

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

FIFTH SECTION

DECISION

Application no. 54646/17
X
against Germany

The European Court of Human Rights (Fifth Section), sitting on 7 November 2017 as a Chamber composed of:

Erik Møse, *President,*
Angelika Nußberger,
Nona Tsotsoria,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 30 July 2017;

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court;

Having regard to the factual information and comments submitted by the parties;

Having deliberated, decides as follows:

PROCEDURE

1. The applicant is a Russian national who was born in 1999 in the Northern Caucasus. He was represented before the Court by Ms C. Graebsch, a professor lecturing and practising in Dortmund.

2. Together with his application under Article 34 of the Convention, the applicant requested an interim measure under Rule 39 of the Rules of Court to suspend his deportation to Moscow, Russia.

3. On 31 July 2017 the Court decided to apply Rule 39 and indicated to the German Government, in the parties' interest and that of the smooth

conduct of the proceedings, that they should not deport the applicant pending the outcome of the proceedings before the Court. It also granted priority (Rule 41), anonymity (Rule 47 § 4) and confidentiality (Rule 33), and asked the Government for factual information (Rule 54 § 2 (a)).

4. Submissions by the Government were received on 18 August 2017 and, after they had been sent to the applicant for comment, his comments were received on 24 August 2017.

5. On 29 August 2017 the Court decided to lift the interim measure under Rule 39.

THE FACTS

A. The circumstances of the case

6. The applicant arrived in Germany in 2002. In the same year, and again in 2011, his asylum requests were refused by the competent domestic authorities. In 2012 the applicant was granted a residence permit, which was subsequently prolonged until March 2018.

7. In 2014 the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) investigated the applicant owing to his alleged ties to the "radical Islamic scene". In December 2014 the applicant was ordered not to leave Germany, as it was suspected that he was going to travel to Syria to join the so-called "Islamic State". A request to lift this order was denied in 2016 as the security agencies possessed information indicating that the applicant was still in contact with the "radical Islamic scene".

8. In January 2017 the police obtained intelligence about the applicant, including records of online chats in which the applicant stated that he would be willing to participate in an "operation" in Germany. Subsequently the public prosecutor's office launched an official investigation on the grounds of "encouraging the commission of a serious violent offence endangering the state" and the applicant's flat was searched. During the search several smartphones, tablets and other devices were seized. On the devices 42,000 pictures and 1,000 videos were found which showed violent acts in an Islamic context and also included a manual for building explosive devices.

9. On 13 March 2017 the Bremen Administration ordered the applicant's deportation to Russia, as he constituted a threat to national security. He was suspected of being willing to participate in or carry out a terrorist attack in Germany. The decision was based on intelligence gathered by the security agencies (see paragraphs 7 and 8 above). Although the authorities concluded that he had not yet reached the planning stage, he nonetheless constituted an abstract danger for society. This abstract risk was sufficient to

overrule the applicant's right to respect for private and family life, given the fact that he had grown up and lived in Germany for the previous 15 years. Moreover, there was no risk for the applicant under Article 3 of the Convention as the Russian authorities would not be informed about the intelligence that had been gathered and it was up to him not to join the "radical Islamic scene" in Russia after his deportation.

10. The applicant challenged the decision before the Federal Administrative Court and applied for an interim measure suspending his deportation for the duration of the main proceedings. During the interim proceedings the Federal Administrative Court requested further information from the German Foreign Office concerning the expected treatment of the applicant after deportation to Russia. Based on conversations with employees of the Russian NGO "Committee Against Torture" the Foreign Office responded that it could be expected that the applicant would be questioned and monitored by security agencies, but that it would be highly unlikely that he would be pre-emptively tortured.

11. On 13 July 2017, in a detailed decision of 63 pages, the Federal Administrative Court refused to grant the interim measure. It concluded that the assessment of the security risk for the applicant was in essence correct. However, unlike the Bremen Administration, the court considered that the Russian authorities would be acquainted with the reasons for the applicant's deportation. Therefore, due to the risk of torture and ill-treatment the applicant could not be deported to his home region of Dagestan. However, he could be deported to another part of Russia. After considering several current reports on the situation, the court held that there were no specific indications that the applicant would be detained or tortured elsewhere in Russia or be forcibly brought to Dagestan on the basis of his previous conduct in Germany. It found that the publicly available reports were not applicable to the present case as they concerned persons who were in one way or another connected to the conflicts in Dagestan and Chechnya, which the applicant was not. The most relevant information stemmed from the Committee Against Torture (see paragraph 10 above), which had provided information specific to the present case to the German Foreign Office. According to this information the applicant would probably be questioned and monitored by security agencies in Russia, but it was highly unlikely that he would be tortured. Consequently, the court concluded that even though it could be expected that the applicant would be closely monitored, any further action by the Russian authorities would depend on the applicant's future conduct in Russia. As regards Article 8, the court held that even though the applicant would face certain problems due to not having family in other parts of Russia and everyday discrimination based on his Caucasian ethnicity, he should still be able to settle in the suburbs of Moscow and find a job, since he had a basic knowledge of the Russian language.

12. On 26 July 2017 the Federal Constitutional Court – in a reasoned decision – refused to grant an interim measure or to admit the applicant's constitutional complaint for adjudication. While criticising that the Federal Administrative Court had not assessed in sufficient depth whether the applicant could live and find work outside of the Northern Caucasus without facing the risk of inhuman or degrading treatment at the hands of the Russian authorities, it pointed out that the Federal Administrative Court had nonetheless correctly based its decision on current reports concerning the situation of persons of Northern Caucasian ethnicity returning to Russia and information requested from the German Foreign Office and the Federal Office for Migration. It therefore concluded that the Federal Administrative Court had considered all possible risks the applicant would face and had also correctly found that the applicant could be deported to Russia.

13. The main proceedings before the Federal Administrative Court are still pending.

B. Relevant domestic law

14. The deportation of a so-called "*Gefährder"* (a potential offender, who poses a threat to national security) is regulated in section 58a of the Residence Act (*Aufenthaltsgesetz*), which reads:

> "(1) The supreme Land authority may, based on an assessment of the facts and without a prior expulsion order, issue a deportation order for a foreigner in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat. The deportation order shall be immediately enforceable; no notice of intention to deport shall be necessary.
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> ..."

C. Reports from independent international human rights protection associations and governmental sources

15. The Human Rights Watch report "'Invisible War' – Russia's Abusive Response to the Dagestan Insurgency" of 18 June 2015 outlines several human rights violations during counter-insurgency operations in Dagestan, including arbitrary detention, torture and forced disappearances. It also states that the authorities have cast an excessively wide net by essentially treating Salafis as criminal suspects without charging them with any specific offence.

16. A report drawn up by the Swiss Refugee Council in 2014 ("Russland: Verfolgung von Verwandten dagestanischer Terrorverdächtiger außerhalb Dagestans", 8 September 2015) describes the situation of family members of alleged terrorists involved in the conflict in Dagestan. According to it, family members were increasingly the targets of

persecution by the Russian authorities even outside of the Northern Caucasus. The methods employed by the Russian authorities included arbitrary arrests and criminal prosecution, and disappearances.

17. An updated report by the Swiss Refugee Council regarding the human rights situation in Chechnya ("Russie – Tchétchénie – Mise à jour: situation des droits humains", 13 May 2016) illustrates several examples of Chechens, with a prior connection to the conflict in Chechnya, having been detained, tortured and killed after returning to Russia. The NGO also reports that the Chechen and Russian authorities cooperate closely and that several persons had been forcibly returned to Chechnya from other parts of Russia.

18. The International Crisis Group in its report "The North Caucasus Insurgency and Syria: An Exported Jihad?" of 16 March 2016 describes grave human rights violations, including enforced disappearances, summary executions and the widespread occurrence of torture in Dagestan and Chechnya. It also describes the preventive registration of those suspected of adherence to fundamentalist strands of Islam as one of the key control methods across the Northern Caucasus. After incidents such as clashes between security forces and insurgents, or terrorist acts, the individuals on these lists were faced with the risk of detention and interrogation, which often involved violent or degrading methods.

COMPLAINTS

19. The applicant complained under Article 3 of the Convention that, if returned to Russia, he would be put under surveillance, detained, tortured or "disappear" due to his classification as a "*Gefährder*" in Germany, which would be known to the Russian authorities as the reason for his deportation. He also invoked Article 8 of the Convention regarding the fact that he would be torn from his family and the country in which he had lived for the past 15 years. Moreover, the prohibition on his returning to Germany would make it impossible for him to visit his immediate family. Lastly, the applicant complained under Article 13 of the Convention that the domestic courts did not sufficiently assess the situation in which he would find himself if he were to be deported to Russia.

THE LAW

A. Article 3 of the Convention

20. The applicant complained that his deportation to Moscow would violate Article 3 of the Convention, which reads:

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

21. The Government contested that argument.

1. Exhaustion of domestic remedies

22. The Court notes that the main proceedings before the Federal Administrative Court are still pending and that the applicant, so far, has only exhausted domestic remedies with a suspensive effect. The Court recalls that for applications alleging that a removal to a third country would have consequences contrary to Article 3 of the Convention only remedies with "the possibility of suspending the implementation of the measure impugned" can be considered an "effective remedy" (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 460, ECHR 2005-III; *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII). Given the importance which the Court attaches to Article 3 of the Convention and to the irreversible nature of the damage liable to be caused if the risk of torture or ill-treatment materialises, it has held that only remedies with a suspensive effect have to be exhausted under Article 35 § 1 of the Convention (see *Sow v. Belgium*, no. 27081/13, § 47, 19 January 2016; *Sultani v. France*, no. 45223/05, § 50, 20 September 2007).

23. The Court concludes that, since the applicant has availed himself of all remedies with a suspensive effect, his complaint under Article 3 cannot be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Whether the application is manifestly ill-founded

(a) The parties' submissions

24. The Government submitted that the domestic courts, in particular the Federal Administrative Court, had conducted a comprehensive evaluation of all available information. Based on this information the court had correctly concluded that the applicant would not face the risk of torture or ill-treatment upon his return to Russia. None of the available reports corroborated the argument that the applicant would be at risk, provided that he was not deported to the Northern Caucasus. In addition, there were no reports of forcible transfers from other parts of Russia to Dagestan or Chechnya. In sum the Government argued that neither the available reports

nor the case-law of the Court substantiated the applicant's allegations that he would be at risk of ill-treatment, torture, abduction or even "extra-judicial" killing if returned to Moscow.

25. In support of his complaint the applicant referred to several reports by international NGOs (see paragraphs 15-18 above) and submitted that, even though they did not show that there would be a risk of torture or ill-treatment for him in particular, they nevertheless proved that torture, forced removal and "extra-judicial" killings frequently occurred in relation to suspected Islamic extremists and "rebels" in Russia. Given the reasons for his deportation, he had to be considered as belonging to this risk group. Moreover, he argued that the reasoning of the Federal Administrative Court and the Government that he would not be "pre-emptively" tortured due to his conduct in Germany was not convincing. Given the international character of the so-called "Islamic State", differentiation in accordance with the lines drawn by national borders seemed fanciful. The Russian authorities would take great interest in the applicant's alleged contacts and their methods of communication and recruitment. The Government had accepted that the applicant would be interrogated. Based on the available reports, the interrogation of suspected Islamic extremists frequently included torture.

26. The applicant also submitted information which he had obtained from the Russian NGO "Memorial" after the decision of the Federal Constitutional Court of 26 July 2017. The NGO responded as follows to the question of whether it was likely that someone who was deported from Germany due to terrorist suspicions would arouse the interest of the Russian security agencies:

> "A person deported from Germany will undoubtedly be under social attention. The likelihood for him to become a victim of prosecution and torture is increasing. If he is expelled with such stigma as suspicion on the intention to commit a terrorist act, there the danger increases many times."

(b) The Court's assessment

27. At the outset the Court reiterates that, throughout its history, it has been acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which represents, in itself, a grave threat to human rights. As part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to constitute threats to their national security. It is no part of this Court's function under Article 3 of the Convention to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention. It is well established that 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 circumstances, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 183-5, ECHR 2012 (extracts), with further references).

28. The Court has summarised its approach towards assessing the risk of exposure to treatment contrary to Article 3 of the Convention in deportation cases in the case of *Saadi v. Italy* ([GC], no. 37201/06, §§ 128-33, ECHR 2008, with further references):

> "128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*. In cases such as the present one, the Court's examination of the existence of a real risk must necessarily be a rigorous one.
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> 129. 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. Where such evidence is adduced, it is for the Government to dispel any doubts about it.
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> 130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.
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> 131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US Department of State. At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence.
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> 132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.
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> 133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court. This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court. Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive."

29. Applying the general principles outlined above to the present case, the Court notes that in its extensive decision the Federal Administrative Court assessed in detail the publicly available reports. Since it considered that the available reports were not applicable to the situation of the applicant, it requested further information concerning the present case from the German Foreign Office, among other sources. Upon receipt of this information, stemming from a local Russian NGO, the court came to the conclusion that even if there was a risk of torture and ill-treatment in the region of Dagestan, where the applicant was born, there was no such risk in the other regions of the Russian Federation. As there was no indication that the applicant would be brought to Dagestan against his will, the Federal Administrative Court found that the applicant would not be tortured or ill-treated after his deportation to Moscow. This assessment was subsequently confirmed by the Federal Constitutional Court.

30. The Court agrees with this conclusion and observes, just as the Federal Administrative Court did, that the available reports concern in essence the situation of persons either directly connected to the conflicts in the Northern Caucasus themselves or being relatives of persons directly connected. However, the applicant has no connection with these conflicts as he left Dagestan when he was three years old. Consequently, these reports cannot establish that the applicant would face the risk of torture or ill-treatment if returned to Moscow.

31. The only information specifically concerning the likely situation facing the applicant following his potential deportation is the information provided by the Committee Against Torture (see paragraphs 10 and 11 above), to the German Foreign Office (see paragraph 11 above) and the responses of Memorial provided by the applicant (see paragraph 26 above).

32. As the latter information was not available to the national authorities during the domestic proceedings, the Court has to assess whether the new information, which contradicts the information provided by the Committee Against Torture (see paragraphs 10 and 11 above) and in the domestic proceedings is capable of calling into question the conclusions of the Federal Administrative Court, which are thus far correct. While the Committee Against Torture considers that it would be highly unlikely that the applicant would be pre-emptively tortured, even though he would be questioned and monitored by security agencies, Memorial stated that there is a highly increased risk that the applicant would become a victim of prosecution and torture.

33. The Court considers both NGOs equally credible, but also observes that neither of them referred to previous similar deportations in order to substantiate their assumptions. Accordingly, it sees no reason to depart from the decisions of the domestic courts in this respect.

34. Taking into account the careful weighing of evidence and comprehensive assessment by the domestic courts and in the light of all the

material in its possession, the Court cannot but conclude that, as the applicant has no connection with the conflicts in the Northern Caucasus, there are no substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 if deported to Moscow.

35. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Article 13 in conjunction with Article 3 of the Convention

36. As regards the applicant's complaint under Article 13 in conjunction with Article 3 of the Convention that the assessment by the domestic courts had not been thorough enough, the Court has already considered this suggestion under Article 3 (see paragraphs 29-32 above). The Court also notes that the applicant had two remedies at his disposal whereby to obtain an interim measure suspending his deportation.

37. Accordingly, this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Article 8 of the Convention

38. The Court notes that the main proceedings giving rise to the issues under Article 8 of the Convention are still pending before the Federal Administrative Court. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 30 November 2017.

Milan Blaško
Deputy Registrar

Erik Møse
President