



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

Communicated on 31 August 2015

THIRD SECTION

Application no. 15109/15
M.B. against Spain
lodged on 27 March 2015

STATEMENT OF FACTS

1. The applicant, M.B., is a Cameroonian national who was born on 9 May 1976. She is represented before the Court by Ms M.E. Muñoz Martinez, a lawyer practising in Madrid, member of CEAR (“Spanish Commission for Refugee Aid”).

A. The circumstances of the case

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

1. The applicant’s background

3. The applicant was born in Basolo (Cameroon) to a family belonging to the *Yambassa* ethnic group. On 1995, following the *Yambassa* tradition, she was forced to marry T.B. and to reside in her husband’s village, Obala. The applicant faced mistreatment at the hands of her husband during more than seventeen years. The applicant brought numerous complaints before the national authorities, but to no avail.

4. In 2013 the applicant’s husband died from AIDS. The applicant did not know that her husband had AIDS. Once she found out, she underwent clinical analysis which confirmed that she had been infected with HIV and was a HIV carrier.

5. After the husband’s death, and following the *Yambassa* tradition, the applicant’s family and her husband’s family arranged a new marriage for the applicant, this time with her deceased husband’s brother. Fearing to be subjected to ill-treatment again, the applicant refused to marry him and was forced to flee her village and leave her three children with her late husband’s family.

6. The applicant moved to Douala, where she started a new life and fell in love with a woman. They both started a secret relationship. People in the

village found out and informed the applicant's family about the existence of this same-sex relationship.

7. In October 2014 the applicant's oldest son called the applicant and told her that her family had found out that she was in a relationship with another woman and were threatening her to inform the police about her sexual orientation (in Cameroon sexual relations with a person of the same sex are criminalized). The applicant had to leave her apartment and moved to another neighbourhood.

8. A week later, the applicant's brother called her and urged her to leave immediately Douala, warning her that she was going to "pay the price" for refusing to marry her late husband's brother. The applicant decided to leave the country with the help of a trafficker. Her intention was to arrive to France and apply for asylum in that country.

9. On 7 March 2015 the applicant landed in Madrid Airport (Madrid - Barajas Adolfo Suárez), where she was arrested by the border authorities.

2. Domestic proceedings before Spanish authorities

10. On 8 March 2015 the applicant, assisted by a lawyer, applied for asylum. Her request was rejected on 11 March 2015 by the General Deputy Director of Asylum, on the ground that the applicant's allegations were "contradictory and insufficient", within the meaning of Article 21.2.b of Law. no. 12/2009, of 30 October 2009, regulating asylum right and subsidiary protection (hereinafter, "Law no. 12/2009"). Firstly, the national authorities considered that the applicant lacked credibility on the following grounds:

(i) the applicant's husband, who according to the General Deputy Director of Asylum was "the main agent of persecution", was dead;

(ii) the applicant had stated that her husband's family had accused her of being responsible for her husband's death. This was in contradiction with the family's alleged intention to marry the applicant with her late husband's brother;

(iii) the fact that she was an HIV carrier should bar people from wanting to marry her;

(iv) it was very unlikely that people in the village had found out about her homosexual relationship, as it was a secret one;

(v) the applicant had requested international protection only after the Spanish authorities had found out that she was trying to enter into the country with a passport that did not belong to her.

11. Additionally, the General Deputy Director of Asylum stressed that the phone calls that she had allegedly received urging her to leave the village were not evidence of the existence of a real threat and concluded that it was not credible that the applicant had faced a situation of "social and familiar harassment" due to her sexual orientation. The General Deputy Director of Asylum also indicated that there were no evidences that the Cameroonian public authorities were aware of the applicant's sexual orientation.

12. On 11 March 2015 the Spanish Delegation of the United Nations High Commissioner (UNHCR) issued a report in support of the applicant's request seeking international protection "due to the seriousness of the applicant's allegations and the current situation of the LGBT groups in Cameroon".

13. On 13 March 2015 the applicant brought an appeal against the General Deputy Director of Asylum's decision, which was rejected on 16 March 2015 on the same grounds.

14. At the same time, the applicant's file was re-examined by the UNHCR, which on 16 March 2015 issued a new decision "upholding its previous decision to declare the applicant's request for international protection admissible".

15. The applicant then initiated judicial proceedings before the *Audiencia Nacional* against the General Deputy Director of Asylum's decision. At the same time, she requested the *Audiencia Nacional* to suspend her removal to Cameroon and grant her authorization to stay in Spain until it had delivered a decision on the substance of her request for international protection.

16. On 18 March 2015 the *Audiencia Nacional* granted the applicant's request to stay the removal, as it considered that the applicant's fears to be a victim of domestic and homophobic violence and the allegations about the lack of effective protection by national authorities were credible. The *Audiencia Nacional* stressed that Article 21.2 of Law no. 12/2009 was only applicable to those cases where allegations were "manifestly and absolutely ill-founded". The *Audiencia Nacional* also observed that there had been some procedural shortcomings in the re-examination of the Asylum request, specifically, that the authorities had failed to assess the UNHCR's report in favour of the admissibility of the applicant's request for international protection.

17. However, on 26 March 2015 the *Audiencia Nacional* lifted the adopted provisional measures. The *Audiencia Nacional* considered that the applicant's allegations were not credible on the following grounds:

(i) the applicant had requested international protection only after Spanish authorities had discovered that she was trying to enter illegally in the country;

(ii) it was highly unlikely that her late husband's family was forcing her to marry her husband's brother if they thought that she was responsible for her husband's death;

(iii) the applicant could have applied for asylum in Guinea Conakry, where she had made an intermediary stop before flying to Madrid;

(iv) the two phone calls were not evidence that the applicant had suffered any social or family harassment or aggression.

18. The applicant was to be deported on 28 March 2015, while the appeal on the merits before the *Audiencia Nacional* was still pending. On 27 March 2015 the applicant lodged a request with the Court under Rule 39 of the Rules of Court asking for the stay of her removal to Cameroon. On the same date the Court granted her request and indicated to the Spanish Government to stay the applicant's removal to Cameroon for the duration of the proceedings before the domestic courts.

B. Relevant international and domestic law

19. As regards the Council of Europe’s position regarding the concept of asylum, the Court refers to paragraphs 75, 76 and 82 of the judgment in *I.M. v. France* (no. 9152/09, 2 February 2012).

20. As regards the applicable domestic law, the proceedings followed against the applicant were carried out in conformity with Law no. 12/2009, of 30 October 2009, regulating asylum right and subsidiary protection, which, insofar relevant to the instant case, establishes the following:

Section 21. Requests submitted in a border point

“...

2. Similarly, the Ministry of Interior may reject through a reasoned decision any request, which will notified to the applicant within a maximum of four days from the request’s submission, upon the occurrence of any of the following situations:

a) situations envisaged in letters c), d) y f) of the first paragraph of Article 25;

b) when the exposition of facts is incoherent, contradictory, unbelievable, or contradicts evidence-based information concerning the applicant’s country of origin or habitual residence in case he or she was stateless, insofar that it is clear that the request is ill-founded as regards the applicant’s fear of persecution or to be at risk of serious harm.

...”

Section 29. Appeals

1. All the decisions provided in this Law will put an end to the administrative proceedings, except in those cases where the re-examination of the decision according to Article 21 is requested. In that case, the decision on the re-examination will put an end to the administrative proceedings and will be subject to a facultative contentious-administrative appeal and a subsequent appeal before the administrative courts.

2. In those cases where the applicant asks for suspension of the appealed administrative act through the contentious-administrative appeal, the request will be dealt urgently in conformity with Article 135 of Law no. 12/2009, on the Jurisdiction for Judicial Review.

...”

Section 46. General system of protection

“1. Within the framework of the present Act, and within the terms established by regulation, the specific circumstances of asylum seekers or beneficiaries of international protection in a position of special vulnerability shall be taken into account, particularly children, non-accompanied children, the disabled, the elderly, pregnant women, one-parent families, victims of torture, rape or other serious psychological, physical or sexual abuse and victims of trafficking in human beings.

2. Given their special vulnerability, measures shall be adopted whenever appropriate to give international protection requests submitted by individuals belonging to the categories mentioned in the preceding paragraph special consideration. Likewise, special treatment shall be given to those who, as a result of their personal characteristics, could be subjected to persecution on grounds other than those specified in the present Act.

3. An applicant for international protection may be authorised to stay in Spain for humanitarian reasons other than those specified for obtaining subsidiary protection by the legislation on aliens and immigration.”

21. As regards the proceedings regulating the interim measures, Article 135 of Law no. 12/2009, on the Jurisdiction for Judicial Review reads as follows:

“When the parties allege the existence of especially urgent circumstances, the single- or multi-judge bench may resolve as follows, without hearing the opposing party.

a) The judicial authority may perceive the existence of especially urgent circumstances and adopt or deny the measure, pursuant to Section 130. No appeal may be entered against this ruling. In the same decision, the single- or multi-judge bench shall grant the opposing party a hearing within three days to make such allegations as it deems suitable or hold a hearing with the parties within three days of adoption of the measure. Once the allegations have been received, the deadline therefor has lapsed or the hearing has been held, the single- or multi-judge bench shall decide to lift, maintain or modify the measure adopted. That decision may be appealed in keeping with the general rules.

The provisions contained in Section 63 shall be applicable to the recording and documentation of the hearing.

b) The judicial authority may perceive no especially urgent circumstances and rule that the request for precautionary measures shall be processed as laid down in Section 131, during which the parties concerned may request no new measure via application of the present section.

2. In cases relating to actions performed by the administration involving foreign citizens, political asylum or refugee status entailing the return of minors to their country of origin, the judicial authority shall hear the public prosecutor prior to delivering a ruling referring to the first paragraph of this section.”

COMPLAINT

The applicant complains under Articles 2 and 3 of the Convention that her life and physical integrity will be at risk if she is ever removed to Cameroon.

The applicant further complains under Article 13 of the Convention in conjunction with Articles 2 and 3 that the administrative and judicial proceedings concerning her asylum application did not meet the requirements of an effective remedy, as national authorities did not carry out a thorough examination on the merits and in view of the short deadlines granted to prepare and file a request for provisional measures before the *Audiencia Nacional*. Moreover, she claims that she has not had access to a remedy with automatic suspensive effect, as is required by the Court’s case-law in cases in which there are grounds to suspect that a person runs a risk of ill-treatment or torture if he or she is removed to a certain country.

QUESTIONS TO THE PARTIES

1. In the light of the applicant's claims and the documents which have been submitted, would she face a real risk of being killed or subjected to treatment in breach of Articles 2 and 3 of the Convention if the expulsion order were enforced?

2. Did the applicant have at her disposal an effective domestic remedy as required by Article 13 of the Convention and the Court's jurisprudence (*A.C. and Others v. Spain*, no. 6528/11, 22 April 2014; *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, ECHR 2007-II; and *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I)?