

Press release issued by the Registrar

**CHAMBER JUDGMENT
BEN KHEMAIS v. ITALY**

The European Court of Human Rights has today notified in writing its Chamber judgment¹ in the case of *Ben Khemais v. Italy* (application no. 246/07).

The Court held unanimously that there had been:

- a **violation of Article 3** (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights on account of the applicant's deportation to Tunisia, and,
- a **violation of Article 34** (right of individual petition) of the Convention regarding Italy's failure to comply with the measure indicated under Rule 39 of the Rules of Court.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 for costs and expenses. ([The judgment is available only in French.](#))

1. Principal facts

The applicant, Essid Sami Ben Khemais, is a Tunisian national who was born in 1968. He is currently in prison in Tunisia.

The case concerns the applicant's deportation to Tunisia, where he was sentenced to ten years' imprisonment for membership of a terrorist organisation.

In February 2002 the Italian courts sentenced Mr Ben Khemais to five years' imprisonment for membership of a criminal organisation. He served his sentence in full. In March 2006 the Como District Court sentenced him to another prison sentence for assault and ordered him to be deported from Italy after he had served his sentence. The outcome of an appeal lodged by the applicant with the Court of Cassation is unknown.

In the meantime, by a judgment of 30 January 2002, the Tunis Military Court had sentenced the applicant to ten years' imprisonment in his absence for membership of a terrorist

¹ Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

organisation. That conviction was apparently based exclusively on the statements of a co-accused.

Mr Ben Khemais lodged his application with the European Court of Human Rights in January 2007. In March 2007, pursuant to Rule 39 (interim measures) of the Rules of Court, the Court indicated to the Italian Government that it was desirable, in the interests of the parties and of the smooth progress of the proceedings before the Court, to stay the order for the applicant's deportation pending a decision on the merits.

However, on 2 June 2008 the applicant's representative informed the Registry of the Court that his client had been taken to Milan Airport in order to be deported to Tunisia. The Italian Government informed the Court on 11 June that a deportation order had indeed been issued against the applicant on 31 May 2008 on account of his role in the activities of Islamic extremists. The Milan Criminal Court had observed, *inter alia*, that he represented a threat to national security because he was in a position to renew contacts with a view to resuming terrorist activities, including on an international scale. The applicant had been deported to Tunisia on 3 June 2008.

The Italian Government also submitted documents to the Court containing diplomatic assurances that they had obtained from the Tunisian authorities. According to these documents, the applicant would not be subjected to torture, inhuman or degrading treatment or arbitrary detention. He would be given appropriate medical treatment and would be allowed to receive visits from his lawyer and members of his family.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 3 January 2007.

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

Françoise **Tulkens** (Belgium), *President*,
Ireneu **Cabral Barreto** (Portugal),
Vladimiro **Zagrebel'sky** (Italy),
Danutė **Jočienė** (Lithuania),
Dragoljub **Popović** (Serbia),
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey), *judges*,

and also Sally **Dollé**, *Section Registrar*.

3. Summary of the judgment²

Complaints

Relying on Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 6 (right to a fair trial), the applicant alleged in particular that his deportation to Tunisia had exposed him to a risk of death, torture and a flagrant denial of justice. Under

² This summary by the Registry does not bind the Court.

Article 34 (right of individual petition), he alleged that the enforcement of the decision deporting him had infringed his right of individual petition.

Decision of the Court

Article 3

The Court reiterated that in its Grand Chamber judgment in the case of *Saadi v. Italy* (28 February 2008, application no. 37201/06), it had concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3.

In the present case the Court did not see any reason to review its conclusions, which were, moreover, confirmed by Amnesty International's report of 2008 on Tunisia. That report also said that although a lot of detainees had complained of having been tortured while in police custody, "in virtually all cases the authorities had failed to carry out investigations or bring the alleged perpetrators to justice". The inability of Mr Ben Khemais's representative before the Court to visit his client confirmed the difficulty experienced by Tunisian prisoners in gaining access to independent foreign lawyers even where they were parties to judicial proceedings before international courts. Once an applicant was deported to Tunisia, the lawyers thus risked finding themselves unable to verify their circumstances and ascertain any complaints they may raise regarding the treatment inflicted on them. It also appeared impossible for the Italian Government to undertake any such checks since their ambassador could not see the applicant at his place of custody.

In those circumstances the Court was unable to accept the argument advanced by the Government to the effect that the assurances given by the Tunisian authorities secured effective protection against the serious risk of ill-treatment incurred by the applicant. It reiterated in that connection the principle affirmed by the Parliamentary Assembly of the Council of Europe (PACE) in its resolution no. 1433(2005), according to which diplomatic assurances could not be relied on unless the absence of a risk of ill-treatment was firmly established.

The Court also pointed out that the Tunisian authorities had indicated that the applicant had received many visits from members of his family and his Tunisian lawyer. The latter had stated that his client had not alleged that he had suffered ill-treatment, which appeared to be confirmed by a medical report annexed to the diplomatic assurances. However, whilst that showed that the applicant had not suffered ill-treatment in the weeks following his deportation it did not in any way predict the applicant's future fate.

Accordingly, the Court held that the enforcement of the order deporting the applicant to Tunisia had violated Article 3.

Articles 2 and 6

The Court held that there was no need to consider whether the enforcement of the order deporting the applicant had also infringed Articles 2 and 6.

Article 34

The Court stressed that the level of protection which the Court was able to afford the applicant in respect of the rights laid down in Articles 2 and 3 had been irreversibly reduced following his deportation. It mattered little that he had been deported after the exchange of observations between the parties; the measure had nonetheless deprived any finding of a violation of all useful effect as the applicant had been deported to a country that was not a party to the Convention, where he risked being subjected to treatment contrary to the Convention.

Moreover, it was implicit in the notion of the effective exercise of the right of application that for the duration of the proceedings in Strasbourg the Court should remain able to examine the application under its normal procedure. The Tunisian authorities had confirmed, however, that Mr Ben Khemais's representative before the Court could not be authorised to visit his client in prison.

Furthermore, the Court noted that the Italian Government, before deporting the applicant, had not requested that the interim measure adopted under Rule 39 of the Rules of Court be lifted and had proceeded to deport him without even obtaining the diplomatic assurances they had referred to in their observations.

Consequently, on account of his deportation to Tunisia, the applicant had not been able to advance all the arguments relevant to his defence and the judgment of the Court was liable to be deprived of all useful effect. The fact that the applicant had been removed from Italy's jurisdiction presented a serious obstacle that could prevent the Italian Government from complying with their obligations to protect the applicant's rights and erase the consequences of the violations found by the Court. Accordingly, the Court held that there had been a violation of Article 34.

Judge Cabral Barreto expressed a concurring opinion, the text of which is annexed to the judgment.

The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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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.