CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF AOULMI v. FRANCE

(Application no. 50278/99)

JUDGMENT

STRASBOURG

17 January 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It remains subject to editorial revision.

In the case of Aoulmi v. France,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr J.-P. COSTA,
Mr G. BONELLO,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 10 May and 13 December 2005,

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

PROCEDURE

1. The case originated in an application (no. 50278/99) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Algerian national, Mr Rachid Aoulmi ("the applicant"), on 11 August 1999.

2. The applicant was represented by Mr J. Debray, a lawyer practising in Lyons. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of the Department of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged that his proposed removal to Algeria would put him at risk of treatment prohibited by Article 3 of the Convention and would interfere with his family life within the meaning of Article 8.

4. The application was allocated to the Court's Third Section (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.

5. The President of the Chamber decided to apply 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 expel the applicant pending the Court's decision.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 10 May 2005 the Chamber declared the application admissible.

8. The applicant and the Government each filed further written observations on the merits of the case (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1956 in Algeria, where he currently lives.

A. The facts

10. The applicant arrived in France with his parents in 1960. He has six brothers and sisters, all of whom were born in France and have French nationality.

11. On 13 April 1982 he was convicted of burglary and handling stolen goods by the Lyons Criminal Court. He was given an eight-month suspended prison sentence and was ordered to pay a fine of 1,200 French francs (FRF).

12. On 24 April 1984 he was sentenced by the Lyons *tribunal de grande instance* to six months' imprisonment for burglary. The court also activated the suspended sentence he had been given previously. On 28 June 1984 the Lyons Court of Appeal upheld the activation of the suspended sentence, which was the only point on which the applicant had appealed.

13. On 6 December 1988 the Lyons *tribunal de grande instance* sentenced the applicant to 14 months' imprisonment and ordered his permanent exclusion from French territory, for offences under the legislation on dangerous drugs.

14. On 15 April 1989 the applicant married a French national. The marriage was dissolved on 28 January 1993. He has one daughter, who was born in 1983.

15. On 27 April 1989 the Lyons Court of Appeal raised the sentence to four years' imprisonment and upheld the permanent exclusion order, for offences under the legislation on dangerous drugs. It noted in particular that the applicant had been arrested on his arrival at the home of a drug-addicted prostitute and had been in possession of a small bag containing 100 grams of heroin, which the police laboratory described as being "of good quality". The court moreover considered that the applicant could not have been unaware that he had been acting as intermediary between a supplier and his

principal client and accordingly that he had possessed, transported and dealt in heroin. It concluded that his role in such deals had been confirmed by the discovery at his home of precision scales and lactose.

The Court of Appeal further found that, at the material time, the applicant had been on day release from prison and that he had preferred to act as intermediary between a drug supplier and his clients rather than doing a job that he had abandoned for the past month. It held: "the conduct of this foreign national, who presents a risk to public safety and health, is incompatible with his continued presence in France".

16. On 7 June 1990 the Court of Cassation declared that his right to appeal on points of law was forfeit.

17. On 22 October 1992 the Lyons Criminal Court tried fifteen individuals on drugs offences.

It noted that during a search of the applicant's home investigators had found four small transparent plastic bags containing traces of white powder, a book of matches on which a number of accounts were noted, 20 syringes and a spoon with a blackened underside, together with two forged identity cards and one forged driving licence. On the basis of various statements, including that of the applicant's wife, and the results of telephone tapping and shadowing, the court concluded that the applicant had played a key role as a supplier in the drug trafficking.

The court ordered the applicant to serve prison sentences of six years for the drugs offence, three months for forgery of administrative documents and two months for residing in France in breach of an exclusion order.

18. In 1994 the applicant was diagnosed as suffering from active chronic hepatitis.

19. In a judgment of 6 June 1996 the Lyons Court of Appeal dismissed an application by the applicant for the lifting of the exclusion order. It noted that the applicant had had five convictions between 13 April 1982 and 22 October 1983, with prison sentences ranging from two months to six years, and that the offences of which he had been convicted on 27 April 1989 concerned heroin deliveries, including one of 100 grams of very high-quality heroin, and had been committed while he was on day release from prison. The court also found that the authenticity of the applicant's marriage to a French national had not been confirmed by the slightest evidence, and that the order for his removal did not constitute a disproportionate interference with his rights under Article 8 of the Convention.

20. On 8 December 1997 the Minister of the Interior issued a deportation order against the applicant. An appeal by the applicant to the Lyons Administrative Court was dismissed on 16 December 1998.

21. On 9 August 1999 the applicant was released from prison and taken into administrative detention pending his removal from France.

22. On 11 August 1999 the prefect ordered the applicant's removal to Algeria.

23. On 13 August 1999 the applicant lodged an application with the Administrative Court seeking the annulment and stay of execution of that order, together with a request for its immediate suspension.

24. On 16 August 1999 the Administrative Court dismissed the request for immediate suspension, finding:

> "it is not apparent from the evidence, and in particular from the medical certificate produced by the applicant, that his state of health entails a short-term imperative need for the treatment of hepatitis C with two associated substances that are not currently available in Algeria; accordingly, [the applicant] is not justified in seeking the suspension of execution of the decision taken by the prefect of the *département* of Isère ordering his removal to that country."

25. On 16 August 1999 he applied for asylum, which was denied on 18 August 1999 by the OFPRA (French authority for the protection of refugees and stateless persons) on the ground that "his application, which was not lodged in a timely manner, [did] not contain any established or individual elements to substantiate the merits of his fears of persecution by the current Algerian authorities".

26. A doctor serving as a public-health inspector for the health and social services department for the *département* of Rhône sent two letters to the prefect of the Rhône-Alpes region on 13 and 18 August 1999. In the first of those letters the doctor stated, *inter alia*:

> "I observe that Mr Aoulmi has not produced any medical documents subsequent to January 1998, that he has not asked to see a doctor since his arrival at the detention centre and that he is not currently undergoing any treatment. I am thus entitled to consider that his current state of health is of no immediate cause for concern.
>
> The medical certificate mentions that Mr Aoulmi's state of health may justify treatment involving a combination of interferon and ribavirin; ...
>
> I have contacted the laboratory ... which produces ribavirin. According to the information I received, ribavirin is not yet available on the Algerian market. The drug may be imported with the authorisation of the Algerian Ministry of Health further to a request by the central pharmacy of Algiers Hospital. A procedure has been initiated with a view to exporting the molecule to Algeria ..."

27. In his second letter the doctor indicated:

> "I refer to the second medical certificate that you sent to me, for my opinion, concerning the state of health of Mr Rachid Aoulmi, issued by Lyon-Sud Hospital on 13 July 1999.
>
> Supplementing the previous certificate that you brought to my attention, this second certificate confirms that Mr Rachid Aoulmi's medical condition may be treated with a combination of interferon and ribavirin. The indications on the certificate concerning the availability of ribavirin in Algeria do not correspond to those given to me verbally by the laboratory ...

I should point out that ribavirin is available in France under temporary authorisation (ATU – *autorisation temporaire d'utilisation*) for use in hospital pharmacies alone and that the marketing authorisation is to be issued shortly."

28. On 19 August 1999 the applicant was put on a boat for Algeria.

29. On 13 December 2000 the Lyons Administrative Court set aside the prefect's removal order of 11 August 1999, holding as follows:

"It is apparent from the evidence and in particular from the medical certificate issued by the prison hospital and healthcare service on 13 July 1999, as produced by the applicant, that he suffers from hepatitis C. His state of health is such that he requires imperative treatment with two associated products, interferon and ribavirin, which were not available in Algeria on the date of the impugned decision. Accordingly, having regard to the exceptionally serious consequences that the measure taken against him may entail, the decision by the prefect of the *département* of Isère whereby Algeria was designated as the country to which Mr Aoulmi was to be removed in execution of the deportation order issued against him on 10 April 1988 must be set aside".

That judgment was irrevocable.

30. On 17 June 2003 the applicant's lawyer indicated that his client had encountered difficulties in obtaining a passport. The lawyer enclosed with his letter an attestation to that effect issued on 5 February 2003 by the chief of Bejaia district.

31. On 13 October 2003 the applicant's lawyer explained that his client could not return to France because the Algerian authorities would not issue him with a passport and he could not obtain a laissez-passer from the French authorities. He added that, according to the information he had received through the applicant's family, his health was continuing to decline and he had not been receiving the necessary medical treatment.

32. In a letter of 5 November 2003 he provided the Court with a copy of the visa refusal issued by the French Consulate-General in Algiers on 13 October 2003.

33. According to a medical certificate issued by an Algerian doctor on 31 July 2005, the applicant is suffering from the following complaints:

"ulcer-related condition, only treatable with omeprazole,

erythematous gastropathy, intestinal functional disorder and chronic constipation,

chronic viral hepatitis type C, for which interferon was prescribed in France some ten years ago and which has not been treated or checked for about ten years."

B. Procedure

34. On 11 August 1999 the President of the Third Section decided to indicate to the Government, pursuant to Rule 39 of the Rules of Court, that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to expel the applicant to Algeria prior to

the forthcoming meeting of the appropriate Chamber on 24 August 1999. Under Rule 49 § 2 (a) the Government were also requested to submit information, in particular concerning treatment available in Algeria.

35. The competent authorities decided to stay the execution of the removal until 16 August 1999 in order to obtain an expert medical opinion (see paragraph 27 above).

36. On 19 August 1999 the applicant was removed to Algeria.

37. On 20 August 1999 the Government submitted answers to the questions put to them.

38. The applicant's representative submitted his answers on 24 September 1999.

39. On 9 November 1999 the Court decided to request the Government to submit their observations on the admissibility and merits of the application, and on the fact that the applicant had been expelled notwithstanding the application of Rule 39.

40. The Government submitted their observations on 3 February 2000 and those of the applicant's representative were submitted on 23 March 2000.

41. On 9 September 2003 the Court decided to adjourn its examination of the case pending the Grand Chamber judgment in the case of *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, ECHR 2005-I).

42. On 10 May 2005 the Court requested the parties to provide information about the applicant's state of health, his administrative situation, and any action taken further to the Administrative Court's judgment of 13 December 2000. They were also requested to address once again the possibility of a breach of Article 34 of the Convention, in the light of the *Mamatkulov and Askarov* judgment (cited above), which had been delivered on 4 February 2005.

43. The parties submitted their observations on 26 September 2005.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

44. Article L. 630-1, sub-paragraph 1, of the Public Health Code, as worded at the material time, provided:

> "Without prejudice to the application of Articles 23 et seq. of Ordinance no. 45-2658 of 2 November 1945, the courts may make an order excluding an alien convicted of an offence under Articles L. 626, L. 627-2, L. 628, L. 628-4 or L. 630 from French territory for between two and five years. They may make an order permanently excluding an alien convicted of an offence under Article L. 627.
>
> An exclusion order shall automatically entail removal of the convicted person at the end of his sentence. ..."

45. Former Article L. 627 of the Public Health Code provided:

> "Anyone who has contravened the provisions of the public-administration regulations laid down in the preceding Article concerning toxic plants or substances classified under the regulations as narcotics shall be liable on conviction to between two and ten years' imprisonment and a fine of between FRF 5,000 and FRF 50,000,000, or one only of those penalties. The sentence for offences of importing, producing, manufacturing or unlawfully exporting the said substances or plants shall be between ten and twenty years' imprisonment ...
>
> Penalties for attempts to commit any of the offences referred to in the preceding paragraph shall be the same as for the completed offence. A like rule shall apply to criminal association or conspiracy to commit such offences ...
>
> The following persons also shall be liable to imprisonment of between two and ten years and a fine of between FRF 5,000 and FRF 50,000,000, or to one only of those penalties:
>
> (1) Anyone who has facilitated the use by another of the said substances or plants by procuring premises or by any other means, and whether or not for consideration ...
>
> Where the person whose use of the said substances has been facilitated is a minor under 21 ... the term of imprisonment shall be between five and ten years ..."

46. As regards the question of compliance with Article 34 of the Convention, see *Mamatkulov and Askarov*, cited above, §§ 39-53.

THE LAW

...

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

92. The Court moreover observes that the respondent Government failed to comply with the indications that it had given to them under Rule 39 of the Rules of Court. This raises the question as to whether there has been a violation of Article 34 of the Convention, taking into account the alleged breach of Article 3.

Article 34 of the Convention provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of Court provides:

"1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. Notice of these measures shall be given to the Committee of Ministers.

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. The parties' submissions

93. Counsel for the applicant pointed out that he had not been able to make contact with his client since his removal to Algeria. He explained that this had hindered the exercise of the applicant's right of petition before the Court.

In counsel's view, by expelling the applicant on 19 August 1999, when the Court was about to examine his application on 24 August, the Government had breached his right to an effective remedy as guaranteed by Article 34 of the Convention.

94. In his further observations, the applicant's representative referred to the case of *Mamatkulov and Askarov* (cited above).

95. He observed that in that judgment the Court had concluded that the failure by a Contracting State to comply with an interim measure amounted to a breach of Article 34 of the Convention.

96. He considered that it had been clearly established that in the present case the French Government had not complied with the interim measures indicated to them, and that such an attitude undoubtedly constituted a violation of Article 34 of the Convention.

97. The Government maintained that they had used their best endeavours to take into account the request made by the Court under Rule 39 and that the applicant's removal had accordingly been postponed to allow a re-examination of his situation.

They added that the fresh examination had shown that there were no grounds relating to the applicant's health that stood in the way of his removal. They stressed that the applicant had not been taking medication and that the only treatment considered desirable by doctors for the future was not currently available in France or Algeria.

98. They moreover contended that the Court's request, according to the very wording of its Rules, was simply an indication given to the State and not a legally binding order for action on its part.

99. The Government, referring to the Court's judgment in *Cruz Varas and Others v. Sweden* (judgment of 20 March 1991, Series A no. 201), considered that the applicant's removal had not interfered with his right under Article 34 of the Convention to lodge an individual application with

the Court without the effective exercise of that right being hindered in any way by the State.

100. In their further observations they pointed out that the applicant's expulsion had taken place before the delivery of the *Mamatkulov and Askarov* judgment and submitted that the Court was required to reach its findings with reference to the applicable legal context at the time of the impugned measure.

B. The Court's assessment

101. The Court observes that, in a judgment delivered by the Grand Chamber on 4 February 2005, it ruled on the consequences, in the light of Article 34 of the Convention, of a respondent Government's failure to comply with measures indicated by the Court under Rule 39 (see *Mamatkulov and Askarov*, cited above, §§ 99-129).

102. The Court reiterated that the undertaking not to hinder the effective exercise of the right of individual application precluded any interference with the individual's right to present and pursue his complaint before the Court effectively.

103. Thus, in cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint. The result that the applicant wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it. Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the "effective exercise" of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject-matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State (ibid., § 108).

104. In the present case, as the applicant was expelled by France to Algeria, the level of protection that the Court was able to afford the rights which he was asserting under Article 3 of the Convention was irreversibly reduced. In addition, as the applicant's lawyer has lost all contact with him since his expulsion, the gathering of evidence in support of the applicant's allegations has proved more complex.

105. The Court further pointed out in *Mamatkulov and Askarov* that the system of protection, as it now operated, had been modified by Protocol No. 11 and that the right of individual application was no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoyed at

the international level a real right of action to assert the rights and freedoms to which they were directly entitled under the Convention. It considered that in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures could not be dissociated from the proceedings to which they related or the decision on the merits they sought to protect.

106. It concluded that, as a result, it could be said that, whatever the legal system in question, the proper administration of justice required that no irreparable action be taken while proceedings were pending.

107. Likewise, under the Convention system, interim measures, as they have consistently been applied in practice, play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.

108. Indications of interim measures given by the Court, as in the present case, permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention (ibid., § 125).

109. The Court points out that in its *Mamatkulov and Askarov* judgment it accepted that in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents.

It also reiterated, however, that it was of crucial importance that the Convention be interpreted and applied in a manner which rendered its rights practical and effective, not theoretical and illusory. It added that the Convention was a living instrument which had to be interpreted in the light of present-day conditions (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, § 31).

110. The Court considers that, in the present case, it was prevented by the applicant's expulsion to Algeria from conducting a proper examination of his complaints in accordance with its settled practice in similar cases and ultimately from protecting him, if need be, against potential violations of the Convention. As a result, the applicant has been hindered in the effective exercise of his right of individual application guaranteed by Article 34 of the Convention.

111. The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application.

It stresses that, in the present case, even though the binding nature of measures adopted under Rule 39 had not yet been expressly asserted at the time of the applicant's expulsion, Contracting States were nevertheless already required to comply with Article 34 and fulfil their ensuing obligations.

112. Having regard to the material before it, the Court concludes that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, France is in breach of its obligations in the present case under Article 34 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

4. *Holds* that France has failed to comply with its obligations under Article 34 of the Convention;

...

Done in French, and notified in writing on 17 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE	Nicolas BRATZA
Registrar	President