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

FOURTH SECTION

CASE OF JABARI v. TURKEY

(Application no. 40035/98)

JUDGMENT

STRASBOURG

11 July 2000

FINAL

11/10/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Jabari v. Turkey,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr G. Ress, *President,*
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr V. Butkevych,
Mr J. Hedigan,
Mr M. Pellonpää, *judges*,
Mr F. Gölcüklü, ad hoc *judge*,
and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 28 October 1999 and 22 June 2000,

Delivers the following judgment, which was adopted on that last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 40035/98) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iranian national, Mrs Hoda Jabari ("the applicant"), on 26 February 1998.

2. Before the Court the applicant was represented by Mr S. Esmer, a lawyer practising in Ankara (Turkey). The Government of Turkey ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged, *inter alia*, that she would be subjected to a real risk of ill-treatment and death by stoning if expelled from Turkey and that she was denied an effective remedy to challenge her expulsion. She invoked Articles 3 and 13 of the Convention in respect of these two complaints.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The Commission decided to apply former Article 36 of its Rules of Procedure (Rule 39 of the Rules of Court) indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the applicant to Iran pending the Commission's decision. Following the entry into force of Protocol No. 11 and in accordance with Article 5 § 2 thereof, the Court confirmed the application of Rule 39 until further notice.

7. By a decision of 28 October 1999, the Chamber declared the application partly admissible[1].

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. In 1995, at the age of 22, the applicant met a man ("X") in Iran while attending a secretarial college. She fell in love with him and after some time they decided to get married.

10. However, X's family was opposed to their marriage. In June 1997 X married another woman. The applicant continued to see him and to have sexual relations with him.

11. In October 1997 the applicant and X were stopped by policemen while walking along a street. The policemen arrested the couple and detained them in custody as X was married.

12. The applicant underwent a virginity examination while in custody. After a few days she was released from detention with the help of her family.

13. In November 1997 the applicant entered Turkey illegally. In February 1998 the applicant went to Istanbul, from where she tried to fly to Canada via France using a forged Canadian passport.

14. When the applicant arrived at the airport in Paris, the French police found her to be in possession of a forged passport.

15. On 4 February 1998 the applicant was put on a plane for Istanbul. Following her arrival at Istanbul Airport at 1 a.m. on 5 February 1998 she was arrested by policemen on the ground that she had entered Turkey using a forged passport. Her passport was sent for examination.

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[1]. *Note by the Registry.* The Court's decision is obtainable from the Registry.

16. On 6 February 1998 the applicant was transferred from a police station inside the airport to the Aliens Department of the Istanbul Security Directorate. She was brought before the Bakırköy public prosecutor on the ground that she had entered Turkey using a forged passport in contravention of the Passport Act 1950. The public prosecutor ordered her release, finding she had not entered Turkey of her free will. The applicant was handed over to the Istanbul Security Directorate with a view to her deportation. When the applicant realised that she was going to be sent to Iran she told the Aliens Department that she was an Iranian national. The applicant lodged an asylum application with the Aliens Department. The police rejected her application as it had been submitted out of time. The applicant was informed that under section 4 of the Asylum Regulation 1994 she should have lodged her application for asylum within five days of her arrival in Turkey.

17. According to the applicant, she was held in detention at the Aliens Department until 26 March 1998. Thereafter, following the intervention of the Ankara branch office of the United Nations High Commissioner for Refugees (UNHCR), she was accommodated at a hotel in Istanbul.

18. On 12 February 1998 a staff member of the UNHCR, with the permission of the authorities, interviewed the applicant about her asylum request under the 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention"). On 16 February 1998 the applicant was granted refugee status by the UNHCR on the basis that she had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged.

19. On 8 March 1998 the applicant lodged an application with the Ankara Administrative Court against her deportation. She also asked for a stay of execution of her deportation.

20. On 16 April 1998 the Ankara Administrative Court dismissed the applicant's petitions on the ground that there was no need to suspend her deportation since it was not tainted with any obvious illegality and its implementation would not cause irreparable harm to the applicant.

21. On 4 November 1998 the Ankara Administrative Court found that there was no actual risk of her being deported in view of the fact that she had been granted a residence permit pending the outcome of her application under the European Convention on Human Rights. The court found that it was not required to suspend the deportation order since no such order had yet been made.

II. RELEVANT LAW AND PRACTICE

A. Administrative law provisions

22. Article 125 of the Turkish Constitution provides, *inter alia*:

> "All acts or decisions of the authorities are subject to judicial review ...
>
> If the implementation of an administrative act would result in damage which is difficult or impossible to compensate, and at the same time this act is clearly unlawful, a stay of execution may be decided upon, stating the reasons therefor ..."

23. Article 155 of the Constitution states, *inter alia*:

> "The Supreme Administrative Court is the final instance for reviewing decisions and judgments given by administrative courts. It shall also be the first and last instance for dealing with specific cases prescribed by law. ..."

24. Article 5 of the Code on the establishment and duties of tax courts, administrative courts and regional administrative courts (no. 25765) provides, *inter alia*:

> "Administrative courts deal with:
>
> (a) actions for annulment
>
> (b) administrative actions
>
> (c) ...
>
> except for those actions which are within the competence of tax courts and those which should be dealt with by the Supreme Administrative Court as a first-instance court."

25. Article 25 of the Act on the Supreme Administrative Court provides:

> "Final decisions rendered by the administrative courts and the tax courts, as well as final decisions rendered by the Supreme Administrative Court acting as a first-instance court may be appealed to and dealt with by the Supreme Administrative Court."

B. The law and practice governing asylum-seekers

26. Turkey has ratified the Geneva Convention and the 1967 Protocol thereto. It has exercised the geographic preference option under the 1951 Convention in order to limit the grant of refugee status to asylum-seekers from European countries. For humanitarian reasons, Turkey issues temporary residence permits to asylum-seekers from non-European countries who are recognised by the UNHCR as refugees pending their resettlement in a third country by that organisation.

27. The Ministry of the Interior issued a regulation on 30 November 1994 concerning asylum-seekers seeking asylum in Turkey or who are to be resettled in a third country. According to this Regulation, foreign nationals arriving in Turkey to seek asylum must submit their asylum application to the police within five days of their arrival in Turkey. Those who enter illegally are required to submit their application to the police at the border town nearest the point where they entered the country. Asylum-seekers entering the country legally may submit their application to the police in any city within five days of their arrival.

28. A person who enters Turkey illegally and does not apply to the Turkish authorities within five days of his or her entry cannot be accepted as a refugee.

29. Asylum requests are examined by the Ministry of the Interior. Non-European asylum-seekers who receive a positive decision may then submit their cases to the UNHCR for resettlement. The Ministry of the Interior considers the merits of an asylum application from the standpoint of Turkey's obligations under the Geneva Convention and has regard to the opinions of the Ministry of Foreign Affairs and other relevant ministries and agencies. Foreigners whose requests are not accepted are liable to be deported by the local authorities.

30. An amendment was introduced to the 1994 Asylum Regulation in January 1999. According to the amendment, the five-day period in which to lodge an asylum request has now been increased to ten days. Furthermore, an asylum-seeker whose application has been refused may now appeal within fifteen days of the refusal to the competent governorship. The appeal is to be assessed by the superior of the official who took the initial decision to refuse asylum.

C. Recent international materials commenting on the punishment of adultery in Iran

31. In its 1999 Annual Report, Amnesty International concluded that judicial punishments amounting to torture or cruel, inhuman or degrading punishment continued to be reported. Flogging was reportedly imposed for a wide range of offences, at times in conjunction with the death penalty or a custodial sentence. An Iranian woman, the co-accused of a foreign businessman, was reportedly sentenced to 100 lashes in October 1999 after she was convicted of illicit sexual relations. It was unknown whether the sentence was carried out. In November 1999 an Iranian national was acquitted after he escaped from the pit in which he had been buried to the waist in order to be stoned to death in the town of Lahijan. He had been sentenced to death for adultery.

32. The 1999 Country Reports on Human Rights Practices, released on 25 February 2000 by the US Department of State, mention, with reference

to Iran, that harsh punishments are carried out, including stoning and flogging. Article 102 of the Islamic Penal Code details the methods authorities should follow when conducting a stoning: "The stoning of an adulterer or adulteress shall be carried out while each is placed in a hole and covered with soil, he up to his waist and she up to a line above her breasts." According to press accounts, a man was stoned to death in April 1999 in the town of Babol, which borders the Caspian Sea. He was alleged to have killed three of his own sons. Prior to the stoning, he received sixty lashes. The first stone was cast by the judge who sentenced him to death. The law also allows for the relatives of murder victims to take part in the execution of the killer.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicant maintained that her removal to Iran would expose her to treatment prohibited by Article 3 of the Convention, which provides:

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

34. The applicant stated that she had committed adultery in Iran and had to leave before criminal proceedings could be brought against her. She submitted that she would probably have been prosecuted and sentenced to a form of inhuman punishment. In support of her assertion the applicant relied on, *inter alia*, reports prepared by Amnesty International which refer to cases of women in Iran having been stoned to death for having committed adultery. She stressed that she was granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution as she belonged to a particular social group, namely women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution.

35. The applicant further claimed that, bearing in mind the established case-law of the Court, stoning to death, flogging and whipping, which are penalties prescribed by Iranian law for the offence of adultery, must be considered forms of prohibited treatment within the meaning of Article 3 of the Convention.

36. The Government maintained in reply that when becoming a Contracting Party to the 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention"), Turkey had availed itself of the geographic preference option in the Convention to give preference to asylum-seekers from European countries (see paragraph 26 above). However, for humanitarian reasons the authorities issue temporary

residence permits to non-European asylum-seekers like the applicant who are recognised as refugees by the UNHCR pending their resettlement in a third country. Given that the applicant failed to comply with the five-day requirement under the 1994 Asylum Regulation (see paragraphs 27-28 above), this facility could not be extended to her.

37. The Government further questioned the substance of the applicant's fears. In their opinion the fact that the applicant failed to make an application to the authorities or to the UNHCR when she arrived in Turkey in 1997 was at variance with her allegations under Article 3 of the Convention. It was also significant that she did not claim asylum status when she arrived at the airport in Paris (see paragraph 14 above). In the Government's view, it must be doubted whether the applicant would ever have sought refugee status if she had managed to enter Canada.

38. The Court recalls 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. Moreover, the right to political asylum is not contained in either the Convention or its Protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, § 102).

However, it is well established in the case-law of the Court that 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 in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 90-91; the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70; and the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74).

39. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (see, *mutatis mutandis*, the Chahal judgment cited above, p. 1855, § 79, and p. 1859, § 96).

40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears

about being removed to Iran (see paragraph 16 above). In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court, on her application for judicial review, limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

41. The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented. It is to be observed in this connection that the UNHCR interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery. It is further to be observed that the Government have not sought to dispute the applicant's reliance on the findings of Amnesty International concerning the punishment meted out to women who are found guilty of adultery (see paragraph 34 above). Having regard to the fact that the material point in time for the assessment of the risk faced by the applicant is the time of its own consideration of the case (see the Chahal judgment cited above, p. 1856, § 86), the Court is not persuaded that the situation in the applicant's country of origin has evolved to the extent that adulterous behaviour is no longer considered a reprehensible affront to Islamic law. It has taken judicial notice of recent surveys of the current situation in Iran and notes that punishment of adultery by stoning still remains on the statute book and may be resorted to by the authorities (see paragraphs 31-32 above).

42. Having regard to the above considerations, the Court finds it substantiated that there is a real risk of the applicant being subjected to treatment contrary to Article 3 if she were to be returned to Iran.

Accordingly, the order for her deportation to Iran would, if executed, give rise to a violation of Article 3.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

43. The applicant further complained that she did not have an effective remedy to challenge the decision whereby her application for asylum was rejected as being out of time. She averred that this amounted to a breach of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

44. The applicant maintained that since her application for asylum was out of time she was never afforded an opportunity to explain to the authorities why she feared deportation to Iran. There was no appeal against the rejection of her asylum application. Furthermore, her action before the Ankara Administrative Court could not be considered an effective remedy since that court could not suspend the deportation decision with immediate effect. The court did not give detailed reasons for its decision not to suspend the applicant's deportation since the decision was an interim one and a separate decision would have been required.

45. The Government acknowledged that the Ankara Administrative Court rejected the applicant's request for suspension and annulment of the deportation order. However, she failed to request the annulment of the decision rejecting her asylum request. The Ankara Administrative Court was bound to dismiss the applicant's request with regard to her deportation since no such order had as yet been made.

46. With reference to the provisions of Article 125 of the Constitution (see paragraph 22 above), the Government maintained that the domestic courts are empowered to stay the execution of an administrative act if irreversible harm would be caused to a plaintiff and the act is clearly unlawful. Furthermore, an appeal from the decision of an administrative court lies to the Supreme Administrative Court (see paragraph 25 above).

47. For these reasons, the Government contended that the applicant had an effective remedy to challenge her deportation.

48. The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (see the Chahal judgment cited above, pp. 1869-70, § 145).

49. The Court reiterates that there was no assessment made by the domestic authorities of the applicant's claim to be at risk if removed to Iran. The refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action entitled her neither to suspend its implementation nor to have an examination of the merits of her claim to

be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint, even though it was arguable on the merits in view of the UNHCR's decision to recognise her as a refugee within the meaning of the Geneva Convention.

50. In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13.

Accordingly, there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

52. The applicant stated in her application form that she sought just satisfaction for the violation of her rights. She repeated this request in her pre-admissibility submissions dated 17 June 1999. No details of her claims under Article 41 of the Convention were supplied.

53. The Government did not explicitly address the applicant's requests at any stage of the proceedings.

54. The Court considers that in the circumstances of the instant case a finding of a potential violation of Article 3 of the Convention and an actual violation of Article 13 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage that the applicant may have suffered.

B. Costs and expenses

55. In her application form the applicant stated that she sought the payment of her costs and expenses for bringing the Convention proceedings. No details of her claims under Article 41 of the Convention were supplied. The applicant received the sum of 5,000 French francs (FRF) by way of legal aid from the Council of Europe.

56. The Government made no submissions under this head either.

57. The Court observes that, in the absence of details of the applicant's claim under this head, the sum received by the applicant by way of legal aid from the Council of Europe (FRF 5,000) can be considered to cover adequately any costs and expenses incurred in connection with the Convention proceedings.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that in the event of the decision to deport the applicant to Iran being implemented, there would be a violation of Article 3 of Convention;

2. *Holds* that there has been a breach of Article 13 of the Convention;

3. *Holds* that the finding of a potential breach of Article 3 of the Convention and an actual breach of Article 13 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2000.

Vincent BERGER	Georg RESS
Registrar	President