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

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Return to Morocco of an applicant of Sahrawi origin who stated that he was a political activist for the Sahrawi cause: no violation of the Convention

In today's **Chamber** judgment[1] in the case of E.H. v. France (application no. 39126/18) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights, and

no violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3 of the Convention.

The case concerned the return to Morocco of an applicant who claimed to be at risk of treatment contrary to Article 3 on account of his Sahrawi origins and his activism in support of the Sahrawi cause.

In general terms, the Court found that Moroccan nationals who were activists for Western Saharan independence and the Sahrawi cause constituted a group at particular risk.

In this specific instance, in the light of all the circumstances of the case, the Court agreed with the conclusion reached by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), the National Asylum Court (CNDA) and the Paris and Melun Administrative Courts, all of which had given properly reasoned decisions, in view of the lack of specific information in the file substantiating the applicant's alleged fears stemming from his involvement with the Sahrawi cause and from the Moroccan authorities' efforts to find and prosecute him. The Court also noted that the applicant had not produced any document or evidence in the proceedings before it besides those he had previously produced before the domestic authorities. The Court inferred from this that the evidence in the file did not provide substantial grounds for believing that the applicant's return to Morocco had placed him at real risk of treatment contrary to Article 3 of the Convention.

As to the effectiveness of the remedies made available to the applicant under domestic law, the Court noted that he had on four occasions exercised a remedy that suspended the enforcement of the order for his return to Morocco. In the context of these different remedies he had given evidence on four occasions and had been given an opportunity, despite the short deadlines, to present his claims in an effective manner by virtue of the safeguards afforded to him (assistance of an interpreter, support from an approved association, appointment of a legal-aid lawyer).

After assessing the proceedings as a whole, the Court concluded that the remedies exercised by the applicant, taken together, had been effective in the particular circumstances of this case. There had therefore been no violation of Article 13 read in conjunction with Article 3 of the Convention.

Principal facts

The applicant, E.H., is a Moroccan national of Sahrawi origin who was born in 1993 and lives at the home of his representative in Paris.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

E.H. stated that he had become involved in the Sahrawi cause at the end of his secondary schooling. He said that he had been arrested, arbitrarily detained and tortured by the police on several occasions. In March 2018 he had learned that he was being sought by the Moroccan authorities and that police officers had issued threats against him and his family. Fearing for his life, he had decided to flee Morocco. He had obtained a passport, followed by a "student" visa issued by the Ukrainian consulate in Rabat, and had booked a seat on a flight from Marrakesh because the police checks there were less strict than in Casablanca.

On 18 July 2018 E.H. arrived at Roissy Charles de Gaulle airport. He was refused entry into France on the grounds that he did not have a "Schengen visa" or a valid residence permit. He was placed in the airport's waiting zone for persons whose case was being processed (ZAPI).

On 19 July 2018 E.H. requested permission to enter the country in order to claim asylum. He sought leave to remain in France so that he could submit an asylum application to the French Office for the Protection of Refugees and Stateless Persons (OFPRA). He was held in the waiting zone for four days while his request was being examined.

On the same day E.H. was invited to attend an interview with a protection officer of the OFPRA, scheduled for 20 July 2018. The invitation, which had been translated into Arabic, mentioned the option of being accompanied by a lawyer or by an approved representative of one of the associations authorised by the OFPRA to operate in the waiting zone. On 20 July 2018 at 10 a.m. E.H., assisted by an Arabic interpreter, was interviewed by an OFPRA official who had come to the waiting zone.

In an order of 20 July 2018 issued on the basis of the OFPRA's recommendation, the Minister of the Interior refused the applicant leave to enter France in order to claim asylum, on the grounds that his request was manifestly unfounded. The Minister ordered the applicant's removal to Morocco or any country which he could lawfully enter, on the basis of Article L.213-4 of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA). On 21 July 2018 E.H., who was still in the waiting zone, applied to the Paris Administrative Court to have the order of 20 July 2018 set aside.

In an order of 22 July 2018 the Liberties and Detention Judge of the Bobigny *tribunal de grande instance* authorised the extension of the applicant's stay in the waiting zone for a further eight days on the grounds that his application to the Paris Administrative Court was pending. E.H. appealed against that order to the Paris Court of Appeal. On 24 July 2018 the latter declared the appeal inadmissible. In a judgment of 25 July 2018 the Paris Administrative Court rejected the application to set aside the order of 20 July 2018. E.H. did not appeal against that judgment.

On 26 and 27 July 2018 E.H. objected to his removal to Morocco and refused to board the aircraft. On 28 July 2018 he again refused to board a flight to Morocco. He was therefore arrested and taken into police custody for wilfully evading the enforcement of an order refusing entry to French territory, and thus entered the country *de facto*.

On 29 July 2018 the prefect of Seine-Saint-Denis issued an order requiring E.H. to leave French territory, naming Morocco as the receiving country. E.H. was placed in the Mesnil-Amelot administrative detention centre.

On 30 July 2018 E.H., who was receiving legal assistance from the *Comité inter-mouvements auprès des évacués* (CIMADE), lodged an application with the Melun Administrative Court to have the order of 29 July 2018 set aside. On 31 July 2018 the Liberties and Detention Judge authorised the extension of the applicant's administrative detention for twenty-eight days. That decision was upheld by the Court of Appeal on 1 August 2018.

On 2 August 2018 E.H. lodged an asylum application. On the same day the prefect issued an order refusing him leave to remain as an asylum-seeker and authorising his continued detention in the administrative detention centre. The prefect specified that the OFPRA would examine the

applicant's asylum claim under the expedited procedure. On 6 August 2018 E.H. lodged a fresh application with the Melun Administrative Court for the setting-aside of the order of 2 August 2018. On 9 August 2018 an interview with a protection officer from the OFPRA took place by videoconference, lasting fifty-five minutes. E.H. was assisted by a Hassaniya Arabic interpreter. The applicant asserted that because his asylum claim was being examined under the expedited procedure he had not had sufficient time to gather together all the necessary documents. In a decision of 9 August 2018 taken under the expedited procedure the OFPRA rejected the applicant's asylum application.

On 13 August 2018 the Melun Administrative Court held a hearing at which the two applications lodged by E.H. (concerning the order of 29 July 2018 in so far as it specified the receiving country, and the order of 2 August 2018) were entered in the list and joined. E.H. attended the hearing and was represented by a court-appointed lawyer and assisted by an interpreter. On the same date the Administrative Court rejected the applications in a single judgment. E.H. did not appeal.

On 14 August 2018 the OFPRA's decision was served on the applicant. On 16 August 2018 he refused to board a flight to Morocco. On 17 August 2018 he lodged an application with the National Asylum Court (CNDA) to set aside the OFPRA's decision rejecting his asylum application. He asked for his asylum claim to be examined by a bench of judges, in accordance with the ordinary procedure. On the same day he also applied to the legal-aid office of the CNDA for legal aid. On 17 August 2018 he asked the prefect of Seine-Saint-Denis to submit an application to the Ukrainian authorities for "re-entry" into Ukraine. The prefect turned down his request. On 22 August 2018 E.H. requested the Court to apply an interim measure under Rule 39 of the Rules of Court with a view to preventing his removal to Morocco. The Court refused the request.

E.H. was removed to Morocco on 24 August 2018.

On 7 September 2018 the CNDA appointed a legal-aid lawyer to assist the applicant in the proceedings before it.

On 4 November 2019, after hearing evidence from the applicant's legal-aid lawyer at a public hearing held on 25 October 2019, the CNDA rejected the application to set aside the OFPRA's decision. The CNDA's ruling was served on the applicant on 23 December 2019.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), the applicant alleged that the enforcement of the order for his removal to Morocco had been apt to put him at risk of treatment contrary to that Article of the Convention. He also asserted that the treatment contrary to Article 3 to which he had been subjected before fleeing Morocco had been repeated on his return to that country following his removal by the French authorities.

Relying on Article 13, he also alleged a breach of his right to an effective remedy by which to assert his complaints under Article 3 of the Convention.

The application was lodged with the European Court of Human Rights on 14 September 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Stéphanie **Mourou-Vikström** (Monaco),
Lətif **Hüseynov** (Azerbaijan),
Jovan **Ilievski** (North Macedonia),
Lado **Chanturia** (Georgia),
Ivana **Jelić** (Montenegro),
Mattias **Guyomar** (France),

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Article 3

The Court observed that this was the first case concerning a return to Morocco in which it was called upon to rule on the merits of a complaint under Article 3 of the Convention raised by an applicant who alleged that the risks to which he had been exposed resulted from the fact that he was of Sahrawi origin and had been active in support of that cause. It emerged from various international reports concerning Morocco that Moroccan nationals who were activists for Western Saharan independence and for the Sahrawi cause could be regarded as categories of the Moroccan population who were at particular risk.

With regard to the applicant's individual situation, the Court noted at the outset that he had used the two procedural remedies available under domestic law to aliens claiming to be at risk of treatment contrary to Article 3 of the Convention if they were returned to their country of origin. These were an application to the OFPRA potentially leading to the granting of refugee status, subject to review by the CNDA, which had full jurisdiction, and an application to the administrative courts to set aside the refusal of leave to enter France in order to claim asylum and the order for his removal to Morocco.

After the applicant had given evidence (in two interviews with a protection officer of the OFPRA and at the two public hearings), the Paris Administrative Court ruled that he had provided imprecise and unsubstantiated information on the nature and extent of his political involvement and his responsibilities as an activist. The OFPRA, in its decision rejecting the applicant's asylum application, had taken the view that his description of his political activism in support of the Sahrawi cause, his allegations concerning threats made against him since 2011 and his account of the circumstances of his arrest had contained few personal details; the Melun Administrative Court had reached the same conclusion. Like the OFPRA and the aforementioned courts, the CNDA had taken the view, after hearing evidence from the applicant's lawyer, that the documents in the file did not suffice for the applicant's fears to be regarded as well founded.

The Court noted that the applicant had not produced any documents in the proceedings before it besides those previously examined by the domestic authorities and courts, which had unanimously found them to be inconclusive, especially on account of their stereotypical nature. While the applicant alleged that the Moroccan authorities had been actively searching for him on account of his activism before he left Morocco, there was nothing in the case file to corroborate that assertion, which the OFPRA and the Paris and Melun Administrative Courts had also found to be unproven. The applicant had not offered any explanation for the inconsistencies in his account, remaining very evasive as to how he had managed to obtain a passport, as well as a "student" visa from the Ukrainian consular authorities in Rabat, and to leave Morocco by plane. It seemed highly unlikely that an individual whose activities had already attracted the attention of the authorities in his country of nationality would be issued with an international travel document. Lastly, the Court noted that the applicant asserted that he had been summoned to appear before a court in Agadir, but had not specified the reasons for the summons, the date or the name of the court. Similarly, the Court observed that the applicant remained very evasive on the subject of the treatment to which he claimed to have been subjected on his return to Morocco following his removal by the French authorities, and that he had not produced any evidence or document before the Court substantiating the alleged treatment.

Accordingly, and despite the fact that Moroccan nationals who were activists for Western Saharan independence constituted a group at particular risk, the Court, in the light of all the circumstances of

the case, could not but agree with the conclusion reached by the OFPRA, the CNDA and the Paris and Melun Administrative Courts, all of which had given duly reasoned decisions, in view of the lack of specific evidence in the file substantiating the applicant's alleged fears stemming from his involvement with the Sahrawi cause and the Moroccan authorities' efforts to find and prosecute him before he left Morocco and after his forcible return. Furthermore, the applicant had not produced any document or evidence before the Court besides those he had previously produced before the national authorities.

Accordingly, the Court found that the evidence in the case file did not provide substantial grounds for believing that the applicant's return to Morocco had placed him at real risk of treatment contrary to Article 3 of the Convention. There had therefore been no violation of Article 3 of the Convention.

Article 13 read in conjunction with Article 3

The issue that arose in the present case concerned the effectiveness of the various remedies exercised by the applicant in order to have a complaint under Article 3 of the Convention examined before his removal to Morocco, while he was being held in the waiting zone and subsequently in the administrative detention centre. The Court observed that it had previously addressed these issues in 2007 and 2012 respectively, in the cases of *Gebremedhin [Gaberamadhien] v. France* and *I.M. v. France*, in which it had found a violation of Article 13 taken together with Article 3.

The Court noted that the legislature had made the legislative amendments required for the proper execution of those judgments. Under the Act of 20 November 2007, appeals against decisions refusing leave to enter the country in order to claim asylum now had automatic suspensive effect. Furthermore, asylum applications lodged by aliens in administrative detention were no longer examined systematically under the expedited procedure, which under the relevant legislation was now applied only in cases where the application was deemed to be aimed solely at circumventing the removal measure. The Court also observed that the legislation applicable to the applicant's situation, whether in the waiting zone or in the administrative detention centre, had been amended substantially compared with the legislation applicable or in force in the cases of *Gebremedhin [Gaberamadhien] v. France* and *I.M. v. France*, cited above, owing to the introduction of the Act of 29 July 2015 and to a lesser extent the Act of 7 March 2016. The Court inferred from this that the applicant's complaints were to be examined on the merits in the context of the new legislation.

The applicant's complaints concerned the practical and legal obstacles he had allegedly encountered and which, in his view, had undermined in concrete fashion the effectiveness of all the remedies he had attempted. The facts of the case, viewed from the standpoint of Article 13 in conjunction with Article 3 of the Convention, could be broken down into three stages corresponding to the applicant's status at each successive stage: the period spent in the waiting zone, the applicant's placement in the administrative detention centre, and his situation in Morocco following his removal by the French authorities on 24 August 2018.

The effectiveness of the remedies used by the applicant to assert a complaint under Article 3 of the Convention before his removal to Morocco, while he was held in the waiting zone.

The Court observed that decisions refusing leave to enter France in order to claim asylum were taken by the Minister responsible for immigration after consulting the OFPRA, one of whose officials had to interview the alien concerned first, either in person or by videoconference. The Court stressed that when the person's situation was being examined, the fact that he or she claimed to belong to a group that was systematically exposed to a practice of ill-treatment had to be given particular consideration. The Court noted that during the interview of 20 July 2018 the applicant's replies to the OFPRA official's questions had been particularly evasive, whether on the subject of his involvement with the Sahrawi cause, the persecution he claimed to have suffered as a result, the reasons for and circumstances of his departure from Morocco, or his fears in the event of a return to that country.

The Court also noted that while aliens who had been refused entry into France did not have access to a remedy with automatic suspensive effect, this was not true in the applicant's case since he had submitted an asylum application at the border. Under Article L. 213-9 of the CESEDA as applicable at the relevant time, the applicant had had a remedy with automatic suspensive effect enabling him to take proceedings in the Paris Administrative Court challenging the order of 20 July 2018 refusing him leave to enter the country in order to claim asylum, within forty-eight hours of that order being served. The Court pointed out that until the administrative court had ruled on his application the applicant could thus not be returned to Morocco, where he claimed to be at risk of treatment contrary to Article 3 of the Convention.

The Court stressed that it did not underestimate the difficulties that might be faced by aliens claiming asylum who were being held in the waiting zone, stemming in particular from the fact that the CESEDA did not provide for them to receive legal aid, unlike aliens who had been placed in an administrative detention centre. Nevertheless, the Court observed that while the applicant had not been assisted by a lawyer or by one of the associations operating in the waiting zone, either before or during the interview of 20 July 2018 with the OFPRA official, a lawyer assigned by the legal-aid office had assisted him in the proceedings before the Paris Administrative Court. Furthermore, it was the task of the administrative court to review whether the asylum application was manifestly unfounded, and if necessary, to set aside the order of the Minister responsible for immigration as being *ultra vires*.

In the present case the Court noted that the applicant had given evidence at the hearing of 25 July 2018. Hence, he had been given an opportunity to invoke the risks he allegedly faced if he was returned to Morocco and to produce evidence in support of his allegations. The Paris Administrative Court had ruled on the applicant's application by means of a duly reasoned decision, after hearing evidence from the applicant in person.

The effectiveness of the remedies used by the applicant to assert a complaint under Article 3 of the Convention before his removal to Morocco, while he was in the administrative detention centre

The Court noted that on 29 July 2018 the prefect of Seine-Saint-Denis had issued the applicant with an order to leave French territory and had placed him in administrative detention. After the applicant had lodged his asylum application, an order had been issued on 2 August 2018 refusing him leave to remain as an asylum-seeker. On 30 July 2018 and 6 August 2018 the applicant had lodged applications with the Melun Administrative Court seeking the setting-aside of the removal order, the definition of Morocco as the receiving country and the decision refusing him leave to remain as an asylum-seeker. Those applications had been rejected in a single judgment of 13 August 2018. The applicant had also lodged an asylum application with the OFPRA on 2 August 2018, which had been rejected on 9 August 2018.

With regard to the examination by the OFPRA of asylum applications submitted by persons being held in an administrative detention centre, the Court noted at the outset that under the legislation as applicable to the facts of the present case such applications were no longer examined under the expedited procedure as a matter of course. Even if it were true that the prefectures systematically found such applications to have been submitted with the sole purpose of circumventing the removal measure, Article L. 556-1 of the CESEDA nevertheless provided that the administrative authority's assessment had to be based on objective criteria relating, among other things, to the timing and seriousness of the application. Under Article L. 723-2 of the same Code, the OFPRA always had the option of giving a decision under the ordinary procedure where it deemed this necessary in order to ensure that the application was given the proper consideration.

In the present case the Court noted that the applicant, who had applied to the Melun Administrative Court to set aside the order of 29 July 2018 requiring him to leave French territory, could not be removed to Morocco until that court had ruled on his application. While the time-limit of forty-eight hours for appealing was short, the Court noted that the applicant had received legal assistance from

the CIMADE in preparing his application and that it had been open to him, under Article R. 776-26 of the Administrative Courts Code, to make additions to his application until the close of the Administrative Court hearing, and that he had in fact done so.

At the hearing before the Melun Administrative Court, which had examined all the appeals lodged against the removal order and against the decision extending the applicant's administrative detention and refusing him leave to remain as an asylum-seeker, the applicant had been assisted by an interpreter and a lawyer designated by the legal-aid office to plead his case. Both appeals had been dismissed in a judgment of 13 August 2018 which had become final.

The effectiveness of the remedy used by the applicant against the OFPRA's decision rejecting his asylum application, which the CNDA ruled on after the applicant's removal to Morocco on 24 August 2018

After the applicant had been forcibly removed by the French authorities, the CNDA found that no risks had been established and dismissed the appeal against the OFPRA's decision. While it was regrettable that the CNDA considered itself bound to draw inferences from the fact that the applicant was not present at the hearing, the fact remained that the applicant had not produced any new information regarding the risks he allegedly faced, either in those proceedings or in the proceedings before the Court. Lastly, the Court held that, in view of the circumstances of the case and in particular all the safeguards afforded to the applicant and the remedies with suspensive effect which he had exercised before his forcible removal to Morocco, the fact that the remedy he exercised before the CNDA did not have suspensive effect had not infringed his right to an effective remedy.

Conclusion

The Court noted that the applicant had been able on four occasions to make use of remedies which suspended the enforcement of his return to Morocco. In the context of these different remedies he had given evidence four times and had been given an opportunity, despite the short deadlines, to present his claims in an effective manner by virtue of the safeguards afforded to him (assistance of an interpreter, support from an approved association, appointment of a legal-aid lawyer).

After assessing the proceedings as a whole, the Court concluded that the remedies exercised by the applicant, taken together, had been effective in the particular circumstances of this case. There had therefore been no violation of Article 13 read in conjunction with Article 3 of the Convention.

The judgment is available only in French.

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