

APPLICATION N° 25803/94

Ahmed SELMOUNI v/FRANCE

DECISION of 25 November 1996 on the admissibility of the application

Article 3 of the Convention *Allegations of ill-treatment inflicted during police custody (Complaint declared admissible)*

Article 6, paragraph 1 of the Convention *Length of criminal proceedings with application to join the proceedings as a civil party seeking damages, still pending (Complaint declared admissible)*

Article 6, paragraphs 1 and 3 of the Convention

- a) *The question whether a trial is in conformity with the requirements of Article 6 para 1 must be considered on the basis of an examination of the proceedings as a whole and not one isolated aspect. This principle applies both to the specific guarantees under paragraph 3 and to the concept of a fair trial under paragraph 1 of Article 6.*
- b) *Allegations of failure to assign a lawyer to assist the applicant during the judicial investigation and before the Court of Appeal.*

Article 26 of the Convention

- a) *Exhaustion of domestic remedies requires exhaustion of such remedies as relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach.*

- b) *The burden of proving the existence of effective, sufficient and accessible remedies lies upon the State invoking non-exhaustion of domestic remedies*
- c) *This provision must be applied with some degree of flexibility with due regard to the context and without excessive formalism*
- d) *Domestic remedies have been exhausted if, before the highest domestic authority, the applicant has submitted the complaint he puts before the Commission*
- e) *Where the national authorities remain passive in the face of serious allegations of misconduct or infliction of harm by State agents this is a relevant criterion in absolving the applicant from the obligation to exhaust domestic remedies. Circumstances in which the speed with which a remedy can be exercised may be a relevant factor in assessing its effectiveness*

Complaints relating to violence to which the applicant was allegedly subjected by police officers while in their custody and to the length of criminal proceedings brought after the applicant had filed a criminal complaint with a request to join the proceedings as a civil party seeking damages. Having regard to the seriousness of the allegations and the fact that no one has been charged five years later, the applicant has satisfied the rule of exhaustion of domestic remedies

THE FACTS

The applicant, of Dutch and Moroccan nationality, born in 1942, is currently in Montmédy Prison

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

1 Criminal proceedings against the applicant

On 20 November 1991 the police arrested G T, D K and his girlfriend H C in connection with a drug trafficking investigation. D K confessed voluntarily and told the police that he had bought his heroin in Amsterdam from a certain "Gaby", who had helped him conceal it in order to bring it into France over a number of trips. He gave the police a telephone number in Amsterdam which enabled them to identify the applicant

On 25 November 1991 the applicant was arrested in a surveillance operation of a hotel in Paris. The applicant, who was recognised by D K and H C, explained that he had had business dealings with D K in the clothes trade. He denied any involvement in drug trafficking

The applicant was held in police custody from 25 to 29 November 1991, whereupon he was brought before an investigating judge in Bobigny, Mr de L , who charged him with offences under the drugs legislation and remanded him in custody

The investigating judge extended the detention on remand by orders of 19 March and 7 July 1992

In an order of 8 September 1992, the investigating judge committed the applicant for trial before the Criminal Court and ordered him to be kept in detention on remand. During the investigation, the President of the Bar Council assigned a lawyer to act for the applicant and the applicant also retained the services of three other lawyers of his own choice

Bobigny Criminal Court first convened on 16 October 1992 and adjourned the case to a hearing on 30 November 1992 at which the applicant was represented by two lawyers. The applicant argued that the proceedings were void on the ground that the warrants issued by the investigating judge, which had enabled the police to arrest him, were not on the case file

In a judgment of 7 December 1992 Bobigny Criminal Court dismissed the application for the proceedings to be declared void, noting that a certified copy of the warrants had been attached to the file. The court sentenced the applicant to fifteen years' imprisonment to permanent exclusion from French territory and regarding the civil action by the customs authorities, ordered him to pay, jointly and severally with his co-accused, an aggregate fine of twenty-four million francs. The applicant appealed

On 3 September 1993 he sent a letter to the President of the Court of Appeal setting out his grounds of defence. The letter began as follows: "I write to inform you that, as I cannot afford a lawyer, I have no alternative but to attend the hearing before Paris Court of Appeal on 16 September 1993 alone. I wanted to send your Honour this letter before appearing before you"

In a judgment of 16 September 1993, Paris Court of Appeal noted that the applicant had appeared without legal representation and that he did not wish to be represented. It reduced the prison sentence to thirteen years and upheld the remainder of the lower court judgment. During the hearing, one of the applicant's co-defendants, A M , admitted the charge and implicated the applicant

The applicant appealed on points of law. On 7 October 1993 he was granted provisional legal aid and a Court of Cassation lawyer was assigned to him immediately

On 13 December 1993 the registry of the Criminal Division of the Court of Cassation informed the applicant that his personal pleadings had arrived at the registry on 29 November 1993 and that they had been attached to the case file. In these pleadings, the applicant criticised the failure to provide him with legal representation during the investigation and before the Court of Appeal and denied having committed the offence of which he had been convicted.

On 12 January 1994 the applicant's officially assigned lawyer sent him a copy of the grounds of appeal drafted on his behalf. These grounds invoked Article 6 paras 1 and 3 of the Convention, in that the Criminal Court had dismissed the application for the proceedings to be declared void, despite the fact that no certified copy of the warrants had been produced during the proceedings.

On 10 February 1994 the applicant was definitively awarded legal aid.

In a judgment of 27 June 1994, the Court of Cassation dismissed the applicant's appeal, on the grounds

'that neither the judgment under appeal, nor the appellant's grounds of appeal, show that he had raised, before the Court of Appeal, the argument submitted to the lower court, namely that the proceedings were void, in the circumstances, and given that contrary to the appellant's allegations both parties were given an opportunity to comment on the document in question on appeal, without this giving rise to any dispute, this ground of appeal, which is new and has no basis in fact, cannot be allowed.

2. *The applicant's criminal complaint and request to join the proceedings as a civil party seeking damages*

From 25 to 29 November 1991 the applicant was held in police custody and questioned by the police officers of the SDPJ 93 in Bobigny.

On 29 November 1991 a doctor examined the applicant while he was in police custody and noted the presence of traumatic injuries, particularly under his eyes and on his arms, back, chest and thigh.

When the applicant first appeared before the Bobigny investigating judge on 29 November 1991, the judge on his own initiative, appointed an expert to examine him.

On 2 December 1991 the applicant was examined by Dr N of the medical service of Fleury-Merogis Prison. This doctor drew up a medical certificate noting "extensive bruising on the chest and thighs and severe haematomas round the eyes". The doctor added "Haematomas (illegible word)". Says sight impaired in left eye.

On 7 December 1991, a medical examiner, Dr G, the expert attached to Paris Court of Appeal appointed by the investigating judge on 29 November, examined the applicant at the prison. The applicant made the following statements to the doctor:

"I was arrested in the street on 25 November 1991 at about 9 a.m. There were no problems at that stage. I was taken to my hotel. One of the plainclothes police officers then hit me in the area of my left temple. I was then taken to Bobigny police station. At about 10 a.m. I was taken up to the first floor where about eight people started hitting me. I was made to kneel down. An inspector pulled me up by my hair. Another police officer hit me repeatedly on the head with an instrument which might have been a baseball bat. Another one kept kicking me and thumping me in the back. The interrogation continued for about an hour. In the night, I asked to be examined. I was taken to hospital where I had head and chest X-rays. I was hit again at about 9 p.m. the following day during a further interrogation and this went on until 2 a.m. When I arrived at Fleury, I underwent a medical examination."

The doctor noted in his report:

- suborbital haematoma two centimetres below the left lower lid, purplish, almost completely healed
- thin, linear scar approximately 1 cm long continuing the line of the left eyebrow
- right suborbital haematoma, almost completely healed
- multiple cutaneous abrasions (six of which are large), almost completely healed, on the left upper limb
- two 5 cm linear cutaneous abrasions - possibly scratches - on the right upper limb
- 0.5 cm cutaneous lesion on the back of the right hand
- haematoma on the posterior part of the chest in the right hand infrascapular region
- haematoma in the right flank region
- severe (10 cm by 5 cm) haematoma on the left lateral part of the chest
- three haematomas on the left flank
- severe (5 cm by 3 cm) haematoma on the anterior part of the chest, purplish, in the epigastric region
- haematoma in the right prehepatic region
- haematoma on left rib cage 5 cm below the nipple
- 5 cm by 3 cm haematoma on the left lateral part of the axillary line
- haematoma in the right subclavian region
- haematoma on the right buttock
- 10 cm by 5 cm haematoma on the left buttock
- 5 cm by 1 cm linear haematoma on the anterolateral part of the left thigh
- cutaneous abrasion corresponding to a wound, now healing, on the anterior part of the right ankle

swelling on the back of the right foot and a cutaneous abrasion on the back of the foot

5 superficial wounds, now healing, on the anteroinferior part of the right leg -cutaneous abrasions and bruised swelling on the back of the first two left metacarpals

The patient states that, on his arrival at Fleury, he was treated with skin cream and given painkillers

No injuries to the scalp or left eyeball "

The doctor concluded his report as follows

CONCLUSION

[The applicant] states that he was subjected to ill-treatment while in police custody. The traumatic injuries to his cutaneous integument correspond to the period of police custody.

These injuries are healing well.

This report was attached to the investigation file and given the reference number "D 207"

In a letter subsequently sent to the President of the Criminal Court dealing with the charge under the drugs legislation, the applicant stated that he had been raped with a baseball bat and that a police inspector had urinated over him.

When questioned by officers of the General Inspectorate of the National Police on 1 December 1992 at Fleury Merogis Prison, the applicant confirmed his statement and gave further details of what had happened. At the end of his interview, the applicant said "I am filing a criminal complaint against the police officers"

The applicant regularly attended Hôtel Dieu Hospital for treatment.

On 22 February 1993 the Bobigny public prosecutor requested an investigation to be opened into charges against persons unknown of unlawful wounding with a weapon of a defenceless person and of indecent assault. The applicant and A.M., one of his co-defendants in the criminal case, applied to join the proceedings as civil parties seeking damages on 26 March and 5 April 1993 respectively.

At the same time, on 15 March 1993, the applicant had filed a criminal complaint with a request to join the proceedings as a civil party of 'wounding resulting in total unfitness for work for more than a week, assault with a weapon - namely a baseball bat - indecent assault, grievous bodily harm causing permanent disability, in this case the loss of one eye and rape by two or more accomplices - all of which offences were committed between 25 and 29 November 1991 by police officers in the exercise of their duties.

In an order of 15 June 1993, the Bobigny investigating judge dealing with these complaints, Mrs. M., ordered them to be joined

The investigating judge issued a number of warrants to the General Inspectorate, which then heard evidence from numerous police officers. The judge heard evidence from the applicant on 14 May 1993, instructed an expert on 9 June 1993 and served the expert's medical report on the parties on 15 September 1993

The investigating judge questioned the civil parties again on 6 December 1993 after the warrants had been returned on 2 December 1993. The civil parties were questioned again on 10 February 1994 when an identity parade was organised in order to identify the police officers in question

With a view to charging the police officers identified by the civil parties, the investigating judge sent the file to the public prosecutor's office on 1 March 1994

The Bobigny public prosecutor referred the matter to the Paris public prosecutor who, in turn, referred it to the Court of Cassation

The applicant was assigned a lawyer under the legal aid award of 26 January 1994

In a judgment of 27 April 1994, the Court of Cassation decided to remove the Bobigny investigating judge from the case and referred it to a judge attached to Versailles *tribunal de grande instance* in the interests of the proper administration of justice

On 22 June 1994 a Versailles investigating judge was appointed

In an order of 22 September 1995, the investigating judge appointed an eye specialist

On 7 November 1995 the applicant underwent an operation on his left eye. He was operated on again on 14 August 1996

To date, the applicant has no information on the investigation being conducted in Versailles. He has still not been summoned and the investigating judge has not charged anyone

COMPLAINTS (Extract)

1 The applicant complains about the violence to which he was subjected by police officers while in their custody. He invokes Article 3 of the Convention

2. The applicant also complains about the length of time taken to examine his criminal complaint and application to join the proceedings as a civil party seeking damages. He invokes Article 6 para 1 of the Convention.

3. He considers further that the failure to assign him a lawyer to represent him during the judicial investigation and before the Court of Appeal constitutes a violation of Article 6 paras 1 and 3 (c) of the Convention

...

THE LAW (Extract)

1. The applicant complains about the violence to which he was subjected by police officers while in their custody. He invokes Article 3 of the Convention which provides that:

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

The respondent Government raise an objection on the ground that the applicant has not exhausted domestic remedies, since the criminal investigation is still being dealt with by the Versailles investigating judge.

The applicant considers that he has no means of expediting the procedure and complains that no progress has been made with his case since it was transferred to Versailles, despite the fact that it is based on substantial evidence supporting his allegations.

The Commission recalls that the only remedies which Article 26 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. An applicant does not have to exhaust remedies which, although theoretically effective, in reality offer no chance of redress of the alleged violations. It is further established that it falls to the State invoking the exhaustion of remedies rule to prove that the existence of such remedies is sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (Eur. Court HR, *de Jong, Baljet and Van den Brink* judgment of 22 May 1984, Series A no. 77, p. 19, para. 39, *Akdivar and Others v. Turkey* of 16 September 1996, Reports 1996, to be published).

The applicant can establish that the facts of the case or certain special circumstances absolve him from the obligation to exhaust domestic remedies. One of the relevant factors may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance (Eur. Court HR, the above-mentioned *Akdivar and Others v. Turkey* judgment) or where the time taken to exhaust a remedy leads to the observation that it is not effective (see, *inter alia*, Nos. 15530/89 and 15531/89, *Mitap and Muftuoğlu v. Turkey*, Dec. 10/10/91, D.R. 72, p. 169).

The Commission must therefore apply the rule while having due regard to the context (Eur Court HR, Van Oosterwijck v Belgium judgment of 6 November 1980, Series A no 40, p 18, para 35 the above mentioned Akdivar and Others v Turkey judgment), as Article 26 has to be applied with some degree of flexibility and without excessive formalism (Eur Court HR, Cardot v France judgment of 19 March 1991, Series A no 200, p 18 para 34)

In the instant case, the Commission notes that a number of measures were carried out while the proceedings were under the jurisdiction of Bobigny *tribunal de grande instance*. However, the Commission notes that since 27 April 1994, the date on which the investigating judge attached to that court was removed from the case and it was transferred to Versailles *tribunal de grande instance*, the proceedings have not progressed. It notes, in particular that five years after the events no one has been charged, despite the fact that the police officers accused by the applicant have been identified.

Having regard to the seriousness of the applicant's allegations and the length of time which has elapsed since the events took place, the Commission considers that the authorities have not taken all positive measures required in the circumstances to bring the investigation to a rapid conclusion.

Consequently the Government's argument that the applicant has failed to exhaust domestic remedies cannot be allowed. It follows that the applicant has satisfied the exhaustion of domestic remedies requirement, in accordance with Article 26 of the Convention.

Having examined the parties' submissions, the Commission considers that this complaint raises questions of fact and law which cannot be resolved at this stage of the examination of the case, but require an examination of the merits. It cannot therefore be declared manifestly ill founded pursuant to Article 27 para 2 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant also complains about the length of time taken to examine his complaint and request to join the proceedings as a civil party seeking damages. He invokes Article 6 para 1 of the Convention, which provides that

In the determination of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by [an] tribunal.

The Government consider as a preliminary point, that the proceedings about which the applicant complains go back only to 15 March 1993, the date on which he filed a criminal complaint and request to join the proceedings as a civil party seeking damages.

In the first place the Government raise the objection that the applicant has failed to exhaust domestic remedies. They consider that from 15 March 1994, the applicant could have requested the investigating judge to commit the case for trial and that should the judge have refused the applicant could have applied to the Indictments

Division, pursuant to the provisions of section 175 1 of the Code of Criminal Procedure. The Government go on to point out that the applicant could also have requested any investigative measure which he deemed appropriate in accordance with the provisions of sections 81 and 82 1 of the Code of Criminal Procedure.

The Government submit in the alternative, that the complexity of the case justifies the length of the proceedings. They consider, moreover, that the investigation in Bobigny was conducted uninterruptedly until 1 March 1994 and that, thereafter, the case was transferred to another court in the interests of the proper administration of justice, as the police officers in question regularly worked with Bobigny public prosecutor's office.

The applicant notes that he expressly lodged a criminal complaint on 1 December 1992, the date of his interview with the General Inspectorate of the National Police. He notes that this remedy is available under French law. He specifies that he subsequently filed a criminal complaint with a request to join the proceedings as a civil party in order to ensure that the proceedings would progress. He notes, moreover, that he was ultimately vindicated by Bobigny public prosecutor's office which began an investigation into the allegations.

As regards the possibility of requesting the investigating judge to commit the case for trial, the applicant notes that, in his case, this would have obliged the judge to discontinue the proceedings, since no one has yet been charged. The case cannot therefore be committed for trial.

As regards the complexity of the case and its transfer to another court, the applicant notes that the Bobigny investigating judge was not removed from the case until more than two and a half years after the investigation had started and that, to date, no one has been charged.

Having regard to its decision to reject the objection raised by the Government regarding the complaint under Article 3 of the Convention, the Commission considers that the objection raised regarding Article 6 para 1 must also be rejected. It follows that the applicant has complied with the exhaustion of domestic remedies rule, in accordance with Article 26 of the Convention.

Having examined the parties' submissions, the Commission considers that this complaint raises questions of fact and law which cannot be resolved at this stage of the examination of the case, but require an examination on the merits. It cannot therefore be declared manifestly ill founded pursuant to Article 27 para 2 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant considers further that the failure to assign him a lawyer to represent him during the judicial investigation and before the Court of Appeal constitutes a violation of Article 6 paras 1 and 3 (c) of the Convention.

Article 6 para 3 (c) provides that

Everyone charged with a criminal offence has the following minimum rights

c) to defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

The Government raise an objection on the ground that the applicant has failed to exhaust domestic remedies. They submit that the applicant did not submit this complaint to the Court of Cassation either through his officially assigned lawyer or his own written pleadings which he has not proved were sent to the Court of Cassation.

In the alternative, the Government submit that the applicant was represented by lawyers right from the investigation stage and that these lawyers were duly authorised to communicate freely with him and were summoned by the investigating judge. The Government note that the applicant thus had the assistance of an officially assigned lawyer and of three other lawyers contacted and hired by the applicant himself. The Government go on to point out that two of them were present at the hearing before the Criminal Court.

As regards the proceedings before the Court of Appeal, the Government consider that the applicant is entirely responsible for his lack of legal representation since, having informed the President of the Court that he would be appearing alone at that hearing, he expressly indicated at the hearing that he did not want legal assistance, as can be seen from the judgment of the Court of Appeal. The Government note that the applicant was nonetheless given a fair opportunity to address the court.

The applicant notes first of all that, contrary to the Government's contention, the Court of Cassation expressly acknowledged receipt of his written pleadings in a letter of 13 December 1993. In that letter, the senior registrar told him that his pleadings had reached the court registry on 29 November 1993 and that they had been attached to the case-file. He considers that he has therefore complied with the exhaustion of domestic remedies rule.

The applicant points out further that the lawyer assigned to represent him during the investigation was always absent and never appeared. He explains that it was only after selling property he owned in the Netherlands that he was able to instruct other lawyers.

As regards the proceedings before the Court of Appeal, the applicant considers that his letter to the President of that court contained an implicit request for a lawyer to be assigned. He considers that it is difficult to know in what conditions the hearing was held and that, in any event, he complained of the lack of representation in his appeal on points of law.

The Commission notes at the outset that it is clear from a letter of 13 December 1993, signed by the Senior Registrar of the Criminal Division of the Court of Cassation, that the applicant's own written pleadings were received and attached to his file on 29 November 1993. The applicant expressly raised this complaint in those pleadings. Consequently, the respondent Government's objection cannot be allowed.

On the merits, the Commission recalls that fairness is assessed on the basis of an examination of the proceedings as a whole and not one isolated aspect. This principle applies both to the specific guarantees under paragraph 3 and the concept of a fair trial contained in Article 6 para. 1 of the Convention.

In this case, the Commission notes that during the investigation the applicant had the benefit of a lawyer assigned by the President of the Bar Council and that, in view of the negligence of that lawyer for which the lawyer alone is responsible and not the judicial authorities (see Eur. Court HR, *Kamisinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 33, para. 65) he hired three other lawyers of his own choosing. Two of them then represented him at the hearing before Bobigny Criminal Court.

As regards the proceedings before Paris Court of Appeal the Commission notes that the applicant did not apply for an officially assigned lawyer. It notes, moreover, that there is nothing in the letter to the President of the Court of Appeal to indicate that the applicant implicitly requested the appointment of a lawyer, especially as the judgment of the Court of Appeal shows clearly that he expressly declined the assistance of a lawyer at the beginning of the hearing. The Commission notes additionally that the applicant subsequently had no difficulty in obtaining, at his request, legal aid for his appeal to the Court of Cassation.

Having regard to the foregoing, the Commission considers that the proceedings as a whole, were fair.

It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to the provisions of Article 27 para. 2 of the Convention.