



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25629/04
by Kossi Archil AMEGNIGAN
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 25 November 2004 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mrs A. GYULUMYAN,

Ms R. JAEGER,

Mr E. MYJER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 16 July 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Kossi Archil Amegnigan, is a Togolese national, who was born in 1980 and lives in Klazienaveen. He is represented before the Court by Mr R. Bosma, a lawyer practising in Assen.

A. The circumstances of the case

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

First asylum request

On 18 September 2000, the applicant applied for asylum in the Netherlands under a false identity. This asylum request was rejected by decision of 19 December 2001. The applicant's subsequent appeal was dismissed on 17 June 2003 by the Regional Court (*arrondissementsrechtbank*) of The Hague.

Second asylum request

On 14 March 2001, the applicant filed a second request for asylum in the Netherlands, this time under his true identity. He stated that he was single, that he had no relatives living in the Netherlands and that his father had died. His family in Togo consisted of his maternal grandfather, his mother and one brother who was born in 1985. He had no other relatives. He claimed that he had been arrested in Togo on 5 November 2000 after a passenger in his taxi had been found to carry weapon parts, that he had been taken into detention, had been ill-treated during his detention and had managed to escape with the aid of a guard. He further claimed that he had left Togo by boat on 22 February 2001 and that he had arrived in the Netherlands on 11 March 2001.

On an unspecified date, a medical examination of the applicant disclosed that he might be infected with HIV and he was referred to the Groningen Academic Hospital in May 2001 for further medical examinations. In a letter of 4 July 2001, a specialist in internal diseases of this hospital confirmed this diagnosis and stated that the applicant found himself in the A3 clinical category of the disease, i.e. the asymptomatic stage of the disease with a CD4+ count of less than 200 cells/ μ L. The specialist concluded that, given the low CD4+ count, antiretroviral treatment was indicated. The applicant was in fact provided with such treatment.

On 19 December 2001, the Deputy Minister of Justice (*Staatsecretaris van Justitie*) rejected the applicant's asylum request, finding that the applicant's asylum account lacked credibility. In so far as the applicant relied on his health problems, the Deputy Minister considered that the applicant could apply for a residence permit on medical grounds. On 14 January 2002, the applicant filed an appeal with the Regional Court of The Hague.

In a letter of 24 March 2003, a specialist in internal diseases of the Groningen Academic Hospital informed the applicant's lawyer that, if the applicant were to cease taking anti-HIV medication, his prospects would become very unfavourable within a short delay. The specialist further wrote

that it was not to be expected that, in Togo, medication was obtainable that the applicant needed to suppress the HIV-infection and to improve his immune system.

On 17 June 2003, following a hearing held on 25 March 2003, the Regional Court of The Hague rejected the applicant's appeal of 14 January 2002. It accepted the finding of the Deputy Minister that no credence could be attached to the applicant's asylum account. In so far as the applicant relied on his health problems, the Regional Court decided not to take into account the information set out in the letter of 24 March 2003 as this information had only been submitted one day before the hearing held on 25 March 2003. It found that taking this information into consideration would be contrary to the principles of due process. It further held that it had not been established that there was a causal link between the applicant's illness and his departure from Togo and that it had not appeared that there were such compelling reasons of a humanitarian nature being connected to the applicant's reasons for leaving Togo that it should be held that, in all reasonability, it could not be expected from the applicant to return to his country of origin. No further appeal lay against this decision.

Third asylum request

On 16 October 2003, the applicant filed a third request for asylum on the basis of newly emerged facts or altered circumstances (*nieuw gebleken feiten of veranderde omstandigheden*). When, on the same date, he was interviewed by the immigration authorities on this request, the applicant stated *inter alia* that he was cohabiting with another asylum seeker from Togo since 2002 and that two children had been born out of this relationship in March 2002 and July 2003, respectively. He further stated that his family in Togo consisted of his mother and a younger brother.

This third request was rejected on 19 October 2003 by the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*), who had succeeded the Deputy Minister of Justice under the Aliens Act 2000 (*Vreemdelingenwet*) which, on 1 April 2001, had replaced the Aliens Act 1965. As to the applicant's argument that, given his HIV-infection, his expulsion to Togo would be in violation of his rights under Article 3 of the Convention; the Minister recalled that, according to the constant case-law, such a situation would only arise if the alien concerned found himself in an advanced and directly life-threatening stage of an incurable disease. The Minister found that there were insufficient indications in the applicant's submissions for holding that there was such a situation in his case and, on this basis, concluded that – irrespective of the possibilities of treatment in Togo and the presence a social support network there – the applicant's case did not raise an issue under Article 3 of the Convention. Moreover, as already indicated in the decision of 19 December 2001, the applicant could apply for a temporary residence

permit on medical grounds. The Minister further found no indication in the applicant's case for concluding that, owing to traumatic experiences linked to the reasons for leaving the country of origin, it could not in all reasonability be expected from the applicant to return to Togo thus rendering him eligible for a residence permit on grounds of compelling reasons of a humanitarian nature. On this point, the Minister considered that the health problems relied on by the applicant were not linked to his reasons for leaving Togo. The applicant was ordered to leave the Netherlands within 24 hours.

On 25 October 2003, the Minister informed the Central Agency for the Reception of Asylum Seekers (*Central Orgaan opvang Asielzoekers*; "COA"), since the applicant's asylum request had been rejected on 19 October 2003, the applicant's entitlement to State-sponsored reception and care facilities for asylum seekers ("*opvang*") had ceased. However, the Minister was of the opinion that the applicant's expulsion should be stayed under Article 64 of the Aliens Act 2000 as, according to medical advice obtained, the applicant was unfit to travel. The Minister therefore advised the COA to prolong the provision of reception and care facilities to the applicant until 8 January 2004. On the same day, the Minister informed the applicant that the COA had been advised to prolong until 8 January 2004 the provision of facilities. The Minister further indicated that an advice of the Medical Advice Bureau (*Bureau Medische Advisering*) would be sought on a possible prolongation of this period.

On 3 November 2003, the applicant's treating specialist doctor of the Groningen Academic Hospital informed the applicant's lawyer that, two years after having started treatment in August 2001, the applicant's condition was stable but that his immune system had apparently been so weakened when he had started treatment that it had still not been properly restored. The doctor further stated that by the suppression of the AIDS virus there was no direct danger, but that as soon as the anti-HIV therapy would be stopped, the applicant would fall back to the advanced stage of the disease which, given its incurable nature, would entail a direct threat for life.

The applicant's appeal against this Minister's decision of 19 October 2003 was dismissed by the Regional Court of The Hague on 13 November 2003.

By letter of 4 March 2004, the Minister for Immigration and Integration informed the applicant's lawyer that, before a decision could be taken on the question whether the applicant's expulsion should be stayed further on medical grounds, it was necessary to obtain medical information from the doctors treating the applicant for which the latter's written consent was required. The applicant's lawyer was requested to return the appended consent form within two weeks.

On 25 March 2004, the Minister informed the applicant that, pending the issuance of an advisory opinion of the Medical Advice Bureau about his situation and on the basis of Article 64 of the Aliens Act 2000, his expulsion would be stayed until 8 July 2004.

The applicant's appeal to the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State against the ruling given on 13 November 2003 by the Regional Court of The Hague was rejected on 5 April 2004. Although the Administrative Jurisdiction Division accepted that the letter of 24 March 2003 of the Groningen Academic Hospital constituted a relevant new fact, it found that this could not lead to quashing the impugned decision taken by the Minister on 19 October 2003. It considered that it could not be concluded from the contents of this letter that the applicant's illness had attained such an advanced and direct life-threatening stage that it should be held that the expulsion of the applicant to Togo or any other country would be in violation of Article 3 of the Convention. It further took into consideration that – according to an additional medical statement of 3 November 2003 that had been submitted to the Regional Court – the HIV-virus would be suppressed as long the applicant would continue taking medication, so that there was no direct threat for life. It therefore accepted that there were no grounds on the basis of which the Minister should reconsider the decision of 19 December 2001.

B. Relevant domestic law and practice

Under Article 15 § 1 of the Aliens Act 1965 (*Vreemdelingenwet*, hereinafter “the Act”), which was in force until 1 April 2001, aliens coming from a country where they have a well-founded reason to fear persecution on account of their religious or political convictions, or of belonging to a particular race or a particular social group, could be admitted as refugees. The expression “refugee” in this provision was construed to have the same meaning as in Article 1 of the Geneva Convention (decision of the Judicial Division (*Afdeling Rechtspraak*) of Council of State of 16 October 1980, *Rechtspraak Vreemdelingenrecht* [Immigration Law Reports] 1981, no. 1).

On 1 April 2001, the Aliens Act 2000 entered into force. On the basis of Article 29 of the new Aliens Act, an alien may be eligible for a residence permit for the purposes of asylum if, *inter alia*,

- he or she is a refugee within the meaning of the Geneva Convention, or
- he or she has established well-founded reasons to assume that he/she will run a real risk of being subjected to torture or other cruel or degrading treatment or punishment if expelled to the country of origin.

Article 4:6 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*) provides that an applicant must adduce newly emerged facts or altered circumstances (*nieuw gebleken feiten of veranderde omstandigheden*) if a new request is filed following a decision in which the

original request is, either totally or partially, rejected. When no such facts or altered circumstances have been adduced, the administrative authority may reject the new request with reference to the decision on the original request. Article 4:6 thus embodies the *res iudicata* principle for the administrative law. Nevertheless, an exception has been made in this particular area of the law, in that an alien may adduce exceptional facts and circumstances relating to him or her personally, on the basis of which the new request may be assessed outside the framework of Article 4:6. In the case of a repeat asylum application which also invokes the risk of treatment contrary to Article 3 of the Convention, an assessment by the court outside the framework of Article 4:6 is therefore possible.

The Administrative Jurisdiction Division of the Council of State has on one occasion quashed the dismissal of a repeat application for a residence permit for the purposes of asylum despite the absence of new facts or altered circumstances (judgment of 24 April 2003, no. 220300506/1, *Nieuwsbrief Asiel- en Vluchtelingenrecht* [Newsletter on Asylum and Refugee law] 2003/160). It did so on the basis of the exceptional circumstance that there was no dispute between the parties, that on his return to his country of origin, the alien would run a real risk of being subjected to treatment or punishment proscribed by Article 3 of the Convention.

During the initial asylum procedure, an alien is in principle entitled to reception and other facilities including health care, provided by the State. Pursuant to Article 10 of the Aliens Act 2000, an alien whose stay in the Netherlands is not lawful is not entitled to such facilities. This provision applies to asylum seekers whose applications have been unsuccessful. Also, a second or further application for asylum does not confer a new entitlement to facilities. An exception to that basic principle can nevertheless be made if, *inter alia*, the asylum seeker finds him or herself in extremely compelling humanitarian circumstances (*zeer schrijnende humanitaire omstandigheden*, Chapter C5/20.4 of the Aliens Circular 2000).

The COA decides whether or not facilities will be provided. Appeal lies against a decision to refuse facilities, but also against a failure to decide (or to decide within a reasonable time) on a request for facilities. The lodging of an appeal does not suspend the denial of facilities, but a provisional measure may be requested to the effect that such facilities are made available pending the appeal proceedings.

According to Article 63 of the Aliens Act 2000, the Minister can order the expulsion of an alien illegally staying in the Netherlands and who has not voluntarily left the Netherlands within the time-limit fixed for this purpose. However, pursuant to Article 64 of the Aliens Act 2000, no expulsion will take place when, in view of the health condition of the alien, travelling is contra-indicated.

C. Relevant international materials

In a report dated September 2000 of the German Federal Office for Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) on HIV and AIDS in Togo, it is stated that – according to information set out in the UNAIDS/WHO Epidemiological Fact Sheet 2000 on TOGO – it was assumed that 5.98% of the adult population in Togo was HIV-positive whereas less than 5% of the total population in Togo is insured against sickness. As regards the local possibilities of treatment, the report states that – although treatment is possible in various hospitals in the capital of Togo as well as in all regional hospitals – many patients cannot afford treatment.

According to a report issued on 20 August 2002 by the Swiss Federal Office for Refugees (*Office fédéral des réfugiés*), treatment is available in Togo, both in various hospitals in its capital Lomé and in four regional hospitals. It further states that, as less than 5% of the total population in Togo has a health insurance, the costs of treatment are generally borne privately and that, as the average monthly income in Togo lies between 38 and 76 euros, a person infected with HIV or suffering from AIDS who does not have health insurance will hardly be able to afford treatment if relatives are unable to provide financial support, despite the fact that negotiations between the Togolese authorities and the pharmaceutical industry have resulted in a considerable reduction of the prices of certain medications for the treatment of HIV/AIDS.

COMPLAINT

The applicant complained under Article 3 of the Convention that his expulsion to Togo, on account of the difficulty of obtaining medical treatment there, would accelerate the course of his HIV infection and considerably reduce his life expectancy.

THE LAW

The applicant complained that his expulsion to Togo would be contrary to Article 3 of the Convention, which reads as follows:

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

The Court reiterates at the outset that 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. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies.

It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

While it is true that Article 3 has been more commonly applied by the Court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, §§ 32 and 34, ECHR 2001-I).

The Court recalls that, in the case of *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 794, § 54), it emphasised that:

“...aliens who ... are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State ...”

In the very exceptional circumstances of the case of *D. v. the United Kingdom* the Court found that the applicant's deportation to St. Kitts would violate Article 3, taking into account his critical medical condition. The Court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by

the respondent State in violation of Article 3 (see *D. v. the United Kingdom*, cited above, pp. 793–794, §§ 51–54).

The Court has therefore examined whether there is a real risk that the applicant's expulsion to Togo would be contrary to the standards of Article 3 of the Convention in view of his present medical condition. In so doing, the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *S.C.C. v. Sweden* (dec.), no. 46553/99, 15 February 2000, unreported, *Arcila Henao v. the Netherlands* (dec.), no. 13669/03, 24 June 2003, unreported, and *Ndangoya v. Sweden* (dec.), no. 17868/03, 22 June 2004, unreported).

The Court notes that, in a medical opinion of 3 November 2003, the applicant's treating specialist doctor indicated that the applicant's clinical condition was stable but that his weakened immune system had not yet properly restored. The doctor further stated that there was no direct danger for the applicant's health at present but that, if the anti-HIV therapy were to be stopped, the applicant would fall back to the advanced stage of the disease which, given its incurable nature, would entail a direct threat for his life.

The Court has found no indication in the applicant's submissions that he has reached the stage of full-blown AIDS or that he is suffering from any HIV-related illness. Whilst acknowledging the assessment of the applicant's treating specialist doctor that the applicant's health condition would relapse if treatment would be discontinued, the Court notes that adequate treatment is in principle available in Togo, albeit at a possibly considerable cost.

In these circumstances the Court considers that, unlike the situation in the above-cited case of *D. v. the United Kingdom* or in the case of *B.B. v. France* (no. 39030/96, Commission's report of 9 March 1998, subsequently struck out by the Court by judgment of 7 September 1998, *Reports* 1998-VI, p. 2595), it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in Togo where his mother and a younger brother are residing. The fact that the applicant's circumstances in Togo would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention.

Accordingly, although the Court accepts the seriousness of the applicant's medical condition, it does not find that the circumstances of his situation are of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3 of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President