

APPLICATION N° 31113/96

José Antonio URRUTIKOETXEA v/France

DECISION of 5 December 1996 on the admissibility of the application

Article 3 of the Convention

- a) *Regardless of the applicant victim's conduct, nothing can justify acts of torture or inhuman or degrading treatment*
- b) *Expulsion of a person may raise an issue under this provision, and hence engage the responsibility of the State where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 in the country to which he is to be expelled*
- c) *Expulsion to Spain of a person claiming that he would be subjected in that country to treatment contrary to this provision. In assessing the risk, the Commission takes account of the fact that the French authorities, in considering that there were no substantial reasons for believing that the applicant would be subjected to treatment contrary to Article 3, based themselves on recommendations put forward by the CPT, and the fact that the applicant had not suffered any inhuman or degrading treatment since his arrival in Spain*

Article 6, paragraph 1 of the Convention *Not applicable to expulsion proceedings*

Article 13 of the Convention *The right recognised by this provision may be exercised only in respect of an arguable claim within the meaning of the case-law of the Convention organs*

Article 25 of the Convention *Alleged hindrance of the effective exercise of the right of individual petition due to a Government's failure to comply with an indication under Rule 36 of the Rules of Procedure (Question unresolved)*

Article 26 of the Convention

- a) *In order to have exhausted domestic remedies the person concerned must have raised at least in substance, before the national authorities the complaint he puts to the Commission*
- b) *Domestic remedies have not been exhausted where a remedy which cannot on the face of it be regarded as ineffective, is still pending*
- c) *Where an individual complains that his deportation to a particular country exposes him to a serious danger, appeals without suspensive effect cannot be considered effective*
- d) *In France regarding an expulsion order, an appeal to the Administrative Court which has rejected a request for stay of execution of that order cannot be considered an effective remedy given that it has not been shown that this appeal would have the effect of suspending enforcement of the order in question*

Rule 36 of the Rules of Procedure of the Commission *Failure by a Government to comply with an indication given under this provision*

THE FACTS

The applicant, a Spanish national of Basque origin was born in 1950 in Miravalles. Before the Commission, he was represented by Mr Karmele Irizabal, a lawyer practising in San Sebastián (Spain)

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

The applicant first entered France, clandestinely, in 1971, after fleeing from Spain

On 5 January 1972, the French Agency for the Protection of Refugees and Stateless Persons (*Office de Protection des Réfugiés et Apatrides*, hereinafter referred to as the "OFPRA") granted him refugee status. As a result of the changes in Spain's political regime and following an examination of the applicant's personal situation, his refugee status was withdrawn on 5 March 1979

While he was a refugee on 21 May 1977, the applicant had been served with his first expulsion order, together with a compulsory residence order, but these were revoked by order of 14 June 1977 of the Minister of the Interior

The applicant is a member of the Basque Separatist Movement, *Euskadi ta Askatasuna* (ETA) and has been involved in numerous clandestine activities, both in France and in Spain He allegedly became the leader of ETA's international underground apparatus in 1981

The applicant went into hiding in January 1984 after being served with a fresh expulsion order, together with a compulsory residence order These were revoked on 6 February 1987 and replaced on the same day with a further expulsion order, issued under the extreme urgency provisions of section 26 of the Ordinance of 2 November 1945 on the conditions for entry into and residence in France That order was served on him on 13 January 1989

On 26 November 1990 Paris *tribunal de grande instance* sentenced the applicant to ten years' imprisonment for attempted murder, conspiracy and infringing the arms and ammunition legislation in the pursuit of terrorism (an aggravated offence)

On 22 April 1996, the applicant applied to Toulouse Administrative Court to have execution of the expulsion order of 6 February 1987 stayed, in so far as the authorities were proposing to deport him to Spain He also sought judicial review of that order

On 23 May 1996, the Administrative Court dismissed the application for a stay of execution on the grounds that at this stage of the proceedings none of the grounds relied on in support of the application for judicial review appears substantial or such as to justify setting the order aside and furthermore, there is nothing in the file to indicate that the Minister has taken a decision to hand the plaintiff over to the Spanish police To date the Administrative Court has still not given a ruling on the merits of that application

In the meantime on 7 May 1996, the applicant's lawyer informed the Commission that the applicant had been deported to Spain on 3 May 1996 pursuant to the Minister's order

COMPLAINTS

The applicant complains that his expulsion to Spain would expose him to treatment contrary to Article 3 of the Convention He also alleges a violation of Article 5 paras 1 (c) and (f) 3 and 4 arguing that his forcible removal to Spain was in reality a "disguised extradition" aimed at securing his detention and conviction in that country He alleges, finally a violation of Articles 6 8 13 18 and 25 of the Convention

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 April 1996 and registered on 22 April 1996

On 22 April 1996, the President of the Commission decided to bring the applicant's complaints under Articles 3 and 8 of the Convention to the notice of the respondent Government and to invite them to submit written observations on their admissibility and merits

On the same day, the President of the Commission also decided to apply Rule 36 of the Commission's Rules of Procedure and to indicate to the Government that it would be desirable in the interest of the parties and the proceedings not to expel the applicant before the Commission had had the opportunity to make a more thorough examination of the application

On 23 May 1996 the Commission sent the Government, for their comments, a letter from the applicant's lawyer informing the Commission that the expulsion order had been enforced

The Government submitted their observations on 8 July 1996 after an extension of the time limit fixed for this purpose, and the applicant replied on 24 July 1996

THE LAW

1 The applicant complains firstly, that his expulsion from France to Spain amounts to inhuman and degrading treatment contrary to Article 3 of the Convention. This provision reads as follows

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment "

a) The Commission wishes to emphasise at the outset that, on 22 April 1996, the President of the Commission indicated to the French Government, pursuant to Rule 36 of the Commission's Rules of Procedure, that it would be desirable in the interest of the parties and the proper conduct of the proceedings to stay execution of the expulsion order

The Government evidently did not see fit to comply with that indication, since the French police handed the applicant over to the Spanish police on 3 May 1996

An issue may arise here as to whether the respondent Government have failed to honour the general obligation to co operate, which is a requirement for effective implementation of the Convention and, in particular, of Article 25 para 1

The French Government argue that Rule 36 of the Commission's Rules of Procedure cannot be considered to give rise to a binding obligation on Contracting Parties. As the European Court has held in a leading case on this issue (*Eur Court HR, Cruz Varas and Others v Sweden* judgment of 20 March 1991, Series A no 201, pp 35-37, paras 97-105), it would be straining the wording of Article 25 para 1 to interpret it as an obligation to comply with a Commission indication under Rule 36.

The Government stress, however, that the decision not to comply with the Commission's indications was made after due consideration had been given to the risk of a violation of Article 3 and in the light of the considerations set forth under (c) below.

The applicant's lawyer finds it most regrettable that the French Government have taken this stance on the matter and contests their submissions, while conceding that "the Commission's recommendations have been of some effect", in so far as the applicant, after being handed over by the French police, not to the *Guardia Civil*, but to the Spanish police, has not been subjected to any treatment contrary to Article 3 of the Convention.

The Commission does not consider it necessary to examine this question further, as the application is inadmissible for the reasons set out under (c) below.

b) The Government rely, primarily, on the applicant's failure to exhaust domestic remedies, arguing that, to date, he has not exhausted all the domestic remedies available to him under French law, in particular before the administrative courts.

The applicant contests this submission and argues that the domestic remedies in question have no suspensive effect as, on 23 May 1996, the Administrative Court refused to stay the execution of the order deporting him to Spain.

The Commission recalls that the obligation to exhaust domestic remedies is limited to normal use of those domestic remedies which are apparently effective, adequate and accessible. Where an individual complains that his deportation exposes him to a serious danger, appeals without suspensive effect cannot be considered effective (No 10078/82, Dec 13 12 84, D R 41 p 103, No 12461/86, Dec 10 12 86, D R 51 p 258, No 19776/92, Dec 18 10 93, unpublished, No 24573/94, Dec 23 95, unpublished).

In this case, the applicant is complaining about the State authorities' decision of 6 February 1987 to expel him. The Government have not shown that an appeal to the Administrative Court would have resulted in the expulsion order being stayed. The Commission notes on this point that on 23 May 1996, the Administrative Court rejected the application for a stay of execution of the expulsion order.

This cannot therefore be considered an effective remedy, according to the generally recognised principles of international law. The Government's objection that domestic remedies have not been exhausted cannot therefore be accepted.

c) The Government submit, in the alternative, that the application is unfounded

The Government submit that they have not infringed the principle laid down by the European Court to the effect that a decision to extradite - and, *mutatis mutandis*, to expel - may raise an issue under Article 3 of the Convention. They stress that, in accordance with French law and, in particular, section 27 *bis* of the Ordinance of 2 August 1945, the decision to deport the applicant to Spain was made after due consideration had been given to the risks to which this might expose him from the standpoint of the Convention.

They indicate further that the applicant did not appeal against the decision of 5 March 1979 to withdraw his refugee status, even though he was legally entitled to do so. Nor did he submit a fresh request to the OFPRA for recognition of his refugee status on the ground that he feared persecution if deported to his country of origin. Finally, although the applicant knew that an expulsion order had been issued against him, he did not at any time try to find another host country.

The Government stress further that Spain is a State governed by the rule of law, which has signed the international agreements for the protection of human rights and is a Contracting Party to the European Convention of Human Rights, under which it has recognised the right of individual petition. It is in the light of these considerations and of the recommendations made on 5 March 1996 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) that the French authorities found there to be no substantial grounds for believing that the applicant would, if deported, be subjected to treatment contrary to Article 3 of the Convention.

The Government make particular reference on this point to a letter of 7 May 1996 from the applicant's lawyer to the Commission indicating that the applicant, who had been arrested and remanded in custody in his country in conditions which complied with respect for human rights, had not, since arriving in Spain, been subjected to any inhuman or degrading treatment and did not allege any treatment contrary to Article 3 of the Convention.

The applicant's lawyer indicates, for his part, that the substantial risks of ill-treatment are corroborated by the CPT's findings and recommendations in reports it drew up after visiting Spain. He admits, however, that, following the President of the Commission's intervention pursuant to Rule 36 of the Commission's Rules of Procedure, the French authorities did not hand the applicant over to the *Guardia Civil*, whose methods have been condemned by the CPT, but to the Spanish police, and that the applicant has not been subjected to treatment contrary to Article 3 of the Convention.

The applicant's lawyer goes on to refute the Government's argument that, as the applicant did not request political refugee status or seek a host country, he has failed to show that he was exposed to a risk of treatment contrary to Article 3 of the Convention. He submits in this regard that the protection flowing from Article 3 concerns any individual and not just those with refugee status or those who have applied for refugee status. Finally, the applicant's lawyer asserts that the applicant did take steps to find a host country and that, in any event, there is a positive obligation on a State not to expel an individual to a country in which there is a risk of a violation of Article 3 of the Convention.

As regards the Government's arguments that Spain is a State governed by the rule of law, the applicant observes that the CPT's reports concern only the member States of the Council of Europe which are parties to the European Convention of Human Rights. These reports have revealed the use of treatment contrary to Article 3 of the Convention, a provision which makes no distinction between the States Parties and other States.

The Commission recalls that the Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. It notes, moreover, that the right to political asylum is not contained in either the Convention or its Protocols (*Eur Court HR, Vilvarajah and Others, v the United Kingdom* judgment of 30 October 1991, Series A no 215, p 34, para 102 and the recent *Chahal v the United Kingdom* judgment of 15 November 1996, p 21, para 73, to be published in Reports, 1996).

However, according to the case-law of the Convention organs, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled to the country in question, would face a real risk of being subjected to treatment contrary to Article 3. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (*Eur Court HR, Soering v the United Kingdom* judgment of 7 July 1989, Series A no 161, p 35, paras. 90-91, *Cruz Varas and Others v Sweden* judgment of 20 March 1991, Series A no 201, p. 28, paras 69-70, *Vijayanathan and Pusparajah v France*, Comm Report 5 9.91, *Eur Court HR, Series A no 241-B*, p 89, para 89 and the above-mentioned *Chahal v the United Kingdom* judgment, p 21, para 74).

When a Contracting State expels an alien from its territory, its responsibility is engaged under Article 3 of the Convention, in so far as it exposes that individual directly to a risk of being subjected to treatment contrary to this Article.

The Commission recalls, further, that although the treatment prohibited under Article 3 of the Convention is that which attains a minimum level of severity and although the assessment of this minimum is, in the nature of things, relative, the Convention lays down an absolute prohibition on such treatment.

In this case, the Commission is well aware of the difficulties encountered by the States in their fight against acts of terrorism and of the fact that democratic institutions must respond firmly to such acts. However, it considers that, in no circumstances, can such a response justify acts of torture or inhuman or degrading treatment, irrespective of the victim's conduct (see, *inter alia*, the Chahal judgment, *op. cit.*, pp 22-23, paras 79-80)

The Commission notes that the French authorities, having taken note of the recommendations made by the CPT, considered that there were no substantial grounds for believing that the applicant would be subjected in Spain to treatment contrary to Article 3 of the Convention. The Commission notes in this regard that, on the admission of the applicant's lawyer himself, the applicant has not been subjected to any inhuman or degrading treatment since he arrived in Spain and that his arrest and remand in police custody by the Spanish authorities were carried out in accordance with the provisions of the Convention.

Having regard to the foregoing, the Commission concludes that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 27 para. 2 of the Convention.

2 The applicant alleges, further, that his expulsion infringes his right to respect for his family life, contrary to Article 8 of the Convention, which provides

"1 Everyone has the right to respect for his private and family life, his home and his correspondence

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others "

The Government argue, primarily, that the applicant has failed to exhaust domestic remedies (see 1 (b) above) and, in the alternative, that the application is clearly unfounded. The applicant contests both these arguments

The Commission does not consider it necessary to develop this point, as it has not been shown that the applicant submitted it to the French courts Toulouse Administrative Court, to which an application for judicial review of the expulsion order was submitted, has not yet given its decision on the merits, however, there is nothing in the file to show that the applicant ever raised this point, either expressly or in substance, before that court Furthermore, once this judgment is given, the applicant can lodge an appeal with the *Conseil d'Etat* and, as part of that appeal, submit his complaint under Article 8 of the Convention

It follows that this part of the application must be rejected pursuant to Articles 26 and 27 para 3 of the Convention

3 The applicant, invoking Article 5 para 1 (c) and (f), 3 and 4 of the Convention, considers that his "forcible removal" to Spain was in reality a "disguised extradition" designed to secure his detention and conviction in that country

The Commission, having undertaken a thorough examination of the evidence, has found nothing to support the applicant's argument that his removal to Spain was made for any reason other than enforcing the expulsion order against him

The Commission therefore considers that there is no substantial evidence to support the applicant's complaint of a breach of Article 5 of the Convention taken as a whole. It follows that this part of the application is manifestly ill-founded and must be rejected, pursuant to Article 27 para 2 of the Convention

4 Lastly, in so far as the applicant invokes Article 6 of the Convention, the Commission recalls that expulsion proceedings do not entail any determination of an applicant's civil rights and applications or of any criminal charge against him (see No 9990/82, Dec 15 5 84, D R 39 p 119). It follows that this complaint is incompatible with the provisions of the Convention and must be rejected pursuant to Article 27 para 2 of the Convention

5 As regards the complaints of a breach of both Article 13 and Article 18 of the Convention, the Commission recalls that Article 13 requires an effective remedy before a "national authority only for those complaints which can be considered "arguable under the Convention. Having regard to the Commission's conclusion in respect of the various points set out above, the complaint raised under Article 13 of the Convention can only be rejected as unfounded. The complaint of a breach of Article 18 of the Convention must be dealt with in the same manner for the same reasons as those set out above

The Commission concludes that these complaints are manifestly ill founded within the meaning of Article 27 para 2 of the Convention

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE