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

Press Release
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The European Convention on Human Rights does not apply to visa applications submitted to embassies and consulates

In its decision in the case of **M.N. and Others v. Belgium** (application no. 3599/18), delivered by the Grand Chamber, the European Court of Human Rights has by a majority declared the application inadmissible.

The case concerned a couple of Syrian nationals and their two children, who were refused the short-term visas that they had requested from the Belgian Embassy in Beirut with a view to applying for asylum in Belgium.

The applicants claimed that there had been a breach of their rights under Articles 3 (prohibition of torture and inhuman or degrading treatment), 13 (right to an effective remedy) and 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The Court reiterated that Article 1 (obligation to respect human rights) of the European Convention limited its scope to persons within the jurisdiction of the States Parties to the Convention. In the present case, it noted that the applicants were not within Belgium's jurisdiction in respect of the circumstances complained of under Articles 3 and 13 of the Convention.

The Court also considered that Article 6 § 1 of the Convention was inapplicable in the present case. The entry to Belgian territory which would have resulted from the visas being issued did not engage a "civil" right within the meaning of Article 6 § 1.

Lastly, the Court noted that this conclusion did not prejudice the endeavours being made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations.

Principal facts

The applicants are a couple and their two children, all Syrian nationals. They live in Aleppo (Syria).

On 22 August 2016 they went to the Belgian Embassy in Beirut to submit applications for short-stay visas, with a view to subsequently claiming asylum in Belgium. The applicants, basing their request on Article 25 of the Community Code on Visas, cited pressing humanitarian reasons.

On 13 September 2016 the Alien's Office (OE) refused to issue the requested visas. The applicants appealed to the Aliens Appeals Board (CCE) under the extremely urgent procedure. On 7 October 2016 the CCE ordered a stay of execution of the OE's decisions. It instructed the State to take new decisions.

On 10 and 17 October 2016 the OE issued new decisions refusing to grant the visas, execution of which was again stayed by the CCE. On 20 October 2016 the CCE instructed the State to issue the applicants, within 48 hours, with laissez-passers or visas, valid for three months, in order to protect their interests. The applicants then lodged applications for judicial review of the OE's decisions (of 10 and 17 October 2016), but these were dismissed by the CCE on the grounds that the decisions of 13 September 2016 refusing to issue the visas had become final.

Since the Belgian authorities refused to execute the Aliens Appeal Board's judgment of 7 October 2016, the applicants then brought proceedings before the Brussels French-language Court of First Instance (TPI), which ordered the State to comply with that judgment, subject to a penalty for non-compliance. On 7 December 2016 the Brussels Court of Appeal delivered a judgment upholding

the order that the State was to execute the CCE's judgment of 20 October 2016, again subject to penalties for non-compliance. However, given the outcome of the applications for judicial review before the CCE, the Court of Appeal held on 30 June 2017 that the judgment of 7 December 2016 was no longer relevant and that no penalties were due.

Complaints, procedure and composition of the Court

The applicants complained about the Belgian authorities' refusal to issue them with the so-called "humanitarian" visas, and submitted that they had been exposed to a situation incompatible with Article 3 of the Convention (prohibition of torture and of inhuman or degrading treatment) with no possibility of remedying it effectively, as required by Article 13 (right to an effective remedy).

They also alleged a violation of Article 6 § 1 (right to a fair hearing), in that it was impossible for them to obtain execution of the Brussels Court of Appeal's judgment of 7 December 2016.

The application was lodged with the European Court of Human Rights on 10 January 2018. On 26 April the Belgium Government was given notice[1] of the application, with questions from the Court. On 20 November 2018 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

The Governments of the Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, Norway, the Netherlands, Slovakia and the United Kingdom, and several national and international non-governmental organisations (the Human Rights League (LDH), the International Federation of Human Rights Leagues (FIDH), the Centre for Advice on Individual Rights in Europe (the AIRE Centre), the European Council on Refugees and Exiles (ECRE), the International Commission of Jurists, the Dutch Council for Refugees, and the Bar Council of French-speaking and German-speaking Lawyers of Belgium (OBFG)) were also given leave to intervene in the written procedure (Articles 36 §§ 2 and 3 of the Convention).

A public hearing was held on 24 April 2019 (Rule 59 § 3 of the Rules of Court).

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),
Angelika **Nußberger** (Germany),
Paul **Lemmens** (Belgium),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Krzysztof **Wojtyczek** (Poland),
Iulia Antoanella **Motoc** (Romania),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Marko **Bošnjak** (Slovenia),
Jovan **Ilievski** (North Macedonia),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

1 In accordance with Rule 54 of the Rules of Court, a Chamber of seven judges may decide to bring to the attention of a Convention State's Government that an application against that State is pending before the Court (the so-called "communications procedure").

Decision of the Court

Articles 3 (prohibition of torture and of inhuman or degrading treatment) and 13 (right to an effective remedy)

Article 1 of the Convention limits its scope to persons within the jurisdiction of the States Parties to the Convention. The Court had therefore to determine whether the applicants were within Belgium's jurisdiction.

The Court noted that that the contested decisions had been taken by the Belgian authorities in Belgium. They were issued in response to visa applications submitted by the applicants to the consular services of the Belgian Embassy in Beirut, with a view to obtaining authorisation to enter Belgium so that they could claim asylum in that country and avoid treatment in breach of Article 3 of the Convention to which they alleged that they were exposed in Aleppo. The decisions refusing to grant the requested visas subsequently passed through the embassy's consular services, which notified the applicants. The Court accepted that in ruling on the applicants' visa applications, the Belgian authorities had taken decisions concerning the conditions for entry to Belgian territory and, in so doing, had exercised a public power. In itself, however, this finding was not sufficient to bring the applicants under Belgium's "territorial" jurisdiction within the meaning of Article 1 of the Convention.

In order to determine whether the Convention applied to the present case, the Court had to examine whether exceptional circumstances existed which could lead to a conclusion that Belgium had exercised extraterritorial jurisdiction in respect of the applicants. This was primarily a question of fact, which required it to explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter had effectively exercised authority or control over them.

In this connection, the Court specified that it was irrelevant that the diplomatic agents had had, as in the present case, merely a "letter-box" role, or to ascertain who had been responsible for taking the decisions, whether the Belgian authorities in the national territory or the diplomatic agents in post abroad.

The Court noted that the applicants had never been within Belgium's national territory; that they did not claim to have any pre-existing ties of family or private life with that country; that they were not Belgian nationals seeking to benefit from the protection of their embassy; and that the diplomatic agents had at no time exercised *de facto* control over the applicants. They had freely chosen to present themselves at the Belgian Embassy in Beirut, as indeed they could have approached any other embassy, and to submit their visa applications there. They had then been free to leave the premises of the Belgian Embassy without any hindrance.

The Court reiterated that the applicants' situation was fundamentally different from the numerous expulsion cases that it had examined since the *Soering*[2] judgment, in which it had accepted that a State Party's responsibility could be engaged under Article 3 of the Convention when a State's decision to remove an individual exposed him or her to a genuine risk of being subjected to treatment in breach of Article 3 in the country of destination. Unlike the applicants, individuals in cases involving removal from a State's territory were, in theory, on the territory of the State concerned or at its border and thus clearly fell within its jurisdiction.

Lastly, the Court examined whether the fact of having brought proceedings at national level was capable of creating an exceptional circumstance which was sufficient to trigger, unilaterally, an extraterritorial jurisdictional link between the applicants and Belgium within the meaning of Article 1 of the Convention.

[2] *Soering v. the United Kingdom* (no. 14038/88, 7 July 1989, Series A no. 161).

In the case of *Abdul Wahab Khan*[3], the Court had clearly held that the mere fact that an applicant brought proceedings in a State Party with which he had no connecting tie could not suffice to establish that State's jurisdiction over him. The Court considered that to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they found themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction.

In the Court's opinion, such an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law, recognised by the Court, according to which the States Parties, subject to their treaty obligations, including the Convention, had the right to control the entry, residence and expulsion of aliens. In this context, the Court noted that that the Court of Justice of the European Union had held in a similar case that, as EU law currently stood, the issuing of long-stay visas fell solely within the scope of the Member States' national law.

In consequence, the Court considered that the applicants had not been within Belgium's jurisdiction as regards the circumstances in respect of which they complained under Articles 3 and 13 of the Convention.

Finally, the Court noted that this conclusion did not prejudice the endeavours being made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations (see *N.D. and N.T. v. Spain*[4], § 222).

Article 6 § 1 (right to a fair hearing)

The Belgian Government argued that the applicants' complaint, which formally concerned the failure to comply with the judgment of 7 December 2016 ordering the Belgian State to execute, subject to daily penalties, the CCE's judgment of 20 October 2016, had in reality concerned the decisions on whether to grant the visas and, in consequence, a political right to which Article 6 § 1 of the Convention did not apply.

The applicants submitted that their complaint concerned a subjective civil right, recognised by the Brussels Court of Appeal's judgment of 7 December 2016, namely the right to secure the execution of a binding and enforceable judgment and to have the damage resulting from its non-execution brought to an end.

The Court was of the view that the entry to Belgian territory which would have resulted from the visas being issued did not engage a "civil" right within the meaning of Article 6 § 1 of the Convention, as was also the case in respect of every other decision relating to immigration and the entry, residence and removal of aliens. It was settled case-law that these areas were outside the scope of Article 6 of the Convention.

Admittedly, the proceedings subsequently pursued by the applicants before the Brussels Court of Appeal to secure execution of the CCE's judgment of 20 October 2016 had concerned the State's refusal to execute a decision delivered by an administrative court, and the court of appeal, in establishing its jurisdiction under domestic law, had held that the dispute before it concerned a civil right. That being stated, the Court found that the object of those proceedings had been solely to continue the proceedings to challenge the merits of the authorities' decisions refusing to issue the visas. In any event, the Court considered that the underlying proceedings did not become "civil" merely because their execution was sought before the courts and they gave rise to a judicial decision.

[3] *Abdul Wahab Khan v. the United Kingdom* ((dec.), no. 11987/11, 28 January 2014.
[4] *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 222, 13 February 2020.

Accordingly, Article 6 § 1 of the Convention was not applicable in the present case.

The decision is available *in English and French.*

Press contacts
Journalists can continue to contact the Press Unit via echrpress@echr.coe.int

Inci Ertekin
Tracey Turner-Tretz
Denis Lambert
Patrick Lannin