

(TRANSLATION)

THE FACTS

The facts, as submitted by the parties, may be summarised as follows.

The applicant, a Moroccan national born on 1 January 1959 at Fez, is a trainee teacher. He has been held in the Baumettes prison in Marseilles since 10 May 1985. He states that after leaving Morocco on 30 July 1983 and spending two years in hiding, he gave himself up to the French police; this is borne out by the copy of a report by the Nice police (Sûreté urbaine) dated 10 May 1985, stating that on that occasion they were notified of an international arrest warrant issued by the investigating judge of the Fez Court of Appeal.

The applicant states that he was then summoned to appear on 13 August 1985 before the Indictments Chamber of the Aix-en-Provence Court of Appeal with a view to his extradition to Morocco. He himself wished to be extradited in order to be able to defend himself. That was when he allegedly learned that he had already been sentenced to death *in absentia* by the Fez Court of Appeal on 16 October 1984.

It appears from the judgment of the Indictments Chamber of the Aix-en-Provence Court of Appeal that the applicant had been convicted in Morocco of murder with felonious intent preceded by aggravated theft, indecent assault and breaking of the fast during Ramadan.

The Indictments Chamber of the Court of Appeal ruled in favour of extradition. The applicant did not appeal to the Court of Cassation against this judgment.

By letter dated 7 October 1985, the French Government informed the Commission that they had asked the Moroccan authorities to specify whether, in the event of B. being handed over to them, he could be retried in the Government's presence in Morocco and also to give them a formal undertaking that, if the death penalty were to be pronounced a second time, it would not be enforced; they had added that it would not be possible to consider any decision to extradite until this request had been complied with.

On 15 July 1986 the French Government informed the Commission that the Moroccan authorities had given an undertaking to the effect that, on his return to Morocco, the applicant would be entitled, under Article 509 of the Dahir of 10 February 1959 (Code of Criminal Procedure), to an adversarial hearing: "if the person convicted *in absentia* gives himself up or if he is arrested before the expiry of the time-limit for enforcement of his sentence, the judgment and the proceedings conducted since the date of the notice to appear for trial shall be automatically set

aside and proceedings shall be instituted against him in the ordinary way". The Government added that they accordingly intended "to carry out the extradition in the next few weeks".

The applicant's complaints may be summarised as follows:

He alleges a violation of Article 3 of the Convention. He submits that uncertainty as to his fate if he were extradited constitutes inhuman and degrading treatment in violation of this provision of the Convention.

He fears that on return he might not be entitled to adversarial proceedings together with the guarantees accompanying a fair trial. If that proved to be the case, he would not be in a position to defend himself and enforcement of the death penalty would therefore constitute treatment contrary to Article 3 of the Convention. In addition, he is liable to receive a further death sentence, which might well be enforced.

PROCEEDINGS (Extract)

The application was introduced on 26 August 1985 and registered on 28 August 1985.

On 29 August 1985 the President applied Rule 36 of the Rules of Procedure, indicating to the respondent Government that it seemed desirable, in the interest of the parties and the proper conduct of the proceedings, not to extradite the applicant.

By letter dated 7 October 1985 the French Government informed the Commission that they had asked the Moroccan authorities to specify whether, in the event of Mr. B. being handed over to them, he could be retried in the Government's presence in Morocco and also to give them a formal undertaking that, if the death penalty were to be pronounced a second time, it would not be enforced; they had added that it would not be possible to consider any decision to extradite until this request had been complied with.

On 15 October 1985 the Commission decided to adjourn its examination of the application in the light of the information provided by the respondent Government on 7 October 1985.

By letter dated 18 October 1985 the parties were informed of the Commission's decision and the reasons for it.

On 15 July 1986 the Government informed the Commission that the Moroccan authorities had stated that under Article 509 of the Dahir of 10 February 1959 (Code of Criminal Procedure):

"if the person convicted *in absentia* gives himself up or if he is arrested before the expiry of the time-limit for enforcement of the sentence, the judgment and

the proceedings conducted since the date of the notice to appear for trial shall be automatically set aside and proceedings shall be instituted against him in the ordinary way".

The Government, referring only to the first of the two conditions with which the Moroccan authorities had been asked to comply, concluded that it followed from the above text that "the condition to which France formally made Mr. B.'s extradition subject is fulfilled. The French Government accordingly intend to carry out the extradition in the next few weeks".

On 21 August 1986 the President renewed the application of Rule 36 of the Rules of Procedure pursuant to the aforementioned letter from the respondent Government.

On 22 and 24 September 1986 respectively, counsel for the applicant and the applicant himself provided the Commission with information.

Lastly, on 22 September 1986, the respondent Government submitted observations pursuant to their letter of 15 July 1986 and to the interim measure taken by the President of the Commission under Rule 36 of the Rules of Procedure.

On 16 October 1986 the Commission decided to maintain the interim measure and give notice of the application to the French Government under Rule 42 para. 2 (b), inviting them to present written observations on the admissibility and merits of the application. In particular, the Government were asked to answer the following question:

"Are the French Government of the opinion that the applicant's extradition to Morocco is consistent with the rights conferred on him by the Convention and the Protocols thereto, to which the Government have acceded, particularly in view of the assurances that the applicant was likely to infer from the information provided in the Government's letter to the Commission dated 7 October 1985?"

On 14 November 1986 the respondent Government submitted their observations on the admissibility and merits of the application.

On 4 December 1986 the applicant submitted his observations in reply.

On 9 December 1986 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application and consequently to maintain the interim measure under Rule 36 of the Rules of Procedure. In particular, the Commission wished the parties to express an opinion on the question of:

"whether a person detained with a view to extradition who receives a communication of this kind is not justified in placing legitimate confidence in the Government's consenting to his extradition only if the Moroccan authorities

give a formal undertaking that, in the event of the death penalty being pronounced a second time, it will not be enforced.

If so, is a change in the Government's attitude liable to constitute a violation of Article 3 of the Convention, in view of the confidence awakened in the prisoner and the extreme seriousness of the issue concerning him?"

The hearing took place on 22 January 1987.

THE LAW

The applicant, who has already been tried and sentenced to death *in absentia* in Morocco, complains that his extradition to Morocco would be in breach of the provisions of Article 3 of the Convention.

In particular, he argues that uncertainty as to his fate if he were extradited constitutes inhuman and degrading treatment contrary to the above-mentioned provision of the Convention. On his return he might not be entitled to adversarial proceedings together with the guarantees accompanying a fair trial; in addition, he is liable to receive a second death sentence, which might well be enforced because he is charged with murder with felonious intent preceded by aggravated theft, indecent assault and breaking of the fast during Ramadan.

The respondent Government submit that the application is premature and based on the fear of acts which have not yet taken place. They claim that it is intended to prevent rather than denounce a violation of the Convention and that no formal decision concerning the applicant's extradition has been taken to date. Despite the ruling of the Indictments Chamber of the Aix-en-Provence Court of Appeal in favour of the applicant's extradition to Morocco, the legal decision to authorise extradition has not yet been taken, nor *a fortiori* carried out. The applicant cannot therefore claim to be the victim of a violation of the Convention within the meaning of Article 25 of the Convention, because the evidence of an alleged violation of the Convention is far too uncertain, not to say speculative.

In this connection the Commission recalls its case-law on the interpretation of the concept of "victim" within the meaning of Article 25 para. 1 of the Convention. According to this case-law, an applicant satisfies the requirements of Article 25 para. 1 if he can claim that he will suffer or has suffered a violation "by one of the High Contracting Parties" of the rights set forth in the Convention. It is therefore necessary for the applicant to show State responsibility for the matters about which he complains and that those matters relate to the alleged violation of one of the rights contained in the Convention.

The Commission wishes to emphasise that in its previous decisions it has recognised that the extradition of a person might, in exceptional circumstances, raise an issue under Article 3 of the Convention, in cases where a person is extradited to a country where, "due to the very nature of the regime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed" (No. 1802/62, Dec. 26.3.63, Yearbook 6 pp. 463, 481; No. 10303/83, Dec. 3.5.83, D.R. 36 p. 209; No. 10479/83, Dec. 12.3.84, D.R. 37 p. 158).

According to the Commission's case-law on cases of extradition from the standpoint of Article 3 of the Convention, the sole factor to be considered is the existence of an objective danger to the person extradited.

The Commission reiterates this interpretation, which is based on the specific terms of Article 3 of the Convention and on the obligation under this article, combined with Article 1, for the Contracting Parties to the Convention to protect "everyone within their jurisdiction" against the real danger of such treatment, in view of its irreversible nature.

The application must, however, be brought against a decision authorising extradition which is final, i.e. not subject to subsequent appeal.

Admittedly, the applicant is at present detained under a warrant for imprisonment pending extradition, which was issued on 10 May 1985 by the public prosecutor, then by the Nice Regional Court pursuant to a judgment *in absentia* given on 16 October 1984 by the Fez Court of Appeal, sentencing him to death. Furthermore, on 13 August 1985 the Indictments Chamber of the Aix-en-Provence Court of Appeal ruled in favour of compliance with the request for extradition.

The extradition proceedings are therefore pending. The Indictments Chamber ruling in favour of extradition allows but does not compel the Government to decide to extradite the applicant. Thereafter, the Government are consequently free to assess whether or not it is advisable to comply with the request for extradition. However, this particular stage in the proceedings has not been completed.

Referring to Article 26 of the Convention, which provides that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law", the Government object that the domestic remedies have not been exhausted. They submit that the applicant may make use of two remedies which are available under French law to everyone against whom extradition proceedings are brought. The first is an appeal to the Court of Cassation against the judgment of the Indictments Chamber in favour of extradition and the second is an application to the Conseil d'Etat to set aside the extradition order.

The Commission finds that the applicant could have appealed to the Court of Cassation against the judgment of the Indictments Chamber of the Aix-en-Provence Court of Appeal. He did not do so. However, it should be pointed out that the supervision exercised by the Court of Cassation concerns only procedural questions relating to the judgment; in the present case, given the nature of the applicant's complaint, this cannot be considered an effective remedy within the meaning of Article 26 of the Convention.

The second remedy, namely the application to the Conseil d'Etat, presupposes the existence of an extradition order. Admittedly, in a letter of 15 July 1986 of which a copy was communicated to the applicant, the Government informed the Commission that they had received an undertaking from the Moroccan authorities that, on his return, the applicant would be entitled to all the guarantees accompanying a fair trial, in accordance with the criminal legislation in force in Morocco, and that they accordingly intended to extradite the applicant shortly; that being so, faced with an imminent act of the executive, the consequences of which would lay him open to treatment prohibited by Article 3, the applicant was entitled to consider himself directly affected by the risk of extradition.

The Commission finds that, while it is a fact that the extradition proceedings are pending and that the Indictments Chamber ruled in favour of extradition, it nevertheless remains that this judgment is no more than an interim stage in the extradition proceedings. It is not a final decision because it is for the Prime Minister to give the extradition order if he deems it appropriate.

The fact is that no such Government act exists in the present case. However, under French law, a remedy is available to the applicant, namely the application he may bring before the Conseil d'Etat to set aside the extradition order as soon as it is given. This application will enable him to challenge before the French courts the actual merits of the extradition he complains of before the Commission. The purpose of the application will be to have the extradition order set aside; in support of his application he will be able to rely on any legal grounds he considers advisable, including those relating to a violation of the Convention. The Commission observes that an application of this kind may be accompanied by an application for a stay of execution which, although it does not in itself have suspensive effect, is intended to ensure that the administrative court will very speedily conduct an initial examination of the extradition order and, if appropriate, order a stay of execution. In this connection it should be pointed out, in the light of the information provided by the French Government, that the practice generally adopted by the Government in the matter is as follows: when the extradition order is served on the person concerned and the latter states his intention of challenging it before the Conseil d'Etat, the Government refrain from implementing the order until the Conseil d'Etat has considered the application. The Conseil d'Etat therefore examines these cases as a matter of extreme urgency and the extradition order is carried out only in the event of the application being dismissed.

It follows that the application to the Commission is brought against acts which are not final and that the applicant cannot be considered to have exhausted the domestic remedies. Moreover, the examination of the case has not disclosed any special circumstance which might, according to the generally recognised rules of international law in the matter, have absolved the applicant from exhausting the domestic remedies.

The Commission concludes that in the circumstances of the present case the application fails in any case to comply with the condition of exhaustion of the domestic remedies and must be declared inadmissible under Article 27 para. 3 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.