

APPLICATION/REQUÊTE N° 17262/90

A v/FRANCE

A c/FRANCE

DECISION of 27 February 1991 on the admissibility of the application

DECISION du 27 fevrier 1991 sur la recevabilite de la requête

Article 3 of the Convention *The expulsion of an individual to a country where there are serious reasons to believe that he will be subjected to treatment contrary to Article 3 may raise an issue under this provision. This is not the case when the individual's allegations are not supported by any persuasive prima facie evidence and documents on the file cast doubt on their accuracy.*

Article 25 of the Convention *The Convention must be applied in a manner which makes the system of individual applications efficient. A person who is about to be subjected to a violation of the Convention may claim to be a victim.*

This is the case where a person is in the hands of a High Contracting Party which has decided to expel him and such expulsion is imminent and may he claims expose him to treatment contrary to Article 3.

Article 26 of the Convention

a) *When an individual alleges that the enforcement of a deportation order against him violates Article 3 of the Convention, a remedy which has no suspensive effect is not effective.*

b) *The appeal to the administrative court against a prefectural deportation order (arrete de reconduite a la frontiere), provided for in the French law of 10 January*

1990 cannot be considered as an effective remedy when the country of destination is not indicated in the order

Article 3 de la Convention *L'expulsion d'un individu vers un pays où il y a de sérieuses raisons de croire qu'il sera soumis à un traitement contraire à l'article 3 pourrait soulever un problème sous l'angle de cet article. Tel n'est pas le cas lorsque les allégations de l'intéressé ne sont étayées par aucun commencement de preuve convaincante et que des pièces du dossier suscitent des doutes sur leur exactitude.*

Article 25 de la Convention *La Convention doit être appliquée de manière à rendre efficace le système des requêtes individuelles. Peut se prétendre victime d'une violation celui qui est sur le point de subir une violation du fait d'une Haute Partie Contractante.*

Tel est le cas de celui qui se trouve aux mains des autorités d'une Haute Partie Contractante que celle-ci a décidé d'expulser à un État étranger dont l'expulsion est imminente et pourrait l'exposer. Affirme-t-il à un traitement contraire à l'article 3.

Article 26 de la Convention

- a) *Lorsqu'un individu allègue que l'exécution d'une mesure d'expulsion prise contre lui viole l'article 3 de la Convention, un recours sans effet suspensif est inefficace.*
 - b) *Le recours prévu par la loi française du 10 janvier 1990 devant le juge administratif contre un arrêté préfectoral de reconduite à la frontière qui n'indique pas le pays de destination ne peut être considéré comme efficace.*
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(TRANSLATION)

THE FACTS

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

The applicant is a Zairian national, born in 1963. He is at present resident in Bourg-en-Bresse.

He left his country on 25 November 1989 and arrived in France where, on 15 January 1989, he applied to the French Office for the Protection of Refugees and Stateless Persons (OFPRA - Office français de protection des réfugiés et apatrides) for political asylum. In support of his application he explained that,

following a student riot which took place on 14 February 1989 in Kinshasa, he was arrested by the Special Presidential Division (SPD), detained and tortured. He managed to escape and went into hiding at the home of his brother, a lawyer in Bukavu. However, he was traced by the SPD, arrested again and imprisoned in June 1989. On his release from prison, after his brother had paid a large sum of money to one of the prison officers, he decided to flee the country so that his family would not be inconvenienced any more. After these events, in fact, his brother was also arrested, charged with complicity and allegedly warned not to harbour his brother in future.

In a decision dated 6 February 1990 the OFPRA rejected the application for asylum on the ground that the applicant had not produced any solid evidence of the truth of his allegations. The applicant appealed, submitting to the Refugee Appeals Board a letter confirming his allegations allegedly written by his brother, a lawyer. On 21 June 1990 the Refugee Appeals Board upheld the OFPRA's decision. The applicant then appealed to the Conseil d'Etat, but withdrew the appeal on 6 December 1990 for financial reasons.

The Refugee Appeals Board held that the documents submitted, alleged to be letters from the applicant's brother, from a minister of religion and from fellow churchgoers, did not conclusively establish the truth of the applicant's allegations, nor did the medical certificate or the results of laboratory tests he had submitted.

On 16 August 1990 the applicant asked the OFPRA to reconsider its decision. When it again rejected his application, on 29 August 1990, in a decision communicated to the applicant on 23 October 1990, he appealed to the Refugee Appeals Board.

Before the Commission the applicant has submitted newspaper articles attesting to the repression of student riots in Zaire and refers to a book concerning the situation there. He also asserts that he has no official document which he could use to establish the truth of his allegations.

The Government, at the Commission's request, have supplied copies of the above-mentioned letters submitted to the Appeals Board, but have been unable to produce the medical certificate or the results of the laboratory tests.

The applicant obtained a provisional residence permit allowing him to remain in France until 13 October 1990.

On 4 January 1991 the Prefect of Ain issued a deportation order (arrêté de reconduite à la frontière) against the applicant, but this was not enforced.

COMPLAINTS

Before the Commission the applicant claims that in the event of his return to Zaire he will be in danger of being exposed to punishment or treatment contrary to Article 3 of the Convention because of his participation in the Zairian student movement.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 August 1990 and registered on 4 October 1990

On 9 October 1990 the Commission decided, in accordance with Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the French Government and invite them to submit observations in writing on its admissibility and merits and to supply copies of the essential documents in the files of the OFPRA and the Refugee Appeals Board

On the same day the Commission decided to apply Rule 36 of its Rules of Procedure by indicating to the Government that it would be desirable, in the interests of the parties and the proper conduct of the proceedings, not to expel the applicant before 9 November 1990, i.e. not before the Commission had had the opportunity to examine the application in greater detail at its forthcoming session, due to take place from 5 to 9 November 1990.

The Commission also decided to invite the applicant to supply detailed information about his activities in Zaire and the circumstances of his departure from that country

On 25 October 1990 the respondent Government announced that the relevant authorities had been instructed to postpone any decision ordering the applicant's expulsion until further notice.

The Government's observations were submitted on 25 October 1990

On 8 November 1990 the Commission decided to extend application of Rule 36 of its Rules of Procedure until 14 December 1990.

The applicant's observations in reply were submitted on 15 November 1990

On 28 November 1990 the respondent Government announced that, in accordance with the Commission's wishes, the applicant still had provisional authorisation to reside in France until 14 December 1990.

On 10 December 1990 the Commission decided to extend application of Rule 36 of its Rules of Procedure until 18 January 1991, to ask the Government to supply copies of the documents mentioned in the decision of the Refugee Appeals Board and to invite the applicant to supply any further document he might wish to have added to the file

In a letter dated 10 January 1991 the Government announced that they had decided to comply with the Commission's wishes.

On 14 January 1991 the Commission decided to invite the parties to submit their observations at a hearing

It also decided to extend the application of Rule 36 of its Rules of Procedure until a decision on the admissibility had been taken.

On 28 January 1991 the Government confirmed that the applicant would not be expelled before the date of the hearing.

The President of the Commission granted the applicant legal aid for the proceedings before the Commission on 4 February 1991

The hearing took place on 27 February 1991

The parties were represented as follows :

For the French Government

- Mr. Bruno Gain, Deputy Director in charge of Human Rights at the Directorate of Legal Affairs of the Ministry of Foreign Affairs, Government Agent ;
- Mr. Luc Chocheyras, administrative court judge, seconded to the Sub-Directorate of Human Rights at the Directorate of Legal Affairs of the Ministry of Foreign Affairs .
- Mr. Pierre Moreau, Secretary General of the French Office for the Protection of Refugees and Stateless Persons (OFPRA – Office français de protection des réfugiés et apatrides) ;

Mrs Frederique Doublet, Charge de mission at the Sub-Directorate of Aliens and Transfrontier Movement at the Directorate of Public Freedoms and Legal Affairs of the Ministry of the Interior ,

- Mr Gerard Poutreau of the Sub-Directorate of Legal Affairs and Litigation at the Directorate of Public Freedoms and Legal Affairs of the Ministry of the Interior

For the applicant

- Mr Gerard Dupuy of the Strasbourg Bar ,

The applicant, who attended the hearing in person

THE LAW

The applicant maintains that in the event of his return to Zaire he will be in danger of being subjected to treatment contrary to Article 3 of the Convention because of his participation in the student movement

1 The Government point out in the first place that, according to the constant case-law of the Commission, the Convention does not guarantee an alien's right to enter or reside in a particular country

Secondly, the Government observe that, as the applicant has not yet actually been expelled, his complaint concerns a situation that is only potential, and he accordingly does not have the status of victim within the meaning of Article 25 of the Convention

In this connection the Commission recalls its finding in the Soering case, namely that "Since the Convention bodies were set up to protect the individual, the Convention must be applied in a manner which serves to make the system of individual applications efficacious" (Soering v the United Kingdom, Comm Report 19189, para 109, Eur Court H R , Series A no 161, p 58)

Consequently, it considers that the applicant is entitled to claim to be a victim within the meaning of Article 25 of the Convention

2 The Government further maintain that the applicant has failed in two respects to satisfy the exhaustion of domestic remedies requirement, firstly regarding the decision of the Refugee Appeals Board and secondly regarding the deportation order

With regard to the Refugee Appeals Board's rejection of the applicant's request for asylum, the Government observe that the applicant could have contested this decision before the Conseil d'Etat, and moreover had started to do so before withdrawing his appeal.

The Government point out in this connection that there is no fee for appeals and that the applicant could have requested legal aid

With regard to the effectiveness of an appeal to the Conseil d'Etat to set a decision aside, the Government point out that the Conseil d'Etat exercises extensive supervision over the decisions of the Refugee Appeals Board and that this is a remedy which can lead in certain cases to an annulment of the decision.

The Government cite in this connection the case-law of the Conseil d'Etat, claiming that it shows how the Conseil d'Etat exercises this supervision particularly in cases involving procedural irregularities, inadequate reasons, errors of law, errors of fact, errors in the legal classification of facts or distortion of the facts or documents in the file.

The applicant maintains that an appeal to the Conseil d'Etat to set aside the Refugee Appeals Board's rejection of an asylum request does not have suspensive effect.

Consequently, as this remedy does not prevent the applicant's exposure to risk in the event of his return to his country of origin, the Government cannot object to the fact that the applicant has not made use of it.

The Commission notes that an appeal to the Conseil d'Etat to set aside a decision does not have suspensive effect and thus would not prevent the applicant from being deported.

It recalls that, according to its constant case-law, a remedy which does not suspend execution of an expulsion decision is not effective for the purposes of Article 26 and does not have to be used by an applicant alleging a violation of Article 3 of the Convention (see No. 10400/83, Dec. 14.5.84, D.R. 38 p. 145 , No. 10760/84, Dec. 17.5.84, D.R. 38 p. 224, and No. 10564/83, Dec. 10.12.84, D.R. 40 p. 262)

The Commission considers that this also applies to appeals without suspensive effect to the Conseil d'Etat against a refusal to grant asylum to a person, who thus becomes liable to deportation before the court hearing the appeal against the decision in question has given a ruling

Consequently, this first objection raised by the Government, alleging failure to exhaust domestic remedies, cannot be upheld

The Government have raised a second objection alleging non-exhaustion, on the ground that the applicant did not make use of the appeal which lay against the deportation order issued against him by the Prefect of Ain on 4 January 1991

3. They maintain that this remedy, provided for by the Law of 10 January 1990 (Article 22 bis of the Order of 2 November 1945 on conditions governing entry into and residence in France by aliens) consists in an appeal to the president of the administrative court and has an automatically suspensive effect

This provision was enacted by Parliament in order to strengthen the guarantees afforded to aliens liable to deportation for illegal entry or residence by giving them the right to have their situation examined during adversarial judicial proceedings

The appeal must be lodged within the twenty-four hours following service of the prefectural deportation order and the administrative court must decide the issue within forty-eight hours of the lodging of the appeal.

These limits were calculated, according to the Government, to reconcile respect for the rights of the defence with the legitimate concern of the authorities to be able to ensure execution of the measures taken, since administrative detention may not exceed seven days.

The Government point out that provision has been made for the assistance of an interpreter where necessary, communication of the file on the basis of which the contested decision has been taken and the possibility of requesting legal aid, in order to guarantee the rights of the defence.

The implementing circular requires the form used for service of the deportation order to state the conditions for appeal by the person concerned and to be printed in several languages

The order cannot be enforced within the twenty-four hours following service or, where an appeal to the administrative court has been lodged, before that court has given its decision, no penalty attaching to failure to decide the appeal within the forty-eight hour limit.

Lastly, the judgment of the president of the administrative court may be contested by means of an appeal to the president of the Litigation Division of the Conseil d'Etat, such appeal not having suspensive effect.

With regard to the scope of review, the Government point out that it covers firstly the principle of the expulsion measure itself and then the choice of the country to which the person concerned is to be sent.

On the question of the expulsion measure itself, the Government assert that, according to the case-law of the Conseil d'Etat, the administrative court must check that the measure envisaged is not likely to have exceptionally serious consequences for the personal or family situation of the person concerned and is also compatible with the Convention, in particular.

The Government further point out that the Conseil d'Etat has established a clear distinction between the expulsion measure and the choice of the country to which the person concerned is to be sent. They maintain that the decision specifying the country of destination can also in itself give grounds for complaint and review by the administrative court, such appeal being subject to the same conditions as an appeal against the deportation order, and also having suspensive effect.

This extensive supervision covers not only procedural irregularities, errors of law, suppression of evidence and factual inaccuracy but also the assessment of the facts.

Accordingly, the Government argue that the applicant had a remedy he failed to make use of against the prefectural deportation order.

The applicant, for his part, observes that at the time when the deportation order was issued the case had already been referred to the Commission.

Furthermore, the judgment cited by the Government in which the Conseil d'Etat scrutinised the compatibility of an administrative decision with the Convention was given on 18 January 1991 and thus postdated the deportation order issued against him.

The Commission notes, first of all, that the deportation order was issued by the Prefect of Ain on 4 January 1991, whereas by that time, after an initial decision dated 9 October 1990 and subsequent decisions covering the period up to 18 January 1991, the Commission had decided to apply Rule 36 of its Rules of

Procedure and indicate to the Government that it would be desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant before it had had time to examine the application in greater detail

The Commission also notes that the Prefect issued the above-mentioned order even though it had applied Rule 36 of its Rules of Procedure and although the Government had stated that they had decided to comply with the Commission's wishes

With regard to the effectiveness of an appeal to the president of the administrative court, the Commission first notes that the twenty-four hour period in which such an appeal can be lodged is extremely short and that in this case the applicant, who lived in Bourg-en-Bresse, would have had to appeal to the president of the Lyon Administrative Court.

It further notes that the deportation order issued in this case did not specify the country of destination

The Commission notes, however, that, according to the information supplied by the Government, the administrative court's scrutiny of a deportation order consists in checking that the measure envisaged is not likely to have exceptionally serious consequences for the personal or family situation of the person concerned and also that the decision is compatible with the Convention

Since the country of destination was not specified in the impugned order, the Commission does not see how the president of the administrative court could have exercised effective scrutiny of these two questions, which in this case depended exclusively on the choice of the country to which the applicant was to be deported. In this connection, the Commission recalls that in a judgment dated 17 December 1990 relied on by the Government (Ouedjedi case) the Conseil d'Etat ruled that the appellant could not validly plead that he would be seriously at risk if he had to return to his country of origin "in support of an appeal against the impugned order, which does not specify the country to which the person concerned is to be deported".

Consequently, the Commission considers that the appeal would not have been effective in this case and that the Government's objection alleging the failure to exhaust domestic remedies cannot be upheld

4 With regard to the merits of the case, the Government consider that the applicant's file contains no conclusive evidence that his fear of being subjected to treatment contrary to the Convention in the event of his return to Zaïre is justified

They observe that the OFPRA and the Refugee Appeals Board gave rulings to that effect, pointing out the weaknesses of the case put forward by the applicant.

In this connection the Government maintain that the applicant's statements are ambiguous in places, are often imprecise and constantly refer to the same book, which does not mention the applicant himself

The Government assert that the documents submitted consist, in part, of letters from people who got to know the applicant in France and can only vouch for his good character.

The Government assert that the newspaper articles produced in evidence contain reports on events in Zaire but do not refer to the specific part allegedly played by the applicant in those events.

The Government further assert that the letter from the applicant's brother, who is a lawyer, is vague, and observe that in any case this is the testimony of a close relative.

Lastly, the Government assert that the OFPRA conducted research in an attempt to corroborate the applicant's statements. For example, it questioned non-governmental organisations with correspondents or outstations on the spot, such as Amnesty International, the Lawyers' Committee for Human Rights and Frères des Hommes, but was unable to obtain any information confirming the applicant's claims.

The applicant considers that the OFPRA did not study the facts carefully enough, that the book he cited contains precise dates and facts and that no account was taken of his brother's testimony.

As for the contradictions noted by the Government, the applicant asserts that these are only apparent and are mainly due to his inadequate command of French.

Lastly, the applicant observes that the situation in his country of origin has not improved.

The Commission notes that the applicant has adduced little evidence in support of his allegations, the most important item being the letter from his brother written in response to a request for further information from the applicant's lawyer

The Commission notes that this letter, which was written, it is claimed, in response to a request for information from the lawyer in France who was preparing the applicant's application for asylum, gives only very vague answers and does not supply any precise information supporting the applicant's allegations.

It also notes that the French authorities dealing with the applicant's asylum request unsuccessfully attempted to obtain evidence supporting the applicant's allegations from several non-governmental organisations possessing precise and detailed information about the persons sought by the Zairian authorities.

Lastly, the Commission notes that, in spite of its requests for more information, the applicant has been unable to supply any further evidence in support of his allegations

Consequently, the Commission concludes that the applicant has not put forward even *prima facie* evidence that, in the event of his return to his country of origin, he would run the risk of being subjected to treatment contrary to Article 3 of the Convention

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, by a majority, the Commission

DECLARES THE APPLICATION INADMISSIBLE