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

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Court declares Kamel Daoudi's application inadmissible for failure to exhaust domestic remedies

In its decision in the case of Daoudi v. France (application no. 48638/18) the European Court of Human Rights has, unanimously, declared the application inadmissible. The decision is final.

The applicant submitted that the residence restriction to which he had been subjected since 24 April 2008, by successive orders of the Minister of the Interior, was in breach of Article 5 (right to liberty and security) of the Convention and, alternatively, of Article 2 of Protocol No. 4 (freedom of movement). He further relied on Articles 8, 6 and 13 of the Convention.

In accordance with the principle of subsidiarity, applications could only be lodged with the Court after all domestic remedies had been exhausted. Under the established case-law, an application for judicial review was in principle a domestic remedy that had to be used, and such proceedings were to be pursued up to and including an appeal on points of law. The Court noted however that, with regard to one of the administrative orders under which he had been placed, the applicant had failed to lodge an appeal on points of law against the judgment of the Paris Administrative Court of Appeal delivered on 5 November 2019 and that, with regard to another, his appeal on points of law against that same court's judgment of 6 April 2023 was currently pending before the *Conseil d'État*.

Moreover, the Court considered that there were no reasons or particular circumstances that would have exempted the applicant from appealing on points of law. In particular, it rejected the circumstances put forward by the applicant, taking the view that a ruling by the Constitutional Council upon referral of a preliminary question as to constitutionality did not suffice to exhaust domestic remedies; that it could not be concluded from the relevant administrative case-law that an appeal on points of law would have been futile; and that lodging an urgent application for a stay of execution did not exempt the applicant from pursuing the main proceedings.

That being so, the Court dismissed the application for failure to exhaust domestic remedies.

Principal facts

The applicant, Mr Kamel Daoudi, is an Algerian national who was born in 1974 and has been subjected to a residence restriction (*assignation à résidence*) since 24 April 2008. He lives in France.

On 14 December 2005 Mr Daoudi was sentenced by the Paris Court of Appeal to a six-year prison term and to permanent exclusion from France for his participation in a criminal conspiracy to commit an act of terrorism and for making use of forged documents with the intent to defraud.

Upon his release, the domestic authorities made arrangements for his removal to Algeria.

In April 2008 the Court indicated to the Government that he was not to be expelled for the duration of the proceedings before it, pursuant to Rule 39 of its Rules. On 3 December 2009 the Court held that his removal would have fallen foul of Article 3 of the Convention had it been enforced at that time (Daoudi v. France).

In a series of orders issued by the Minister of the Interior, Mr Daoudi was placed under a residence restriction. Except during two periods of imprisonment, that restriction was enforced without interruption. Its conditions varied over time. Mr Daoudi was successively confined to municipalities located in the Creuse, Haute-Marne, Tarn, Charente-Maritime and Cantal *départements*. He was

required to report to the police two to four times a day and, from 24 November 2016, to comply with a night-time curfew.

He lodged several applications for judicial review seeking to have some of those orders set aside.

In particular, Mr Daoudi sought to have the Minister of the Interior's orders of 24 November 2016 and 30 January 2017 declared null and void.

Alongside and in support of his actions to set aside, the applicant also lodged urgent applications for stays of execution, which were dismissed by the urgent applications judge of the Paris Administrative Court in two decisions issued on 16 December 2016 and 6 April 2017 respectively. The applicant was refused permission to appeal on points of law against the second of those decisions on 12 July 2017.

During the proceedings on the merits, Mr Daoudi raised a preliminary question as to constitutionality (*question prioritaire de constitutionalité* – QPC), which was referred to the Constitutional Council. In its Decision no. 2017-674 QPC of 1 December 2017 the Constitutional Council declared certain provisions of Article L. 561-1 of the Code regulating the entry and residence of aliens and asylum-seekers (*Code de l'entrée et du séjour des étrangers et du droit d'asile*) unconstitutional. The Paris Administrative Court subsequently dismissed the applicant's actions to set aside the administrative orders of 24 November 2016 and 30 January 2017 in a judgment delivered on 13 April 2018. In its judgment of 5 November 2019 the Paris Administrative Court of Appeal dismissed his appeal. That judgment was not appealed against on points of law.

Mr Daoudi subsequently lodged three more actions to set aside the administrative orders of 23 May 2018, 14 February 2019 and 13 May 2019 respectively, which were dismissed by the Paris Administrative Court in a judgment delivered on 28 January 2021. Mr Daoudi's appeal was dismissed by the Paris Administrative Court of Appeal in its judgment of 6 April 2023. His appeal against that judgment on points of law is currently pending before the *Conseil d'État*.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 11 October 2018.

The applicant's principal submission was that, on account of its conditions, the residence restriction imposed on him amounted to a detention order, and he accordingly complained of a violation of Article 5 (right to liberty and security). In the alternative, he relied on Article 2 of Protocol No. 4 (freedom of movement) to argue, in substance, that domestic law did not provide sufficient safeguards against arbitrariness. Relying in addition on Articles 8 (right to respect for private and family life), 6 (right to a fair trial) and 13 (right to an effective remedy), he complained that he had been kept apart from his family and questioned the fairness of the proceedings he had brought before the administrative courts.

The decision was given by a Committee of three judges, composed as follows:

Stéphanie **Mourou-Vikström** (Monaco), *President*,
Lado **Chanturia** (Georgia),
Mattias **Guyomar** (France),

and also Sophie **Piquet**, *acting Deputy Section Registrar*

Decision of the Court

Before the Court, the Government objected that the applicant had failed to exhaust domestic remedies, as he had not pursued his applications for judicial review. The applicant submitted firstly that an appeal on points of law against the rejection of an application for judicial review would have

been bound to fail in so far as the administrative courts had consistently held that residence restrictions did not constitute custodial measures for the purposes of Article 5 of the Convention and that they could not have found otherwise without departing from the case-law of the Constitutional Council. Moreover, he argued that he had fulfilled the exhaustion requirement by seeking a ruling from the Constitutional Council on a QPC in the context of one of his applications and by lodging an appeal on points of law with the *Conseil d'État* against the dismissal of one of his urgent applications for a stay of execution.

In accordance with the Court's established case-law, an application for judicial review, where available, was in principle a domestic remedy that had to be used. Furthermore, it was in principle necessary to pursue such applications right up to the level of an appeal on points of law. Yet the applicant had failed to lodge such an appeal against the Paris Administrative Court of Appeal's judgment of 5 November 2019. The question before the Court was thus whether there had been some reason or particular circumstances which exempted the applicant from lodging such an appeal with the *Conseil d'État*.

The Court observed firstly that the Constitutional Council's review of constitutionality was separate from the ordinary courts' review of compatibility with the Convention. Consequently, the mere fact that the Constitutional Council had dismissed some of the constitutionality complaints advanced by the applicant in support of a QPC did not suffice to exempt him from pursuing the judicial review proceedings.

Secondly, the Court reiterated that although the existence of well-established case-law constituted a reason to consider that a given remedy was bound to fail, it fell to the applicant to establish as much. However, in seeking to demonstrate that the domestic courts invariably characterised residence restrictions as mere restrictions of freedom of movement under the Convention, the applicant had only referred to a single judgment from an appellate court. The Court found that, on the contrary, in view of the case-law, the *Conseil d'État* took into consideration the "length" and the "enforcement conditions" of the residence restriction appealed against to determine whether it fell within the ambit of Article 5 of the Convention or that of Article 2 of Protocol No. 4. Accordingly, without prejudging the nature of the measure at issue, it considered that the applicant had no basis for arguing that an appeal on points of law would have been obviously futile. It reiterated, moreover, that the existence of mere doubts as to the prospects of success of a particular remedy was not a valid reason for failing to pursue it.

Thirdly, the Court noted that the proceedings in connection with urgent applications for a stay of execution provided for by Article L. 521-1 of the Administrative Courts Code were necessarily secondary to an application to have an administrative decision set aside or varied and only sought a stay of execution until delivery of the judgment in the main proceedings. Exercising that option did not therefore exempt the applicant from pursuing his initial application.

Accordingly, the Court took the view that Mr Daoudi ought to have lodged an appeal on points of law against the Administrative Court of Appeal's judgment of 5 November 2019 in order to fulfil the requirement of prior exhaustion of domestic remedies.

Furthermore, although the applicant had pointed to the fact that he had lodged an appeal on points of law against the Paris Administrative Court of Appeal's judgment of 6 April 2023, the Court noted that the appeal was still pending. Since the *Conseil d'État* had yet to rule on that appeal, the Court considered that, to that extent, the application was premature. Consequently, the Court dismissed the application pursuant to Article 35 §§ 1 and 4 of the Convention. It observed however that Mr Daoudi would be free to lodge a subsequent application with the Court, after exhausting all domestic remedies, if he believed he had grounds to do so.

The decision is available only in French.

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