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

Press Release
issued by the Registrar of the Court

ECHR 039 (2012)
31.01.2012

Islamist extremist's human rights breached concerning extensions of his continued detention and return to Iraq

In today's Chamber judgment in the case of **M.S. v. Belgium** (application no. 50012/08), which is not final[1], the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 3 (prohibition of torture and inhuman and degrading treatment) of the European Convention on Human Rights in respect of the return of the applicant to Iraq;

A violation of Article 5 § 1 (right to liberty and security) of the Convention in respect of the first period of detention in a closed transit centre from 29 May 2008 to 4 March 2009, placement of the applicant in a closed transit centre on 2 April 2010 and measures to extend his detention after 24 August 2010;

A violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention) of the Convention in respect of the first period of detention.

The case concerned the extension of periods of detention while awaiting removal from Belgian territory in respect of an alien having served his sentence.

Principal facts

The applicant, M.S., is an Iraqi national who was born in 1976 and lives in Erbil (Iraq).

On his arrival in Belgium on 15 November 2000, M. S. made an initial asylum application alleging persecution by members of Saddam Hussein's regime.

On 21 May 2003 M.S. was arrested on charges of criminal association, fraud and forgery, suspicion of having links with the terrorist association Al-Qaeda and of participating in supplying forged documents intended to facilitate the entry of Islamists into Europe and of smuggling illegal immigrants into Belgium. On 29 October 2004 he was sentenced to five years' imprisonment. The judgment was upheld by the Court of Appeal, which reduced the sentence to 54 months' imprisonment.

On 26 April 2005 the Commissioner-General's Office for Refugees and Stateless Persons ("CGRA") rejected his first asylum application.

M.S. served the whole of his prison sentence in Hasselt Prison. On 20 September 2007 the court responsible for the execution of sentences refused to grant him provisional release. On 5 October 2007 the Minister of the Interior issued an order to leave the territory with a decision for his removal and his detention for that purpose. The

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

detention order was made on the grounds that M.S. was illegally resident in Belgium and represented a risk of danger to public order.

First period of detention in a closed transit centre (Merksplas): 27 October 2007 – 4 March 2009

On the day of his release from prison, M.S. was transferred to the Merksplas closed transit centre for illegal aliens with a view to his removal. On 6 November 2007 M.S. lodged a second asylum application. He claimed that were he to be returned to Iraq, he feared that he would be subjected to an unfair trial that could lead to the death sentence or, at the very least, life imprisonment. On 8 November 2007 a new order to leave the territory with detention in a designated place was made.

On 2 January 2008 a ministerial order for placement at the Government's disposal was issued. The CGRA was asked by the Minister of the Interior on that same day to express an opinion as to the risks involved in removing M.S. to Iraq having regard to the European Convention on Human Rights. On 29 May 2008 the CGRA reported that M.S. would be exposed to real risks were he to be removed to Iraq.

M.S. was transferred to Vottem closed transit centre for illegal aliens.

On 12 August 2008 he lodged an application for release which was dismissed on appeal on 2 September 2008 for lack of jurisdiction.

On 9 September 2008 M.S. lodged a second application for release which was declared inadmissible by the Antwerp Court on the ground that he had already lodged an appeal with the Aliens Appeals Board ("AAB") against the Ministerial Order of 2 January 2008. He lodged an appeal, which was rejected by the Antwerp Court of Appeal for lack of jurisdiction *ratione loci*.

M.S. lodged a third application for release, which he withdrew because a new order to be placed at the Government's disposal had been made against him on 16 October 2006.

On 2 February 2009 the CGRA rejected M.S.' second asylum application while drawing the authorities' attention to the fact that if M.S. were to be returned to Iraq, he risked being subjected to punishment or treatment incompatible with Article 3 of the Convention. In a judgment of 4 March 2009 the AAB rejected the appeal against that decision.

Residence order: 5 March 2009 – 2 April 2010

Following the decision of the AAB, M.S. was released on 5 March 2009 and placed under a residence order pronounced by ministerial order.

Another ministerial order was made on 24 February 2010 to allow M.S. to live with his new partner. On 9 March 2010 the mayor observed that M.S.'s presence in the area had coincided with the arrival and recruitment of young "hardliners" whom he had met in prison and who held extremist views. On 22 March 2010 the police submitted a detailed report on the conduct of M.S. and on 1 April 2010 the risk assessment coordinating body informed the Secretary of State for Immigration and Asylum Policy that M.S.' residence in Belgium constituted a threat to public order and more particularly to the district in which he was living at that time.

Noting that M.S.'s new partner had returned to live in the Netherlands, the residence order was lifted on 2 April 2010 and M.S. was placed in the Bruges closed transit centre for illegal aliens.

Second period of detention in the closed transit centre (Bruges): 2 April 2010 – 27 October 2010

The decision placing M.S. in a closed transit centre referred to the fact that he needed to be detained in order to obtain a "laissez-passer" from his national authorities and that he represented a threat to public order.

M.S. applied for release on two occasions and those applications were rejected, first for lack of jurisdiction of the court with which the application had been lodged and then on the ground that the Aliens Office (the "AO") was still waiting for an opinion of the CGRA on his possible return to Iraq and for all the necessary steps to be taken to facilitate the applicant's removal within a reasonable time.

On 17 May 2010 the Ministry of Foreign Affairs invited the diplomatic posts of Venezuela, Burundi, Vietnam, Burkina Faso and Costa Rica to approach the authorities in those countries with a view to granting M.S. political asylum. Negative responses were received the following month, and M.S. indicated his refusal to be transferred to Burundi on 16 August 2010.

The AO extended M.S.'s detention several times on the ground that steps had been taken to facilitate his removal within a reasonable time. M.S. unsuccessfully appealed against those decisions.

After July 2010 M.S. was visited by officials from the office of the Secretary of State for Asylum and Immigration Policy who explained to him that he would never be granted authorisation to reside in Belgium and that the only possible course of action would be to return him to Iraq or remove him to a third country. On 30 August 2010 M.S. proposed, in a letter, that the Belgian State pay him a sum of money to fund his defence in Iraq, on which basis he would agree to return.

On 29 September 2010 M.S. had an initial meeting with the International Organization for Migration ("I.O.M.") and a file on his voluntary return was opened. M.S.' lawyer protested, pointing out the Belgian State's obligation to obtain diplomatic assurances from the Iraqi authorities that he would not be subject to arbitrary prosecution or detention, or subjected to torture or inhuman or degrading treatment, or sentenced to death and that, lastly, the Iraqi authorities would undertake to protect him.

The departure date was set for 27 October 2010. Before his departure M.S. wrote a letter, which he handed to his lawyer for circulation after his departure to Iraq, in which he stated that he had not asked for the visit from the I.M.O. whose delegates had explained that the only possibility available to him in Belgium was unlimited detention and that many people had advised him against returning to Iraq on account of the danger he would face. However, he added that he had had no choice and that he had been forced to leave because the prospect of unlimited detention in Belgium was unbearable. On the day before his departure he told a psychologist that he had lost all hope and had taken his decision on the basis that the situation was deadlocked.

M.S. was repatriated to Iraq on 27 October 2010. He was arrested on leaving the aircraft and placed in detention. He was released three weeks later on bail and on condition that he did not leave his home and had no contact with foreigners.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman and degrading treatment), the applicant complained that he had been returned to Iraq.

Relying on Article 5 § 1 (right to liberty and security) and Article 5 § 4, M.S. alleged that his first period of detention in the Merksplas closed transit centre from 17 October 2007 to 5 March 2009, and his second period of detention in the Bruges closed transit centre from 2 April 2010 until his return to Iraq on 27 October 2010, had been arbitrary and the decision as to the lawfulness of his detention had not been made speedily.

The application was lodged with the European Court of Human Rights on 14 October 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Danutė **Jočienė** (Lithuania), *President*,
Françoise **Tulkens** (Belgium),
Dragoljub **Popović** (Serbia),
Isabelle **Berro-Lefèvre** (Monaco),
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey),
Guido **Raimondi** (Italy)*, Judges*,

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 3

The Court reiterated that Article 3 of the Convention prohibited in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct, and even in the most difficult circumstances such as the fight against terrorism. It was not possible to weigh the risk of ill-treatment – even where such treatment was inflicted by another State – against the reasons put forward for the expulsion. In that connection, the conduct of the person concerned, however undesirable or dangerous, could not be taken into account.

In the applicant's case the Court considered that the applicant could not be regarded as having validly waived his right to the protection guaranteed under Article 3 and that his return must be considered to be a forced return.

The Court noted that it had not been disputed that there were serious and established grounds for believing that there was a real risk of treatment contrary to Article 3 in Iraq. Despite that, the Belgian authorities had taken no steps to obtain diplomatic assurances from the Iraqi authorities that M.S. would not be subjected to such treatment upon his return. In the Court's view, M.S.'s return should have been accompanied by a series of safeguards with a view to ensuring his safety in Iraq, the most important being obtaining diplomatic assurances.

By failing to take such action, the Court held, that the Belgian authorities had not done all that could reasonably have been expected of them with regard to the Convention. Accordingly, there had been a violation of Article 3.

Articles 5 § 1 and 5 § 4 in respect of the first period of detention

The Court considered that M.S. had been detained in accordance with a procedure prescribed by law. However, from 29 May 2008, when the CGRA expressed its opinion on the risks faced by M.S. were he to return to Iraq, it appeared that his continued detention had been based merely on reasons of security, since the authorities had been unable to remove him without breaching their obligations under the Convention. If the Belgian authorities had been able to find a country in which M.S. would not risk being

subjected to treatment contrary to Article 3, they would have raised the prospect of expelling M.S. and thus justified the existence of a deportation procedure that was already under way. However, the Government failed to provide any information evidencing that any contact had been made at that stage with other countries.

The Court concluded that there had been a violation of Article 5 § 1 in respect of the first period of detention from 29 May 2008 to 4 March 2009.

The Court considered that the applicant had not benefited from the right to a speedy decision on the lawfulness of his detention and concluded that there had been a violation of Article 5 § 4.

Articles 5 § 1 and 5 § 4 in respect of the second period of detention

The Court considered that the only real ground for detention during that period arose out of the report prepared by the police and the letter from the risk assessment body, rather than a realistic prospect of being able to remove M.S. within a reasonable time. It noted that since his release from prison in 2007, no court had re-assessed the risk posed by M.S. to public order and national security. Moreover, the documents in question had been issued by administrative bodies which had not given any reasons enabling the applicant to understand exactly what he was accused of. In those circumstances, the Court considered that M.S. had not benefited from the minimum guarantees against arbitrariness and that on 2 April 2010 he had been detained in breach of Article 5 § 1.

The situation was different between 17 May 2010 and 16 August 2010 when M.S. indicated his refusal to be sent to Burundi, because over the course of those three months, action was indeed being taken with a view to deportation within the meaning of Article 5 § 1 (f).
Subsequently, and until 27 October 2010, M.S. had been detained on the basis of extension measures justified by the finding that the steps being taken with a view to finding a third country had been carried out meticulously and because of the danger that M.S. represented to public order and national security. Having regard to the failure of the steps taken with a view to finding a third country, the absence of any further steps in that connection and a new opinion from the CGRA of 24 August 2010 confirming the risks faced in the event of removal to Iraq, the Court found that there was no connection between the continued detention of M.S. and the possibility of removing him from Belgian territory.
The Court considered that the applicant's placement in detention on 2 April 2010 and the measures taken to extend his detention from 24 August 2010 had not been "lawful" and that there had been a violation of Article 5 § 1.

Article 41

The Court considered that the findings of violation were sufficient in themselves to afford just satisfaction in respect of the non-pecuniary damage sustained by the applicant. The Court held that Belgium was to pay the applicant 6,000 euros in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.