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

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Court finds that criminal proceedings and convictions had not relied on intelligence collected during applicants' detention at Guantánamo Bay

In today's **Chamber** judgment[1] in the case of Sassi and Benchellali v. France (application nos. 10917/15 and 10941/15) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the fairness of the criminal proceedings in France against the applicants, who had been held at the Guantánamo Bay US naval base before being repatriated. They alleged that statements they had made during that period of detention had subsequently been used for the purposes of the criminal proceedings against them in France and relied upon by the courts in convicting them.

During their detention from January 2002 onwards at Guantánamo Bay, in the US base located on the south-east coast of Cuba, the applicants, who are French nationals, were visited on three occasions by agents in the context of a "tripartite mission", made up of a representative of the Ministry of Foreign Affairs, a representative of the External Security Agency (DGSE) and a representative of the intelligence unit of the Domestic Intelligence Agency (DST). In July 2004 the US authorities authorised the applicants' repatriation to France. They were arrested on arrival in France and taken into police custody on 27 July 2004.

In order to assess the merits of the claim of a violation of Article 6 of the Convention, the Court reviewed the fairness of the French criminal proceedings as a whole.

It first confirmed the assessment of the domestic courts, considering that the tripartite missions to Guantánamo Bay had been purely administrative in nature and unrelated to the parallel judicial proceedings in France. On the basis of the case file, the Court found that the purpose of the missions had been to identify detainees and gather intelligence, not to collect evidence of a suspected criminal offence.

The Court further noted, specifically with regard to the conduct of the proceedings in France, that the applicants had been interviewed 13 times while in police custody, answering the investigators' questions with considerable detail about their background and motives. There was nothing in the file to show that the officers of the DST's judicial unit responsible for interviewing the applicants while in police custody had been aware of the content of the intelligence collected at Guantánamo Bay by their colleagues from the intelligence unit of that agency. Subsequently, assisted by their lawyers, the applicants were questioned ten and eight times respectively by the investigating judge. Throughout the proceedings, they were able to put forward their arguments, submit their requests and exercise the remedies available to them under French law.

The Court also noted that, while statements made by the applicants during their detention at Guantánamo Bay were included in the case file before the trial court, they had been admitted in evidence following a preliminary ruling granting their request for the declassification of the relevant

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.

documents so that they could be open to debate between the parties. In view of all the documents in the file, the Court noted that the domestic courts, in lengthy reasoned decisions, had relied on other incriminating evidence to find the applicants guilty, relying mainly on information gathered elsewhere, as well as on the detailed statements made by the applicants while they were in police custody and during the judicial investigation. In particular, the Criminal Court, whose reasoning was later upheld by the Court of Appeal, had relied on evidence that was unrelated to any statements made by the applicants at Guantánamo Bay, with the exception of a single reference to a memo from the DST's intelligence unit.

Observing, lastly, that any statements taken during the three tripartite missions to Guantánamo Bay had not been used a basis for the criminal proceedings against the applicants or relied upon by the courts in convicting them, the Court found that, in the circumstances of the case, the proceedings against each of the applicants had been fair overall and there had been no violation of Article 6 of the Convention.

Principal facts

The applicants, Nizar Sassi and Mourad Benchellali, are French nationals who were born in 1979 and 1981 and live in Saint Fons and Vénissieux.

Following the attacks of 11 September 2001, when they were in Afghanistan, a country to which they had travelled secretly in order to fight alongside the Taliban, Mr Sassi and Mr Benchellali attempted to flee. They were arrested by the Pakistani authorities at the Pakistan-Afghanistan border and handed over to the US forces. In January 2002 they were transferred to Guantánamo Bay, the location of a US naval base on the south-east coast of Cuba.

In January 2002 the French Domestic Intelligence Agency (DST) reported that the US Central Intelligence Agency (CIA) had informed it that six individuals, including the applicants, who were likely to be members of al-Qaeda and were being held by the CIA, had claimed they were French nationals. In the light of this information the French authorities sought to send a delegation to the area to confirm the identity of the individuals concerned. The Ministry of Foreign Affairs set up a "tripartite mission" composed of a representative of that Ministry, a representative of the External Security Agency (DGSE) and a representative of the DST's intelligence unit.

The first "tripartite mission" visited the Guantánamo base from 26 to 29 January 2002. Its members met with Mr Mourad Benchellali and obtained confirmation of the information already in the possession of the French agencies. On 19 February 2002 the French authorities were informed of the arrival of Mr Nizar Sassi at Guantánamo Bay.

A second "tripartite mission" was present at Guantánamo Bay from 26 to 31 March 2002, for the purpose of meeting with the applicants and obtaining additional information on Mr Benchellali. A third tripartite mission took place from 17 to 24 January 2004.

Diplomatic negotiations were undertaken to secure the return of Mr Sassi and Mr Benchellali to France.

On 27 July 2004 the US authorities authorised their repatriation to France. Upon their arrival, the applicants were arrested by the DST (judicial unit) and taken into police custody. Questioned individually in thirteen different interviews, they gave lengthy answers about all the acts of which they stood accused.

On 31 July 2004 Mr Sassi and Mr Benchellali were placed under judicial investigation, charged with the possession and use of false administrative documents in relation to a terrorist undertaking and with conspiracy to commit acts of terrorism. They were immediately remanded in custody.

During the judicial investigation, Mr Sassi and Mr Benchellali were questioned ten and eight times respectively by the investigating judge, in the presence of their lawyers.

On 23 September 2004 counsel for the applicants asked the investigating judge to seek the production by the DST of all written, audio-visual and audio material from the hearings conducted at Guantánamo, all notes and reports drawn up on that occasion, and the names of the agents who had conducted the interviews. They also requested the hearing of two DST officials who had participated in the judicial investigation.

In decisions of 22 October 2004 the investigating judge decided not to grant these requests. The Investigation Division of the Paris Court of Appeal upheld those decisions.

On 28 January 2005 Mr Sassi and Mr Benchellali requested the exclusion of the procedural acts carried out prior to their first appearance before the investigating judge, as well as the annulment of their placement under judicial investigation. According to them, all of the elements that had served as the basis for the charges had come from the questioning conducted by the DST (intelligence unit) agents at Guantánamo, outside any legal framework. In a judgment handed down on 4 October 2005, the Investigation Division of the Paris Court of Appeal rejected their request, concluding that there was no reason to annul any procedural act or document in the case file. On 9 and 12 January 2006 the applicants were released and placed under judicial supervision, a measure that was lifted by the Criminal Court on 12 July 2006.

In a decision of 18 January 2006 the Criminal Division of the Court of Cassation dismissed the applicants' appeal against the decision of 4 October 2005.

In a decision of 24 April 2006 Mr Sassi and Mr Benchellali were committed to stand trial in the Paris Criminal Court for having, between June and December 2001, participated in a group or conspiracy set up for the preparation of an act of terrorism, as established by one or more criminal acts, and for having fraudulently held a passport that they knew to be falsified.

In a preliminary ruling of 27 September 2006 the Criminal Court sought additional information. Various documents from the Ministries of the Interior, Defence and Foreign Affairs were declassified, sent to the Criminal Court and then admitted in evidence.

The case was examined on the merits by the Paris Criminal Court on 3, 5, 10, 11 and 12 December 2007.

On 19 December 2007 the Criminal Court sentenced the applicants to four years' imprisonment, three of which were suspended, taking account of the length of their pre-trial detention in France and the psycho-traumatic syndrome from which they were suffering as a result of their confinement at Guantánamo Bay. On the merits, the court gave a judgment with lengthy reasoning, based on evidence other than the statements taken at Guantánamo Bay during the "tripartite missions", except for one reference to a DST memo.

Mr Sassi and Mr Benchellali appealed against that judgment. In their pleadings their lawyers alleged that their clients had been manipulated by the agents of the DST (intelligence unit) at Guantánamo Bay, since they had been interviewed without any counsel being present and had been in a difficult situation at the time.

On 24 February 2009 the Paris Court of Appeal took the view that documents before it, which were accessible and open to debate between the parties, had enabled it sufficiently to establish the conditions in which the applicants had been interviewed at Guantánamo Bay. As to the alleged lack of the fairness of the trial, the Court of Appeal found that the DST had not acted fairly in the administration of evidence, thus invalidating the proceedings. The Principal Public Prosecutor of the Paris Court of Appeal appealed on points of law. In the Court of Cassation the Advocate General submitted that the judgment of the Court of Appeal should be quashed, taking the view that the hearings conducted at Guantánamo had merely been administrative in nature and that, as a result,

they were not capable of invalidating the proceedings. In a judgment of 17 February 2010 the Court of Cassation quashed the Court of Appeal's judgment and referred it back to that court for examination by a different bench.

In a judgment of 18 March 2011 the Paris Court of Appeal, ruling in those circumstances, upheld the applicants' conviction. It found that "the trial court [had] rightly declared that the DST's activities had not constituted a breach of defence rights on grounds of unfairness and had not rendered the proceedings unfair".

Mr Sassi and Mr Benchellali appealed on points of law but in a judgment of 3 September 2014 the Court of Cassation dismissed their appeal.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), the applicants complained that there had been several breaches of their right to a fair trial and of their defence rights. They argued that the conditions in which they had been questioned and had their statements taken at Guantánamo Bay breached Article 6 and that the use of those statements had undermined the fairness of the criminal proceedings in France.

The application was lodged with the European Court of Human Rights on 27 February 2015.

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

Síofra **O'Leary** (Ireland), *President*,
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Jovan **Ilievski** (North Macedonia),
Lado **Chanturia** (Georgia),
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Article 6

The Court noted that the three above-mentioned "tripartite missions" to Guantánamo Bay, in January 2002, March 2002 and January 2004, had pursued a number of aims, none of which could lead to the conclusion that a "criminal charge", for the purposes of Article 6 of the Convention, had been laid against the applicants by the agents conducting the missions. Whilst a judicial investigation had been opened in parallel, the missions to Guantánamo Bay had been purely administrative in nature and had been unrelated to the judicial proceedings. Their aim had been to identify the individuals detained there and to gather intelligence, not to collect evidence of any criminal offence that had been committed. In the light of the duly reasoned decisions of the Criminal Court and the Paris Court of Appeal, the Court took the view that, in the context of the tripartite missions to Guantánamo Bay, which were unrelated to the judicial proceedings in France, the applicants had not had a "criminal charge", within the meaning of Article 6 § 1 of the Convention, laid against them by those conducting the missions.

As to the proceedings in France, the Court observed that the applicants had complained of a violation of Article 3 of the Convention on account of the conditions in which they had been questioned by the agents of the DST (intelligence unit) at Guantánamo Bay. The Court declared this complaint – as regards the French agents – inadmissible by a decision of 4 April 2018. The Court

nevertheless had to ascertain, under Article 6 of the Convention, whether, and if so to what extent, the French judges had taken into consideration the allegations that the applicants had been ill-treated, even though such treatment had allegedly been inflicted outside the forum State, and whether there had been any repercussions for the fairness of the proceedings. In doing so the Court had to consider the overall fairness of the criminal proceedings.

The Court noted that it was not in dispute between the parties that, at least from the time the applicants were taken into police custody on 27 July 2004, the date of their arrival in France, the applicants had been charged with a criminal offence, thus triggering the protection of Article 6 of the Convention. On 27 September 2006 the Criminal Court had ordered the gathering of additional information and this had led not only to a number of interviews but also to the declassification of various documents concerning the tripartite missions to Guantánamo Bay, emanating from the Ministries of the Interior, Defence and Foreign Affairs. Those documents had been added to the case file and were open to debate between the parties. The Court had to assess the use which had been made of the relevant statements during the criminal proceedings, both during the judicial investigation and at the trial.

The Court referred back to its finding that, at the time of their interviews by the tripartite missions at Guantánamo Bay, the applicants had not been "charged", within the meaning of Article 6 § 1 of the Convention, by the agents who had questioned them. The proceedings brought by the French authorities against the applicants had been based on evidence which had not come from the interviews at Guantánamo Bay. Furthermore, the Court noted that the statements had been brought to the knowledge of the domestic courts and added to the case file in order to determine whether and to what extent they had contributed to the applicants' conviction and whether the potential breach of defence rights had been subsequently remedied.

The Court first observed that as soon as the applicants had arrived in France they had been arrested by the DST's judicial unit and taken into police custody. It was not in dispute that the interviews in France had been carried out by different agents from those who had taken part in the tripartite missions to Guantánamo Bay. In addition, it had not been established by any evidence in the file that the agents of the DST's judicial unit responsible for the interviews in police custody had been aware of the content of the intelligence collected by their colleagues at Guantánamo Bay. Moreover, the applicants had been interviewed 13 times while in police custody and they had answered the investigators' questions by providing significant detail about their journey, their training in Afghanistan, and their motives.

Secondly, the Court noted that the applicants, assisted by counsel, had subsequently been interviewed by the investigating judge, ten and eight times respectively. Throughout the proceedings they had been able to put forward their arguments, submit requests and use any remedies open to them, whether during the judicial investigation or before the courts hearing their case on the merits. They had obtained, in particular, a preliminary judgment of 27 September 2006 ordering the gathering of additional information. In particular, the applicants had been given access to the documents that had been added to the case file after declassification, with the effective possibility of discussing the content of those documents, assisted by counsel, in compliance with the principle of adversarial proceedings, as attested by all the relevant court decisions.

Lastly, while the disputed documents had been used in the proceedings on the merits, it could be seen that the Criminal Court judgment and that of the Court of Appeal which heard the case after remittal by the Court of Cassation had almost exclusively been based on other evidence of the applicants' guilt. The courts had mainly relied on the information which had already been in the hands of the intelligence services, together with the detailed statements made by the applicants while in police custody and during the judicial investigation. The Court noted the finding of the Criminal Court that the actions taken by the DST unit responsible for gathering intelligence at Guantánamo Bay had not produced anything new. The Criminal Court, whose reasons had

subsequently been upheld by the Court of Appeal, had been based on evidence that was independent of the statements made by the applicants at Guantánamo Bay in the context of the tripartite missions, with the exception of a single reference to a memo from the DST's intelligence unit.

Thus, after deciding to rule on the case of the two applicants in a single decision, the trial court had, in turn, examined their motives, their possession and use of a falsified passport, their journey via London and their awareness of being involved in a terrorist activity, and their training at the al-Farouk camp in the region of Kandahar in Afghanistan, relying very extensively on the numerous extracts from the applicants' statements made exclusively after their return to France, namely during police custody, before the investigating judge and at the trial. The court had taken into consideration the information in the file concerning the family of Mr Benchellali, pointing out that he had been living permanently in an environment of radical Islamism, referring to judgments handed down against his father, an imam who advocated jihad and collected money to fund voluntary combatants, and judgments against his mother and two brothers, showing that they were key players in a network of logistical support for volunteers wishing to fight in Afghanistan and Chechnya. The trial court had also observed, in particular, that the members of this family had been involved in the preparation of terrorist acts by an Islamist group that had been intercepted in Romainville and La Courneuve in 2002.

The Court noted that, in the statement of reasons relating to the acts with which the applicants had been charged, the judgment contained only one reference to information obtained in the context of a mission to Guantánamo Bay, namely a memo dated 5 April 2002 listing the content of the training at the al-Farouk camp, covering the handling of individual weapons, combat tactics, topography and the study of explosives.

Observing, in conclusion, that the statements taken during the three tripartite missions to Guantánamo Bay had not been used as a basis for the criminal proceedings against the applicants or relied upon by the courts in convicting them, the Court found that, in the circumstances of the case, the criminal proceedings against each of the applicants had been fair overall.

Accordingly there had been no violation of Article 6 § 1 of the Convention.

Separate opinions

Judge Bårdsen expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.