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

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Urgent application for protection of a fundamental freedom (*référé-liberté*) constitutes effective remedy for Article 3 violations resulting from full body-search routine

In today's **Chamber** judgment[1] in the case of B.M. and Others v. France (applications no. 84187/17 and 5 others) the European Court of Human Rights held, unanimously, that there had been:

a violation of Articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the European Convention on Human Rights in applications nos. 1734/18, 13562/18 and 29241/18 on account of the applicants' material conditions of detention and the absence of an effective remedy.

The case concerned the detention conditions at Fresnes Prison and whether an effective remedy was available for the purpose of seeking their improvement. Five out of the six applicants also complained about the full body-search routine to which they were subjected when leaving the prison visiting rooms.

Concerning applications nos. 1734/18, 13562/18 and 29241/18, the Court noted that the three applicants had been detained at Fresnes Prison during the same periods as the applicants in the *J.M.B. and Others* case, in which it had found that those applicants had been subjected to detention conditions that were in breach of Article 3 of the Convention, and had further held that no effective remedy had been available to them to seek an improvement in the conditions, in violation of Article 13 of the Convention. The Court saw no reason to arrive at a different conclusion in the present case. It therefore held that there had been a violation of Articles 3 and 13 of the Convention stemming from the detention conditions to which the applicants had been subjected owing to overcrowding and from the absence of an effective preventive remedy at the time of their detention.

The present case differed in that the applicants had complained about the search routine at Fresnes Prison. The applicants, who were still in detention when they lodged their complaint with the Court, submitted that they were subject to a routine of full body searches exposing them to treatment contrary to Article 3 of the Convention and, as a result, a continuing violation of the right protected by that provision.

After noting that the urgent application for protection of a fundamental freedom (*référé-liberté*) provided for by Article L. 521-2 of the Code of Administrative Justice, which allowed the urgent applications judge, in the event of a demonstrable emergency, to swiftly address serious and flagrantly unlawful infringements of a fundamental freedom, had in fact been used, in a certain number of cases, to resolve breaches of Article 3 of the Convention in connection with the practice of full body searches, the Court concluded that, under the circumstances, having regard to the remit of the administrative courts, the urgent application in question should be viewed as having constituted, at the material time, an effective and available remedy in both theory and practice.

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.

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Since the applicants had failed to bring any proceedings before the domestic courts, the Court held that the complaint under Article 3 in connection with searches had to be dismissed for failure to exhaust of domestic remedies.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants, Mr B.M., Mr K.G., Mr A.M., Mr G.K. and Mr O.S., are French nationals; Mr T.A. is a Surinamese national. They were detained at Fresnes Prison between 2016 and 2019.

The general situation at the prison at the relevant time was described in the *J.M.B. and Others v. France* judgment. As at 1 January 2019 the rate of overcrowding was 197%.

After giving notice of the applications, the Court received friendly settlement declarations in the cases of Mr B.M., Mr A.M. and Mr O.S. (applications nos. 84187/17, 7153/18 and 27525/18) under the terms of which the applicants agreed to waive any other claims against France in respect of the complaints under Articles 3 and 13 of the Convention in connection with detention conditions and the absence of effective remedies for their improvement. The Government undertook to pay them the sums of 13,938 euros (EUR), EUR 5,707 and EUR 2,980, respectively, within a period of three months from the date of notification of the Court's decision. These payments were to constitute the final resolution of the relevant part of the applications.

With the exception of Mr T.A. (no. 29241/18), the applicants all submitted that they were systematically subjected to a full body search at the end of each visit received in the prison visiting room. For their part, and in general, the Government argued that three memoranda issued between December 2016 and September 2017 had established the search routine at Fresnes Prison as it applied during the applicants' detention.

Complaints, procedure and composition of the Court

Regard being had to the similar subject matter of the applications, the Court found it appropriate to examine them jointly in a single judgment.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), the applicants complained, with the exception of Mr T.A., that they were systematically subjected to full body searches at the end of each visit. Relying on Articles 3 and 13 of the Convention (right to an effective remedy), they complained of their detention conditions and of the absence of an effective remedy by which to seek their improvement.

The applications were lodged with the European Court of Human Rights on 12 December 2017, 5 January 2018, 2 February 2018, 17 March 2018, 7 June 2018 and 13 June 2018.

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

Lado **Chanturia** (Georgia), *President*,
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
María **Elósegui** (Spain),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),
Mykola **Gnatovskyy** (Ukraine),

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

Decision of the Court

Article 3 - Searches

When they lodged their applications with the Court, the applicants were prisoners. They submitted that they were subjected to a search routine which exposed them to treatment that was in breach of Article 3 of the Convention and, as a result, to a continuing violation of the rights protected by that provision. The Court noted, however, that the applicants had failed to bring any proceedings before the domestic courts to challenge the application of that search routine and obtain its termination.

To determine whether the requirements with regard to the exhaustion of domestic remedies had been fulfilled, the Court must verify that the proceedings brought before the administrative courts were adequate, effective and capable of bringing about the termination of the impugned practices. In the present case, it was necessary to determine whether or not there was an effective preventive remedy capable of putting an end to the alleged violation.

As to urgent applications that allow the administrative court to take an urgent decision and, where appropriate, to put an end to a continuing violation of Article 3 of the Convention, the Government submitted that the applicants should have lodged an urgent application for protection of a fundamental freedom (*référé-liberté*). The Court pointed out that in the *El Shennawy v. France* judgment (§ 57) it had taken note of the availability of that remedy, which waived the requirement for representation by a lawyer both at first instance and on appeal (*J.M.B. and Others*, § 137). Whether that remedy would have been effective in the circumstances of the present case remained to be examined.

The Court reiterated that the urgent application for protection of a fundamental freedom provided for by Article L. 521-2 of the Code of Administrative Justice allowed the urgent applications judge, in the event of a demonstrable emergency, to swiftly address serious and flagrantly unlawful infringements of a fundamental freedom (*Pagerie v. France*). It further emphasised that decisions delivered by the urgent applications judge were enforceable.

As to full body searches, the Court found that according to the consistent and well-established case-law of the *Conseil d'État*, the urgent applications judge was to review the necessity and proportionality of the application of a search routine to a prisoner in order to determine whether or not it constituted an offence against that detainee's dignity. Such review was not confined to individual searches but could also extend to a memorandum from the prison authorities instituting a search routine or to an administrative practice which revealed an informal decision to apply such a routine. It was within the powers of the urgent applications judge to suspend performance of the impugned search and to order the administration to make adjustments to or change the conditions for the application of a search routine or to reassess its merits at regular intervals. The Court concluded that, contrary to the applicants' submissions, and despite the difficulties they had alleged with regard to having the existing policy at Fresnes Prison amended, an urgent application for protection of a fundamental freedom would have had a reasonable chance of success in their case.

Taking note of the absence of any notification or record of the searches conducted in the prison, the Court pointed out that such a deficiency did not, in practice, affect urgent applications since the judge could hear applications for the suspension of search routines that had not been formalised in writing and could, in the course of the adversarial proceedings, request that the prison authorities produce any items that might shed light on the practice in question.

Reiterating that urgent applications for protection of a fundamental freedom had in fact allowed for the successful resolution of relevant breaches of Article 3 of the Convention in a certain number of cases, the Court could not, in the absence of any proceedings initiated by the applicants in the present cases, speculate in the abstract as to the impossibility or otherwise of obtaining the effective enforcement of measures ordered by the urgent applications judge. It also reminded the applicants

that procedures were in place, if necessary, for them to seek enforcement of any measures so ordered.

In the light of all of the foregoing, the Court concluded that, having regard to the remit of the administrative courts, and in particular to the breadth of their review and the scope of their powers, the urgent application for protection of a fundamental freedom had to be seen as having, at the material time, constituted an effective and available remedy in both theory and practice.

The Court concluded that the applicants' complaint under Article 3 relating to searches had to be dismissed for non-exhaustion of domestic remedies.

Articles 3 and 13 – detention conditions and effective remedy

Friendly settlement declarations in applications nos. 84187/17, 7153/18 and 27525/18

The Court took note of the friendly settlements between the parties. It considered that those agreements were based on respect for the human rights as defined in the Convention and the Protocols thereto. Moreover, it did not note any reason that would require it to proceed with its examination of those applications. It concluded that the relevant part of the applications should be struck out of its list in accordance with Article 39 of the Convention.

Government's unilateral declarations in applications nos. 1734/18,13562/18 and 29241/18

Having reviewed the terms of those unilateral declarations, the Court found that, despite the concessions made by the Government on the basis of the *J.M.B. and Others* judgment cited above, the amounts proposed as compensation did not constitute adequate reparation when compared with the sums generally awarded in similar cases and in that judgment in particular. Consequently, the Court dismissed the Government's request for the relevant part of the applications to be struck out of its list. Accordingly, it was necessary for the Court to continue the examination of their admissibility and merits.

The Court noted that the three applicants had been in detention at Fresnes Prison during the same periods as the applicants in the *J.M.B. and Others* case. In that case, it had concluded that those applicants had been subjected to detention conditions that were in breach of Article 3 of the Convention. It had also found that no effective remedy had been available to them to seek the improvement of their material conditions of detention, in violation of Article 13 of the Convention. The Court saw no reason to reach a different conclusion in the present case. It therefore held that there had been a violation of Articles 3 and 13 of the Convention stemming from the detention conditions to which the applicants had been subjected owing to overcrowding and from the absence of an effective preventive remedy at the time of their detention.

Just satisfaction (Article 41)

The Court held that France was to pay Mr K.G. 21,250 euros (EUR), Mr G.K. EUR 13,250 and Mr T.A. EUR 11,750 in respect of non-pecuniary damage and Mr G.K. EUR 2,400 in respect of costs and expenses.

The judgment is available only in French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel.: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Inci Ertekin (tel.: + 33 3 90 21 55 30)
Neil Connolly (tel.: + 33 3 90 21 48 05)
Jane Swift (tel.: + 33 3 88 41 29 04)

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.