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

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Court rejects application lodged by Tunisian national who complained of conditions of his return to Tunisia without applying to Italian courts first

In its decision in the case of Mansouri v. Italy (application no. 63386/16) the European Court of Human Rights has, by a majority, declared the application inadmissible. The decision is final.

The case concerned the lawfulness and conditions of a Tunisian national's confinement on board the ship *Splendid*, which was being used to return him to his country of departure on the basis of a refusal-of-entry order issued by the border police on the ground that he was not in possession of an entry visa.

The Court dismissed the applicant's complaints under Article 5 (right to liberty and security). In particular, it considered that the applicant had failed to exhaust the available and effective domestic remedies put forward by the Government, namely a compensatory remedy[1] and an urgent application for interim relief[2]. He had therefore not taken appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the Court being subsidiary to theirs. It observed that, had the applicant complied with the requirement to exhaust domestic remedies in accordance with the applicable rules and available procedures under domestic law, he would have given the domestic courts the opportunity to settle the question whether the impugned restrictions amounted to a "deprivation of liberty" and, if so, whether they were compatible with the Convention. In addition, assuming that he had subsequently pursued his complaint before the Court, it would have had the benefit of the national courts' factual and legal findings together with their assessment. Lastly, it found that, in the absence of proceedings before them, the Italian courts had not had the opportunity to examine any issue as to the interpretation of the provisions of the Schengen Borders Code and Annex V thereto or its compatibility with fundamental rights, while seeking, if appropriate, a preliminary ruling from the Court of Justice of the European Union.

The Court reiterated, moreover, that, in accordance with an established principle of international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States had the right to control the entry, residence and removal of aliens. It took the view that, in this area, it was especially important to give the national courts an opportunity to interpret domestic law and prevent or put right Convention violations through their own legal system.

The Court also considered that the general accommodation conditions on board the *Splendid*, while they might have caused the applicant to experience frustration, had not attained the minimum level of severity required for the confinement in question to engage Article 3 of the Convention. The complaints under Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) were therefore manifestly ill-founded.

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

Principal facts

The applicant is a Tunisian national who was born in 1976 and currently lives in Tunisia.

From 2014 to 2016 the applicant lawfully resided in Italy on the basis of a temporary residence permit with authorisation to work, which was valid until April 2016. In January 2016 he travelled to Tunisia.

[1] Article 2043 of the Civil Code.
[2] Article 700 of the Code of Civil Procedure.

In May 2016 he was subjected to an identity check at the Palermo maritime border while on board the Italian cruise ship *Splendid*; he had in his possession his passport, his expired residence permit and a copy of his application for a long-term residence permit, dated 16 October 2015.

During the identity check, the border police established that the applicant's residence permit had expired, that the Ferrara Chief of Police (*Questore*) had refused to renew it on 31 March 2016 and that he did not have a visa to enter the country. In consequence, the police issued the applicant with a refusal-of-entry order in accordance with Article 10 § 1 of Legislative Decree no. 286 of 1998 and with the provisions of the Schengen Borders Code and Annex V thereto, and obliged the captain of the *Splendid* to return him to Tunisia.

The applicant alleged that, during the voyage, which had taken seven days, he had been confined to a cabin under constant and strict supervision by the ship's security officers.

Complaints

Relying on Article 5 (right to liberty and security) of the European Convention on Human Rights, the applicant complained that he had been unlawfully deprived of his liberty on board the ship, that he had not been informed of the grounds for this measure and that no domestic remedy had been available to him by which to contest its lawfulness. He further submitted that he had been unable to obtain appropriate redress for the violations alleged.

In addition, relying on Articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the Convention, he complained of the material conditions of his voyage on board the ship and of the lack of a domestic remedy in respect of this complaint.

Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 28 October 2016.

On 20 February 2024 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

A hearing was held on 18 September 2024.

The decision was given by the Grand Chamber of 17 judges, composed as follows:

Marko **Bošnjak** (Slovenia), *President*,
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),
Ivana **Jelić** (Montenegro),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Krzysztof **Wojtyczek** (Poland),
Alena **Poláčková** (Slovakia),
Tim **Eicke** (the United Kingdom),
Péter **Paczolay** (Hungary),
Darian **Pavli** (Albania),
Raffaele **Sabato** (Italy),
Peeter **Roosma** (Estonia),
Ana Maria **Guerra Martins** (Portugal),
Andreas **Zünd** (Switzerland),
Diana **Sârcu** (the Republic of Moldova),
Sebastian **Răduleţu** (Romania),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 5 (right to liberty and security)

The Government submitted that the applicant could have pursued a compensatory remedy[3], whether against the State or the shipowner, to allege that he had been unlawfully deprived of his liberty and to seek damages in that regard. In addition, they submitted that it had been open to him to request his immediate release by means of an urgent application for interim relief[4].

Concerning the compensatory remedy: the Court examined the examples from the case-law that the Government had submitted to the Committee of Ministers as part of the execution procedure pertaining to the *Khlaifia and Others v. Italy*[5] judgment. It considered that these decisions, although they had been delivered after the events in the present case, demonstrated with a sufficient degree of certainty that the civil courts were capable of holding the State authorities to account for deprivations of liberty found to have been unlawful in various regards and, where appropriate, of awarding compensation to make good the damage thereby sustained. It reiterated that the existence of mere doubts as to the prospects of success of a particular remedy which was not obviously futile were not a valid reason for failing to pursue that avenue of redress. Accordingly, had it been used by the applicant, the compensatory remedy would have made it possible for the domestic courts not only to clarify whether the circumstances of the case had amounted to a "deprivation of liberty" but also to scrutinise the lawfulness of the alleged deprivation of liberty and, if appropriate, compensate him in the event of their finding a violation of Article 5 of the Convention.

Concerning the remedy of interim relief: the Court took the view that, had the applicant had any doubts as to the possibility of obtaining interim relief entailing his release by means of an urgent application, it had been for him to dispel those doubts by applying to the domestic courts. It considered that its task was not to speculate in the abstract on the question whether a decision might have been taken within a suitable timeframe to secure the applicant's release. The Court further observed that the applicant had been able to keep in contact with his family and his lawyer throughout the entire journey and that he had immediately filed an administrative complaint challenging the validity of the refusal-of-entry order issued in respect of him. He had therefore been able to receive effective legal assistance. In these circumstances, the Court discerned no impediments to the accessibility of the remedies in question. It observed, moreover, that under the Code of Civil Procedure the courts could give their ruling without hearing the parties.

In consequence: the Court was of the opinion that the applicant had failed to exhaust available and effective remedies and that he had therefore not taken appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the Court being subsidiary to theirs.

Had the applicant complied with the requirement to exhaust domestic remedies in accordance with the applicable rules and available procedures under domestic law, he would have given the domestic courts the opportunity to settle the question whether the impugned restrictions amounted to a "deprivation of liberty" and, if so, whether they were compatible with the Convention. In addition, assuming that he had subsequently pursued his complaint before the Court, it would have had the benefit of the national courts' factual and legal findings together with their assessment.

Nor could the Court overlook the fact that the events in the present case had unfolded in the context of border control exercised by Italy, a country which was in a front-line position in handling the flow of migrants from certain regions of Africa and the Middle East. The Court reiterated that, in accordance with an established principle of international law, and subject to their treaty obligations, including

[3] Article 2043 of the Civil Code.
[4] Article 700 of the Code of Civil Procedure.
[5] *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016.

those arising from the Convention, Contracting States had the right to control the entry, residence and removal of aliens. It took the view that, in this area, it was especially important to give the national courts an opportunity to interpret domestic law and prevent or put right Convention violations through their own legal system.

Lastly, the Court found that, in the absence of proceedings before them, the Italian courts had not had the opportunity to examine, whether on the basis of arguments put forward by the parties or of the courts' own motion, any issue as to the interpretation of the provisions of the Schengen Borders Code and Annex V thereto or its compatibility with fundamental rights, while seeking, if appropriate, a preliminary ruling from the Court of Justice of the European Union.

The applicant's complaints under Article 5 §§ 1, 2 and 4 were therefore inadmissible for failure to exhaust domestic remedies and the complaint under Article 5 § 5 was incompatible *ratione materiae* with the provisions of the Convention.

Articles 3 and 13

The Court observed that the applicant was not particularly vulnerable, whether by reason of anything he might have been through during his journey, or by reason of his age or state of health. Furthermore, the cabin in which he had been confined, which measured eleven square metres, had been of acceptable size and cleanliness and had moreover been equipped with a porthole allowing it to be aired out and affording access to natural light.

Nor was there anything to suggest that the applicant had suffered from a lack of food or drinking water, or that they were deficient as to their quality. Lastly, he had not been deprived of his personal belongings or his mobile phone, with which he had been able to communicate with the outside world and discuss his situation with his lawyer and family without restriction.

While it was true that the Government had not specified the frequency and length of the periods spent outside the cabin, there were no grounds to conclude decisively that access to the outdoors and natural light had been so restricted as to render the applicant's confinement incompatible with Article 3.

The Court concluded that the general accommodation conditions on board the *Splendid*, while they might have caused the applicant to experience frustration, had not attained the minimum level of severity required for the confinement in question to engage Article 3 of the Convention. The complaints under Article 3 and 13 of the Convention were therefore manifestly ill-founded.

The decision is available in English and 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.