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CHA/CFJ/PEH

Vedr.: J. nr. 2015-31-0428 – Klage over afslag på fri proces

Hermed anmodes om genoptagelse af Procesbevillingsnævnets sagsbehandling i ovennævnte sag om klage over ulovligt afslag på fri proces for så vidt angår påstanden om anerkendelse af undersøgelsespligt m.v. i tortursager, jf. EMRK art. 3 og FNs Antitorturkonvention art. 12.

Civilstyrelsens hovedbegrundelse for ikke at meddele fri proces til denne påstand var, at der efter styrelsens opfattelse ikke *"...ved Operation Green Desert eller i forbindelse hermed har foreligget dansk jurisdiktion i henhold til EMRK artikel 1, idet der ikke foreligger sådanne særlige forhold, at der kan ske en udstrækning af dansk jurisdiktion uden for det danske territorium."* (Civilstyrelsens afgørelse af 26. maj 2015, s.8, 3. afsnit).

Dansk jurisdiktion er i lige grad en forudsætning for såvel påstand 1 som påstand 2. Det må derfor antages, at Procesbevillingsnævnet i sin afgørelse har forudsat dansk jurisdiktion for så vidt angår begge påstande.

Når der således - ubestrideligt – nu skal forudsættes dansk jurisdiktion, som redegjort udførligt for i klagens pkt. 4, er ansøgerne omfattet af EMRK art. 3s processuelle garanti om statens undersøgelsesforpligtigelse. Denne pligt kan opfyldes af en national domstol, jf. f. eks. EMDs dom af 6. april 2004 og som nærmere redegjort for i bilag 1A, underbilag 13 (pkt. A. 4 s. 8-9).

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Det bemærkes endvidere, at Procesbevillingsnævnets afgørelse af 11. april 2014 - med tilladelse til kære til Højesteret af Østre Landsrets kendelse af 23. december 2013 - omfattede begge sagsøgernes påstande og således også påstanden om undersøgelsesforpligtelsen. Nævnet har således med denne afgørelse anerkendt påstanden om undersøgelsesforpligtelsen som princi-piel, jf. retsplejelovens § 392, stk. 2.

Fra EMDs praksis angående undersøgelsesforpligtelsen ifølge EMRK art. 13 kan følgende påberåbes:

Aksoy mod Tyrkiet, EMD dom af 18. december 1996

> *"95. The Court observes that Article 13 (art. 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 (art. 13) 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 (art. 13) (see the Chahal judgment cited at paragraph 62 above, pp. 1869-70, para. 145). The scope of the obligation under Article 13 (art. 13) varies depending on the nature of the applicant's complaint under the Convention (see the above-mentioned Chahal judgment, pp. 1870-71, paras. 150-51). Nevertheless, the remedy required by Article 13 (art. 13) must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.*
>
> *96. The Court would first make it clear that its finding (in paragraph 57 above) that there existed special circumstances which absolved the applicant from his obligation to exhaust domestic remedies should not be taken as meaning that remedies are ineffective in South-East Turkey (see, mutatis mutandis, the Akdivar and Others judgment cited at paragraph 38 above, pp. 1213-14, para. 77).*

*97. Secondly, the Court, like the Commission, would take judicial notice of the fact that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence. Furthermore, having been ill-treated in this way, an individual will often have had his capacity or will to pursue a complaint impaired.*

*98. The nature of the right safeguarded under Article 3 of the Convention (art. 3) has implications for Article 13 (art. 13). Given the fundamental importance of the prohibition of torture (see paragraph 62 above) and the especially vulnerable position of torture victims, Article 13 (art. 13) imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.*

*Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13 (art. 13) (see, mutatis mutandis, the Soering judgment cited at paragraph 62 above, pp. 34-35, para. 88)."* (her understreget).

Chahal mod UK, EMD dom af 15. november 1996

*"150. It is true, as the Government have pointed out, that in the cases of Klass and Others and Leander (both cited at paragraph 142 above), the Court held that Article 13 (art. 13) only required a remedy that was*

*"as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention (art. 8, art. 10) and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 (art. 3), where the issues concerning national security are immaterial.*

*151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 (art. 3), the notion of an effective remedy under Article 13 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.*

*152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective (see the above-mentioned Leander judgment, p. 29, para. 77)."* (her understreget).

Hilal Mammadov mod Azerbaijan, EMD dom af 4. februar 2016

*"90. Where an individual raises an arguable claim that he or she has been ill-treated by the police in breach of Article 3, that provision – read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention" – requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice, and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see Assenov and Oth-*

*ers,cited above, § 102, and Labita v. Italy [GC], no. 26772/95, § 131, ECHR 2000-IV).*

*91. An investigation into allegations of ill-treatment must be thorough, meaning that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to form the basis of their decisions (see Assenov and Others, cited above, § 103 et seq.). They must take all steps reasonably available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard. Moreover, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure (see Batı and Others v. Turkey, nos. 33097/96 and 57834/00, §§ 134 and 137, ECHR 2004-IV).*

*92. Moreover, the investigation must be expeditious. In cases under Articles 2 and 3 of the Convention, where the effectiveness of the official investigation is at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time (see Kopylov v. Russia, no. 3933/04, § 135, 29 July 2010). Consideration was given to the starting of investigations, delays in taking statements (see Timurtaş v. Turkey, no. 23531/94, § 89, ECHR 2000-VI, and Tekin v. Turkey, 9 June 1998, § 67, Reports 1998-IV), and the length of the initial investigation (see Indelicato v. Italy, no. 31143/96, § 37, 18 October 2001)."* (her understreget).

Som det fremgår af ovenstående EMD praksis, har effektive retsmidler efter art. 13 en særlig betydning, når det drejer sig om krænkelse af art. 3. Ifølge dommen i sagen Aksoy mod Tyrkiet skal art. 13 medføre en *"prompt and impartial"* undersøgelse, som foreskrevet i FNs Anitorturkonventions art. 12.

Ifølge dommen i sagen Chahal mod UK skal undersøgelsen foretages af en national domstol eller af en myndighed med samme magt og garantier.

Endelig ifølge dommen i sagen Hilal Mammadov mod Azerbaijan, som er den nyeste fra 2016, bekræftes det, at en sådan undersøgelse skal kunne føre til identifikation og straf af de ansvarlige og undersøgelsen skal være grundig og foretages hurtigt.

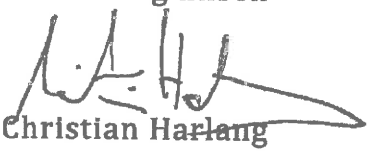
Uanset den foreliggende sag, der blev anlagt fra september 2011, er der indtil videre kun blevet foretaget en undersøgelse i 2012 af Forsvarets Auditørkorps, som henhører under det sagsøgte Forsvarsministerium. Undersøgelsen blev koncentreret om en officer, der angiveligt havde videregivet en videooptagelse fra Operation Green Desert, og sagen blev henlagt, da vedkommende ikke ville oplyse sin kilde.

Dette har ført til, at FNs Antitorturkomité i forbindelse med sin eksamination af Danmarks periodiske rapport i november udtalte i sine "Concluding observations" dateret 4. februar 2016:

> *"The State party should ensure that (a) investigations on the transfer of prisoners to the custody of other states' forces in its military operations abroad are undertaken to completion by an independent body, and made public; and that (b) if a violation of article 3 of the Convention is established, those responsible are appropriately prosecuted and victims are entitled to obtain redress".*

På baggrund af ovenstående anmodes nævnet om at genoptage behandlingen og meddele fri proces til påstanden om anerkendelse af undersøgelsespligt m.v.

Med venlig hilsen



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