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

Information Note on the Court's case-law 240

May 2020

M.N. and Others v. Belgium (dec.) [GC] - 3599/18

Decision 5.5.2020 [GC]

Article 1

Jurisdiction of States

Refusal to grant visa applications submitted to an embassy in a non-member State on the basis of a risk of ill-treatment: *inadmissible*

Article 6

Enforcement proceedings

Article 6-1

Civil rights and obligations

Non-enforcement of judicial decision concerning administrative refusals to grant visas: *article 6 inapplicable*

Facts – The applicants, Syrian nationals who lived in Aleppo, a city then subject to devastating armed conflict, travelled to Lebanon, from where they applied in August 2016 to the Belgian Embassy in Beirut for short-stay so-called "humanitarian" visas (Article 25 of the Community Code on Visas), indicating that they intended to claim asylum on arrival in Belgium. The application was transferred to the Aliens Office ("the OE"), which held that this intention placed their application outside the scope of the provision relied on.

There followed a series of extremely urgent proceedings before the Belgian administrative courts, in which the applicants complained that this refusal exposed them to risks that were contrary to Article 3 of the Convention. In this context, the OE refused to issue visas on two further occasions. On 20 October 2016 the Aliens Appeals Board (the CCE) instructed the Belgian authorities to issue them with the requested visas within 48 hours.

As the authorities declined to reconsider the refusal, the applicants turned, with success, to the civil courts: on 7 December 2016, finding the persistent refusal to issue the visas to be "an illegal action", the Brussels Court of Appeal ordered that the CCE's decision be executed immediately, failing which 1000 euros were to be paid per day of delay. The State lodged an appeal on points of law against this decision, and those proceedings were still pending.

In the meantime the CCE had sent a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) in a similar case: the CJEU found that the provision of EU law relied upon was not meant to apply to the situation in question; in

consequence, the case fell solely within the scope of national law (CJEU, *X and X v. Belgian State*, C-638/16 PPU, 7 March 2017, Information Note 205).

In June 2017 the Brussels Court of Appeal noted that the above-mentioned judgments of 20 October and 7 December 2016 were no longer valid, since in the absence of a request for judicial review the OE's initial refusal to issue the visas had become final before the penalty payment was ordered against the Belgian State.

Law

Article 1 (with regard to the complaints under Article 3): While specifying that its conclusion did not prejudice the endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations (see *N.D. and N.T. v. Spain* [GC], 8675/15 and 8697/15, 13 February 2020, Information Note 237), the Court considered that, for the following reasons, the applicants had not been within Belgium's jurisdiction with regard to the circumstances in respect of which they complained under Article 3 of the Convention; nor, in consequence, under Article 13.

(a) *Absence of a "territorial" jurisdictional link* – The contested decisions had been taken by the central authorities in Belgium, in response to visa applications submitted by the applicants to the consular services of the Belgian Embassy in Lebanon. Those decisions, refusing to grant the visas, had subsequently passed again through the embassy's consular services, which had notified the applicants. Admittedly, in ruling on these applications, the Belgian authorities had taken decisions concerning the conditions for entry to Belgian territory and, in so doing, had exercised a public power. In itself, however, this finding was not sufficient to bring the applicants under Belgium's "territorial" jurisdiction within the meaning of Article 1 of the Convention. The mere fact that decisions taken at national level had had an impact on the situation of persons resident abroad was also not such as to establish the jurisdiction of the State concerned over those persons outside its territory (see *Banković and Others v. Belgium and Others* [GC] (dec.), 52207/99, 12 December 2001).

(b) *Absence of exceptional circumstances capable of creating an "extraterritorial" jurisdictional link* – This was primarily a question of fact, which required the Court to explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter had effectively exercised authority or control over them. In this connection, it was irrelevant that the diplomatic agents had had, as in the present case, merely a "letter-box" role, or to ascertain who had been responsible for taking the decisions, whether the Belgian authorities in the national territory or the diplomatic agents in post abroad.

The applicants had not relied on: (i) any previous presence in the Belgian national territory; (ii) any pre-existing ties of family or private life with that country; (iii) any kind of control exercised by the Belgian authorities in Syrian or Lebanese territory.

Nor were any of the case-law precedents on which they relied relevant.

Firstly, the applicants did not have any of the connecting links which characterised the cases examined by the European Commission of Human Rights concerning the acts and omissions of diplomatic agents. Thus, they were not Belgian nationals seeking to benefit from the protection of their embassy. Further, at no time had the diplomatic agents exercised *de facto* control over them: the applicants had freely chosen to present themselves at the Belgian Embassy, and to submit their visa applications there, as indeed they could have chosen to approach the embassy of any other State; they had then been free to leave the premises of the Belgian Embassy without any hindrance. As to the administrative control exercised by the State over the premises of its embassies,

this criterion could not suffice to bring every person who entered those premises within Belgium's jurisdiction.

Secondly, the present case was fundamentally different from the numerous expulsion or removal cases examined, in which the individuals concerned were, in theory, on the territory of the State concerned, or at its border, and thus clearly fell within its jurisdiction.

Thirdly, the case-law did not support the argument that the fact of having brought proceedings at national level was an exceptional circumstance which was sufficient to trigger, unilaterally, an extraterritorial jurisdictional link. Thus, in the case of *Markovic and Others v. Italy* [GC] (1398/03, 14 December 2006, Information Note 92), concerning civil proceedings for damages brought by the applicants before the Italian courts under national law in respect of the deaths of their relatives as a result of air strikes carried out by the NATO alliance against the Federal Republic of Yugoslavia, the Court had held that no "jurisdiction" existed for all the substantive complaints (that is, those not lodged under Article 6). And in the case of *Güzelyurtlu and Others v. Cyprus and Turkey* [GC] (36925/07, 29 January 2019, Information Note 225), the proceedings which created a jurisdictional link with Turkey with regard to a death which occurred outside its territory were the criminal proceedings opened at the initiative of the Turkish authorities (who had control over the "Turkish Republic of Northern Cyprus"), thus corresponding to action in the context of the procedural obligations under Article 2. This was very different from administrative proceedings brought at the initiative of private individuals who had no connection with the State concerned other than proceedings that they themselves had freely initiated, and without the choice of this State being imposed by any treaty obligation.

On the contrary, in the case of *Khan v. the United Kingdom* (dec.) (11987/11, 28 January 2014, Information Note 171), the Court had clearly stated that the mere fact that an applicant brought proceedings in a State Party with which he had no connecting tie could not suffice to establish that State's jurisdiction over him: to find otherwise would amount to enshrining a near universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they found themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to any individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction.

However, if the fact that a State Party ruled on an immigration application was sufficient to bring the individual making the application under its jurisdiction, precisely such an obligation would be created: the individual in question could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise have existed.

Such an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, had the right to control the entry, residence and expulsion of aliens (see also the above-cited CJEU judgment).

Conclusion: inadmissible (incompatible *ratione loci*).

Article 6 § 1: The applicants' complaint concerned the right to enforcement of a judicial decision – specifically, the court of appeal's judgment ordering execution of the CCE's judgment instructing the authorities to issue the requested visas , subject to penalties for non-compliance.

It was not necessary to rule on the "jurisdiction" of the respondent State, since Article 6 was in any event inapplicable in the present case. The contested proceedings did not concern "civil rights and obligations", for the following reasons.

As Belgian law stood, the authorities had, under Article 25 of the Community Code on Visas, a discretionary power of assessment in deciding whether or not to issue short-stay visas. Nonetheless, the applicants had been able to apply to a court (the CCE), which had stayed the execution of the authorities' decisions and had had power to set them aside. In such a situation, while Article 6 § 1 of the Convention could be applicable, it was on condition that the advantage or privilege, once granted, gave rise to a civil right (see *Regner v. the Czech Republic* [GC], 19 September 2017, Information Note 210). However, this would not have been the case with regard to the entry to Belgian territory which would have resulted from the visas being issued. It was settled case-law in respect of all decisions relating to immigration and the entry, residence and removal of aliens that these areas were outside the scope of Article 6.

Admittedly, in the subsequent proceedings concerning the State's refusal to execute a decision delivered by an administrative court, the court of appeal, in establishing its jurisdiction under domestic law, had held that the dispute before it concerned a "civil" right. Nonetheless, the object of those proceedings had been solely to continue the proceedings to challenge the merits of the authorities' decisions refusing to issue the visas; this had also been the case with regard to the later proceedings to secure execution of the judgment delivered in its turn by the civil court. The underlying proceedings did not become "civil" merely because their execution was sought before the courts and they gave rise to a judicial decision (see *Panjeheighalehei v. Denmark* (dec.), 11230/07, 13 October 2009, Information Note 123). It was irrelevant here that the Belgian courts had not contested the applicability of Article 6; the Convention did not prevent the States Parties from granting more extensive judicial protection in respect of the rights and liberties guaranteed by it (Article 53).

Conclusion: inadmissible (incompatible *ratione materiae*).
