CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

Application no. 31252/03
by Laleh MIR ISFAHANI
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 31 January 2008 as a Chamber composed of:

Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Egbert Myjer,
David Thór Björgvinsson,
Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 30 September 2003,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted jointly by the Dutch Refugee Council (*VluchtelingenWerk Nederland*), the Dutch section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten*), the Foundation for Legal Aid to Asylum Seekers (*Stichting Rechtsbijstand Asielzoekers*) and the European Council on Refugees and Exiles, as well as the comments submitted by the United Nations High Commissioner for Refugees ("UNHCR") pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Laleh Mir Isfahani, is an Iranian national. She was born in 1967 and currently resides in Udenhout (Netherlands). She was represented before the Court by Mr P.B.Ph.M. Bogaers, a lawyer practising in Nieuwegein. The respondent Government were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

The applicant applied for asylum in the Netherlands on 27 March 2001, submitting *inter alia* the following. During her studies at a university for women in Teheran she had become a member of a political organisation, or student movement, which favoured the separation of state and religion. She had remained a member of the political organisation and attended its meetings after graduating and finding employment as an educational counsellor at a secondary school for girls in Teheran. She had also held meetings of a political nature with pupils. After these meetings had come to the notice of the authorities, she had been forced to resign without notice. Nevertheless, she had continued to receive pupils at her home and discuss politics with them.

On 11 August 1999 the applicant had attended a political meeting at a university, attended by students. She had spoken of her experiences and of her having been compelled to resign. While this meeting was in process, it had been raided by *Niruha Entezami* ("Order Troops") in plain clothes and she had been arrested. She had been kept in detention for six weeks and tortured. She had been released on 24 September 1999 after paying a fine and signing an undertaking to desist from further political activity.

On 13 February 2001 the applicant, together with other members of her political organisation, had attended the public administration of corporal punishment to two political activists. This had caused an outcry among the spectators and the applicant was among several arrested by the *Niruha Entezami*. Following her arrest the applicant had been so severely maltreated that *Niruha Entezami* had had her admitted to hospital, from where she had managed to escape. She had subsequently fled to the Netherlands.

Three interviews were conducted with the applicant by the Dutch immigration authorities. By letter of 30 October 2001 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) notified the applicant of her intention (*voornemen*) to reject her asylum request. It was held against her that she had not applied for asylum immediately upon her arrival at the airport, and the fact that she had failed to submit documents establishing her

identity, nationality and travel route – which failure was considered to be attributable to her – was held to cast doubt on the sincerity of her account and to detract from its credibility. It was also considered that the applicant's description of her professional background contained inconsistencies and her rendering of her escape from hospital was not worthy of credence. For the reasons of her subsequent decision of 20 December 2001 to reject the applicant's asylum request, the Deputy Minister referred to this document. The decision contained the mention that an appeal, lodged timely, would suspend the legal consequences of the refusal of the asylum application, including expulsion.

The applicant lodged an appeal with the Regional Court of The Hague, sitting in Amsterdam, on 17 January 2002, arguing that she and her counsel had not been able to discuss the reports of the various interviews and the Deputy Minister's notification of intent because of an error of communication between them. She went on to point to alleged specific errors in the reports of the interviews.

The Regional Court upheld the applicant's appeal on 7 February 2003, annulling the Deputy Minister's decision and ordering the Minister for Immigration and Integration to decide anew. Its reasoning included the following:

> "5. According to a consistent body of case-law it is primarily the responsibility of the [Deputy Minister] to determine whether, and to what extent, a decision on a[n asylum] request should be based on the facts stated by the alien in his asylum story but which are not corroborated. On this point, the Regional Court must therefore confine itself to considering whether the [Deputy Minister] could reasonably take the position that the asylum story is not worthy of credence. The Regional Court takes the view that the [Deputy Minister's] consideration of the asylum story cannot stand up to this judicial test. ...
>
> 6. As is apparent from the decision appealed against, the [Deputy] Minister takes the view that [the applicant] has made a number of unbelievable and contradictory statements which affect the credibility of her story. ..."

The Regional Court then examined a number of alleged inconsistencies which the Deputy Minister had held against the applicant, without – as was pointed out by the Regional Court – having confronted the applicant with those inconsistencies at the time she was interviewed. It concluded that the Deputy Minister

> "... could not in reason take the position that the asylum story was not credible. It makes no difference in this regard that [the applicant] had no documents in her possession, because that cannot be imputed to her if her story is accepted as credible. In the circumstances, the decision appealed against should be annulled. Insufficient care has been taken in its preparation and partly as a result of that it lacks supporting reasoning. ..."

The Minister lodged a further appeal (*hoger beroep*) with the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) on 12 February 2003. The

appeal was based, essentially, on the argument that the Regional Court ought not to have considered factual information that was not available to the Deputy Minister at the time when the decision on the asylum request was taken and ought not to have substituted its own assessment of the facts for that of the Deputy Minister.

The Council of State gave its decision on 4 April 2003. Its reasoning included the following (domestic law references omitted):

> "2.1. As the Administrative Jurisdiction Division has held in earlier cases (...), it is the responsibility of the Minister to consider the credibility of the facts stated by the alien in his asylum story and this consideration can only be reviewed by the courts with due reticence (*terughoudend*).
>
> 2.1.1. As is apparent from [the applicable policy guidelines], the Minister tends to accept the truth of the story and the facts therein stated if the asylum seeker has answered all the questions put to him as comprehensively as possible and if in the main the story is coherent and does not lack credibility and if it is consistent with what is known about the general situation in the country of origin. In addition, it is required that there be none of the circumstances enumerated in section 31, second paragraph, sub a-f, of the Aliens Act 2000 (*Vreemdelingenwet 2000*) which may affect the credibility of the asylum seeker's statements.
>
> If this latter condition is not met, then pursuant to section 31 of the Aliens Act 2000 ... and the policy guidelines established for its implementation there may be no gaps, vague statements, absurdities or inconsistencies as regards the relevant details; the asylum story must be positively persuasive.
>
> 2.1.2. The standard to be applied in the Regional Court's review is not that court's own opinion of the credibility of the story, but the question whether there is ground to consider that the Minister, given the reasoning given in the notification of the intention to reject the application and the decision appealed against, seen in the light of the records of the interviews held, the corrections and additions submitted and the statements contained in the response to the notification of intent, could not in reason have reached the view he did regarding the credibility of the asylum seeker's story.
>
> 2.2. ... [T]he Minister complained that the Regional Court, in considering whether the Deputy Minister could reasonably take the view that the alien's asylum seeker's story was not worthy of credence, did not consider the fact that the alien failed to submit documents for reasons that can be imputed to her, as referred to in section 30, second paragraph, chapeau and sub f, of the Aliens Act 2000 ... [and] that the Regional Court failed to review his findings, as described above, with due reticence.
>
> 2.3. The Regional Court has held that its finding that the [Deputy Minister] could not in reason take the position that the asylum story was not credible is not affected by the fact that the alien was not in possession of documents, because this cannot be imputed to her if her story is accepted as credible. In so holding the Regional Court has mistaken the purport of section 31 (2) (f) of the Aliens Act 2000.
>
> It is further apparent from the preceding findings in the decision appealed against that the Regional Court has not been reticent in considering the Deputy Minister's position on the credibility, but has instead substituted its own view on the credibility [sc. of the applicant's story] for that of the Deputy Minister.

The grounds of appeal must be accepted.

2.4. The further appeal is clearly well-founded already for this reason. ... The decision appealed against must be annulled. Doing what the Regional Court ought to have done, the [Administrative Jurisdiction] Division holds as follows:

2.5. It is noted in the first place that there is no justification for finding that the Deputy Minister could not reasonably take the view that the alien has not been able to provide an adequate explanation for the absence of documents establishing her identity, nationality and route travelled, as referred to in section 31 (2) (f) of the Aliens Act 2000.

In light of this consideration, *inter alia*, there is no justification for the finding that the Deputy Minister could not in reason take the position that the alien's asylum story was not worthy of credence. The decision [of the Deputy Minister] bases this position on the finding that the alien has not provided an adequate explanation for the contradictions in her statements concerning the date on which she became a member of the student movement. There was no need for the Deputy Minister to consider the contradictions found to have been the result of a mistranslation. The Deputy Minister was further entitled, in reason, to consider the alien's statements concerning her escape from the military hospital lacking in credibility.

2.6. In view of the above, the Deputy Minister rightly considered that the alien had not made out that her [asylum] request was based on circumstances that constitute grounds for granting asylum ..."

On 17 August 2007 the applicant informed the Court that she would be accepting a residence permit for which the Deputy Minister of Justice considered her eligible pursuant to the terms of a general amnesty (*generaal pardon*) for rejected asylum seekers who had applied for asylum before 1 April 2001. Nevertheless, she wished to maintain her complaint under Article 13 in conjunction with Article 3 of the Convention.

B. Relevant domestic law

Relevant provisions of the Aliens Act 2000

Section 31

"...

2. In the examination of the [asylum] request, circumstances including the following shall be taken into account [as appropriate]:

...

f. the alien cannot corroborate his request with travel or identity documents or other documents that are needed to consider his request, unless the alien can make out a credible case that the absence of these documents is not imputable to him;

...”

Section 83

“1. In considering the appeal the Regional Court shall take into account facts and circumstances that have emerged after the decision appealed against, unless that would be prejudicial to the proper conduct of the proceedings (*tenzij de goede procesorde zich daartegen verzet*) or a determination of the case would be impermissibly delayed thereby.

2. Facts and circumstances as referred to in the first paragraph shall only be taken into account if they may be relevant to the decision concerning the residence permit [for the purpose of asylum].

3. The Regional Court shall request the competent Minister to inform his opponent and the Regional Court [itself] as soon as possible and in writing whether the facts and circumstances invoked constitute cause to maintain, alter or withdraw the decision appealed against.”

COMPLAINTS

The applicant complained under Article 3 of the Convention that she would face a real risk of being subjected to treatment contrary to that provision if forced to return to Iran.

She also complained under Article 13 of the Convention taken together with Article 3 that the case-law of the Council of State, by divesting the courts of the power to substitute their own findings on the credibility of an asylum seeker’s case for the views of the competent Minister, had deprived the legal remedy nominally available to her of its effectiveness.

THE LAW

A. Alleged violation of Article 3 of the Convention

The applicant originally complained that a forced return to Iran would be in violation of Article 3 of the Convention, which provides as follows:

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

The Court notes that the applicant has now been granted a residence permit in the Netherlands and that she is, therefore, no longer at risk of being expelled. It would thus appear that this matter has been resolved;

moreover, the applicant has not indicated that she wishes to pursue this complaint. In these circumstances, and having regard to Article 37 § 1 (a and b) of the Convention, the Court is of the opinion that it is no longer justified to continue the examination of this part of the application. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the examination of this part of the application to be continued. Accordingly, in so far as the complaint under Article 3 is concerned, it is appropriate to discontinue the application of Article 29 § 3 of the Convention and to strike the case out the list.

B. Alleged violation of Article 13 of the Convention in conjunction with Article 3

The applicant complained that the scope of the judicial review of the Deputy Minister's decision to reject her asylum application, including her claim that her removal to Iran would be in breach of Article 3, was too limited, depriving her of an effective remedy as guaranteed by Article 13, which latter provision reads as follows:

> "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."

1. The parties' submissions

(a) The applicant

Despite the fact that she had been granted a residence permit the applicant requested the Court to continue its examination of this complaint, submitting that a ruling of the Court on this issue remained of importance since the Administrative Jurisdiction Division of the Council of State had not changed its case-law and continued to apply – and impose on lower courts – a marginal judicial review of assessments made by the Deputy Minister of Justice in asylum cases, a practice criticised by the United Nations Committee against Torture in a recent report[1]. Moreover, a decision by the Court on this matter would probably reduce the number of complaints of asylum proceedings in the Netherlands lodged with the Court. Finally, the applicant referred to the case of *Gebremedhin [Gaberamadhian] v. France* (no. 25389/05, 26 April 2007), in which the Court had examined the applicant's complaint under Article 13 despite the fact that he had been recognised as a refugee.

1. UN Committee Against Torture (CAT), *Conclusions and Recommendations of the Committee against Torture: the Netherlands*, 3 August 2007, CAT/C/NET/CO/4.

(b) The Government

The Government were of the view that the application should be struck out of the Court's list of cases on the basis of Article 37 § 1 (c) of the Convention, given that the question central to the application, namely whether the applicant's expulsion to Iran would expose her to a real risk of being subjected to treatment in breach of Article 3, was no longer relevant. Moreover, the issue in the domestic proceedings, which were the subject of her complaint under Article 13, was whether a residence permit should be granted to the applicant, which was not identical to the question whether or not an expulsion in violation of Article 3 was imminent. Since Article 13 exclusively concerned effective remedies against violations of the Convention, rather than effective remedies in general, the Government submitted that it was no longer justified to continue the examination of the case.

In the alternative, they argued that the applicant's complaint under Article 3 was aimed at preventing her expulsion to Iran and the complaint under Article 13 at an effective remedy in obtaining a residence permit as a means to prevent her expulsion to Iran. As both aims had been obtained, the applicant could no longer claim to be a "victim" within the meaning of Article 34 of the Convention.

As regards the merits of the complaint, the Government emphasised that an absence of documents concerning an asylum seeker's identity, nationality and travel route did not by itself constitute sufficient grounds to reject an application for asylum. However, where such an absence could be attributed to the asylum seeker, it undermined the credibility of his or her account to the extent that he or she bore a heavier burden of proof in establishing the validity of the application; the account should then not contain any gaps, vague statements, absurd turn of events or contradictions concerning relevant details.

It was primarily the responsibility of the (Deputy) Minister to assess the credibility of the submissions made by an asylum seeker and to interpret the statements made by him or her. A subsequent judicial review was limited to an examination of the reasonableness of the way in which the (Deputy) Minister had interpreted those statements. The criterion to be applied by the domestic administrative court in this examination was not whether the (Deputy) Minister's interpretation coincided with that of the court, but whether there were grounds for believing that the (Deputy) Minister could not reasonably have arrived at such an interpretation. According to the Government, there was no basis for the opinion that confining a judicial review to a test of reasonableness constituted a breach of Article 13. Even if the court did not form an opinion of its own on the credibility of an asylum seeker's account, it would do so when assessing whether there were clear reasons to suppose that an asylum seeker ran a real risk of being subjected to treatment proscribed by Article 3 if expelled.

As regards the present application, the Government submitted that the applicant had not only had ample opportunity to elucidate her asylum application, including her alleged reason to fear treatment contrary to Article 3, she also had the opportunity to lodge an appeal against the decision dismissing that application. The applicant therefore had at her disposal an effective remedy as required by Article 13 of the Convention.

2. Third party observations

(a) Joint observations by the Dutch Refugee Council, the Dutch section of the International Commission of Jurists, the Foundation for Legal Aid to Asylum Seekers and the European Council on Refugees and Exiles

These observations contained examples of case-law in which the Administrative Jurisdiction Division of the Council of State established which elements of an appeal lodged by an asylum seeker against the rejection of his or her asylum application were subject to a marginal judicial review, and an overview of criticisms expressed in recent years by NGO's and academics of this type of judicial review.

The interveners concluded that the judicial review carried out in asylum cases in the Netherlands did not correspond to the independent and rigorous scrutiny which the Court has held to be required by Article 13 of the Convention – and which it carried out itself – of claims that there exist substantial grounds for believing that an individual, if expelled, faces a real risk of being subjected to treatment contrary to Article 3. This was due to the fact that the courts in the Netherlands could subject the core parts of the decision whether such a real risk existed only to a marginal review.

(b) Observations by UNHCR

In its observations, UNHCR focused primarily on the procedural guarantees necessary for an effective implementation of the *refoulement* prohibition in Article 33 of the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention"), without directly addressing the relationship between that Convention and the European Convention of Human Rights. Nevertheless, UNHCR submitted, some of the legal principles outlined in regard to the 1951 Convention may have relevance to comparable protection issues under the Convention.

According to UNHCR, the strict appliance in Dutch asylum proceedings of the requirement for documentary proof of identity, nationality, travel route and reasons for leaving the country did not take sufficient account of the special situation of asylum seekers, who might not be in a position to provide documentary evidence to substantiate their assertions. Where the lack of such documentation was attributed to the asylum seeker, this resulted in the application of a significantly higher standard of proof than usual. Current Dutch practice could in effect make it extremely difficult for

the asylum applicant to prove his or her claim and could therefore lead to *refoulement* of refugees. UNHCR's concern was intensified by the fact that the higher standard of proof appeared to be the rule rather than the exception.

The provision of a meaningful appeal was a fundamental requirement in the context of refugee status determination, where the consequences of an erroneous decision could be particularly serious. Such an appeal should review the merits of the first-instance decision, including the assessment of the credibility of the asylum seeker's statements, bearing in mind that in asylum cases credibility could be the primary basis for the decision. If the scope of judicial review was limited to questions of law, no examination could take place of the question whether the first-instance authority had correctly established the material facts of the case. This meant that in cases where the rejection of the claim in first instance was based on a negative credibility finding, the appeal was in effect rendered meaningless. UNHCR was concerned that the limited judicial review practised in the Netherlands could not be considered an adequate mechanism for the review of first-instance decisions, with a view to minimising the risk of *refoulement*.

3. The Court's assessment

In the Court's view, it is necessary first of all to determine whether the new fact of the applicant having been granted a residence permit is such as to lead it to decide to strike also this part of the application out of its list of cases in application of Article 37 § 1 of the Convention, which provides:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
>
> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

(a) The application of Article 37 § 1 (a) of the Convention

It is clear that there can be no question of striking this part of the application out of the Court's list of cases in application of Article 37 § 1 (a), as the applicant has expressly stipulated that she wishes to pursue it.

(b) The application of Article 37 § 1 (b) of the Convention

As regards Article 37 § 1 (b), the Court has already noted above that the issue at the heart of the applicant's complaint under Article 3 of the Convention has been resolved. Whether the same can be concluded in respect of the complaint under Article 13 in conjunction with Article 3 depends, firstly, on whether the circumstances complained of directly by the applicant still obtain and, secondly, on whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 42).

The Court notes that the residence permit granted to the applicant does not annul or overturn the decision of the Administrative Jurisdiction Division of the Council of State taken in the further appeal on her asylum application. The residence permit having been granted as part of a general scheme, it can furthermore not be said that the decision to grant it was aimed at offering redress for the effects of a possible violation of Article 13. The aforementioned conditions not having been met, the case should not be struck out of the list in application of Article 37 § 1 (b).

(c) The application of Article 37 § 1 (c) of the Convention

In order to decide whether the application should be struck out of the list in application of Article 37 § 1 (c), the Court must consider whether "the circumstances lead it to conclude" that "for any other reason ... it is no longer justified to continue the examination of [it]".

The Court observes that the applicant seeks to compare her case with that of *Gebremedhin [Gaberamadhian] v. France* (cited above). While it is true that that case also concerned a complaint of a violation of Article 13 taken together with Article 3 of the Convention, lodged by an asylum seeker who had been granted permission to stay in the respondent State in the course of the Strasbourg proceedings, this does not automatically entail that the Court should proceed in the same manner in the present case as it did in that case, namely by continuing its examination of that complaint. As the Court has previously held, it enjoys a wide discretion in identifying grounds capable of being relied upon in striking out an application on the basis of Article 37 § 1 (c), even though it is to be understood that such grounds must reside in the particular circumstances of each case (see *Association SOS Attentats and De Boëry v. France* (dec.) [GC], no. 76642/01, § 41, ECHR 2006-...).

In the opinion of the Court, the facts and circumstances of the two cases are not comparable to such an extent that the principle of legal consistency requires that the same decision, in relation to Article 37 § 1 (c), be reached in both of them. In this context the Court notes in the first place that it has consistently interpreted Article 13 as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV). A decision on the admissibility of the present

application not having been taken, the Court has not expressed an opinion on this issue. To do so would in effect require an examination of the well-foundedness of the applicant's complaint under Article 3 of the Convention, which issue the Court has found to have been resolved. It is in this aspect also that the present case falls to be distinguished from *Gebremedhin*. Prior to adopting its judgment in that case, the Court had declared the complaint under Article 13 taken together with Article 3 admissible, considering that Mr Gebremedhin had an arguable claim of a violation of Article 3. The Court found support for that view in the fact that Mr Gebremedhin had been recognised as a refugee (see *Gebremedhin*, cited above, § 51). It is clear that no such support can be found in the present case as the residence permit now issued to the applicant is not in any way connected to the merits of her claim for asylum.

Secondly, and more importantly, the Court notes that Mr Gebremedhin, upon his arrival at a Paris airport, was denied permission to enter France where he wished to apply for asylum, and that the administrative proceedings he instituted against that decision did not *ex lege* enjoy suspensive effect. The applicant in the present case, however, was able to lodge an asylum application in the Netherlands and to await the decision on that application as well as on her appeal against the decision rejecting the application. Whereas Mr Gebremedhin's complaint thus concerned the absence of a remedy with suspensive effect, the applicant's complaint is about the scope of the judicial review which was available to her.

The circumstances of the present case, and in particular the facts that the applicant has now been granted a residence permit and that she was allowed to stay in the Netherlands pending the proceedings on her asylum application, lead the Court to consider that it is no longer justified to continue the examination of the application within the meaning of Article 37 § 1 (c) of the Convention. Accordingly, it is appropriate to discontinue the application of Article 29 § 3 of the Convention and to strike the case out of the list.

For these reasons, the Court unanimously

Decides to strike the application out of its list of cases.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President