascertain whether this new development is such as to lead it to decide to strike the application out of its list of cases in application of Article 37 of the Convention, which provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
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> (a) the applicant does not intend to pursue his application; or
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> (b) the matter has been resolved; or
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> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
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> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
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> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

The Court notes that the applicant intends to pursue his application. Consequently, Article 37 § 1 (a) does not apply. It further finds that the matter before it has not been resolved for the purposes of sub-paragraph (b) of Article 37 § 1 in that the applicant's request for an asylum-based residence permit has been rejected and his effective removal will be carried out as soon as his medical condition in conjunction with adequate treatment possibilities in Afghanistan will allow this.

The above-mentioned developments may, however, lead the Court to conclude that, "for any other reason ... it is no longer justified to continue the examination of the application" and that the application should therefore be struck out of the list in application of Article 37 § 1 (c). It is clear from the latter provision that the Court enjoys a wide discretion in identifying grounds capable of being relied upon in striking out an application on this basis, it being understood, however, that such grounds must reside in the particular circumstances of each case (see *Association SOS Attentats and de Boery v. France* [GC], (dec.), no. 76642/01, § 37, ECHR 2006-XIV; *Predescu v. Romania*, no. 21447/03, § 29, 2 December 2008, and *F.I. and Others v. the United Kingdom* (dec.), no. 8655/10, 15 March 2011).

The Court notes that in his application form the applicant stated that the object of the present application to the Court was to prevent his removal from the Netherlands and the obtainment of a Netherlands residence title. The Court further notes that, at least until 1 June 2013, the applicant does not risk removal from the Netherlands for reasons based on his present state of health. Against this background, the Court is of the view that the

particular circumstances of this application are such that it is no longer justified to continue its examination.

In accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case. Accordingly, it is appropriate to strike the case out of the list.

For these reasons, the Court unanimously

Decides to strike the application out of its list of cases.

Santiago Quesada
Registrar

Josep Casadevall
President