



## Expulsion of convicted Iraqi migrant smuggler would not breach the Convention, but he had no access to suspensive remedy

The case concerned an order for the expulsion to Iraq of an Iraqi national following his conviction in Romania for having facilitated the entry to Romania of persons involved in terrorist activities (a migrant smuggling offence).

In today's **Chamber** judgment<sup>1</sup> in the case of **D and Others v. Romania** (application no. 75953/16) the European Court of Human Rights held, unanimously:

- that there would **not be a violation of Article 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment)** of the European Convention on Human Rights if the order to expel the applicant to Iraq were implemented;
- that there had been a **violation of Article 13 (right to an effective remedy)** of the Convention, **taken together with Articles 2 and 3.**

The Court held that the general evidence submitted by D was accompanied by very little information about his individual circumstances and failed to demonstrate in practical terms that there was a direct link between his conviction in Romania and the likelihood of his being subjected in Iraq to treatment contrary to Articles 2 and 3 of the Convention. The actions for which D had been convicted in Romania had not taken place in Iraqi territory and had no direct link with terrorism. There were therefore no serious or proven grounds to believe that if he were returned to Iraq, D would run a real risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention.

The Court noted that the remedies available to the applicant to challenge the expulsion order did not have suspensive effect, which was incompatible with the Court's case-law in respect of Article 13.

The Court considered that the complaints under Articles 6 (right to a fair hearing) and 8 (right to respect for private and family life) of the Convention were manifestly ill-founded.

The Court decided to continue to indicate to the Government (Rule 39 of the Rules of Court) not to send D back to Iraq until such time as the judgment became final or the Court gave another ruling on the subject.

### Principal facts

The applicants are D, an Iraqi national who was born in 1975, and his former wife and their three children, Romanian nationals. They live in Bucharest.

D arrived in Romania in 1994 and was legally resident there until 1997. That same year he obtained refugee status in Germany and returned to Romania, where he married. The couple, who had three children, divorced in 2009. Custody of the children was granted to the mother.

Until 2003 D was legally resident in Romania, then illegally after that date. In 2006 the prosecutor's office declared that his presence on Romanian territory was undesirable for a period of 15 years, on

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](http://www.coe.int/t/dghl/monitoring/execution).

the ground that he constituted a serious threat to national security. In the same year D was expelled to Syria, but he returned to Romania illegally in 2007, under a false identity and with false identity papers.

In 2007 D was granted “tolerated status” on Romanian territory. That same year the prosecutor’s office opened a criminal investigation against him on charges of migrant smuggling, membership of a criminal organisation and forgery. Three criminal case files were compiled against him. D was sentenced to prison terms in respect of the first two sets of charges. In this application, his complaints concerned the third criminal case, in which he was accused of having facilitated the entry into Romanian territory of five Iraqi nationals with links to terrorist activities.

In 2014 the first-instance court sentenced D to seven years’ imprisonment, together with a five-year prohibition on residing in the country. On appeal, his sentence was reduced to three years and six months’ imprisonment and the High Court upheld the order for his exclusion from the national territory for five years.

In 2017, after having served his sentence, D was released then placed in administrative detention with a view to his detention from Romania. The applicant challenged his expulsion, alleging that he would be exposed to the death penalty, torture or ill-treatment. He specified that his expulsion would also have irreversible consequences for his private and family life. He also made an asylum claim. All his appeals were rejected.

In the meantime, D contacted the European Court of Human Rights, requesting the application of an interim measure (Rule 39 of the Rules of Court). In October 2017 the Court decided to ask the Romanian Government to stay D’s expulsion until further notice.

In 2019 was granted “tolerated status” until 11 May 2019. He lives with his ex-wife.

## Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment), D alleged that he would be exposed to the death penalty or that he would be subjected to torture and inhuman treatment were he to be deported to Iraq.

Relying on Article 13 (right to an effective remedy), D complained that he had not had access to a remedy with suspensive effect before the domestic courts, which would have enabled those courts to examine his allegations under Articles 2 and 3 of the Convention in the event of his expulsion to Iraq.

Relying on Article 6 (right to a fair trial), D complained about the length of the criminal proceedings the fact that he had been convicted on the basis of statements from witnesses who had not been heard directly by the courts and the use of secret documents to which he had not had access.

The five applicants complained about a breach of their rights as guaranteed by Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 30 November 2016.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,  
Faris **Vehabović** (Bosnia and Herzegovina),  
Iulia Antoanella **Motoc** (Romania),  
Branko **Lubarda** (Serbia),  
Carlo **Ranzoni** (Liechtenstein),  
Georges **Ravarani** (Luxembourg),  
Jolien **Schukking** (the Netherlands),

and also Andrea Tamietti, Deputy Section Registrar.

## Decision of the Court

### Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment)

D alleged that his conviction in Romania for acts linked to terrorism would expose him to ill-treatment, torture or the death penalty if he returned to Iraq. In support of his argument, he referred to the general situation in Iraq.

The Court noted that the general evidence submitted by D was accompanied by very little information about his individual circumstances and failed to demonstrate in practical terms that there was a direct link between his conviction in Romania and the likelihood of his being subjected to treatment in breach of Articles 2 and 3 of the Convention in Iraq. Indeed, although this evidence drew attention to failings in the Iraqi system for suppressing terrorism, it indicated that the shortcomings in question had been observed in the context of criminal proceedings conducted against persons suspected of terrorist acts carried out on Iraqi soil. However, the actions for which D had been convicted in Romania had not occurred on Iraqi territory and had no direct link with terrorism, as D had been convicted of facilitating the entry into Romanian territory of individuals involved in terrorist activities (a migrant-smuggling offence). In addition, D had never been accused, in Romania or Iraq, of having been personally involved in acts of a terrorist nature. For these reasons, the Court concluded that there was no conclusive evidence to suggest that D was exposed to a real threat of being re-tried in Iraq or of being re-sentenced.

The Court also noted that Iraq applied the *non bis in idem* principle, which made it possible from the outset to rule out the possibility of a new trial for the same offences. Furthermore, D had not submitted any evidence showing that this principle had not been respected in practice by the Iraqi authorities. Lastly, D had a normal relationship with the authorities in his country, given that they had issued him, at his request, with a document stating that he was not being searched for or under prosecution in Iraq and that he was not linked to military or terrorist groups. The same Iraqi authorities had also issued him with at least two *laissez-passer*.

For these reasons the Court considered that, in holding that D had not demonstrated that he ran a real risk on account of his individual situation were he to be returned to Iraq, the national courts had not imposed on him an excessive evidentiary burden. In addition, the analysis performed by the national courts had been reasoned and free from arbitrariness.

It followed that there were no serious or proven grounds to believe that if he were returned to Iraq, D would run a real risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention. There would not therefore be a violation of Articles 2 and 3 if the order to expel the applicant to Iraq were implemented.

### Article 13 (right to an effective remedy)

The Court noted that D had been able to challenge the execution of the additional penalty imposed on him (a five-year ban on entering the national territory) and that he had also applied for asylum. However, those remedies did not have suspensive effect under Romanian law in so far as D's situation was concerned, which was incompatible with the Court's case-law. It followed that there had been a violation of Article 13 taken together with Articles 2 and 3 of the Convention.

### Other articles

The Court concluded that the complaints under Articles 6 and 8 of the Convention were manifestly unfounded, for the reasons set out below.

**Under Article 6 (right to a fair trial)**, the Court noted, in particular, that the proceedings had lasted four years, one month and four days for two levels of jurisdiction, in a case involving cross-border elements and foreign witnesses who had had to be identified and located by the national authorities. Those authorities had thus pursued the requirements of a fair trial with due diligence. The Court also noted that there had been serious grounds for the failure of one witness to appear and that secret evidence had not been used to justify D's conviction.

**Under Article 8 (right to respect for private and family life)**, the Court held that the implementation of D's expulsion to Iraq did not appear to give rise to any violation of the five applicants' right to respect for their private and family life. In its reasoning, the Court gave specific consideration to the couple's divorce, which indicated a change in the applicants' family life, the particular seriousness of the terrorism-related offence and other offences of which D had been convicted, and the duration of the measure banning him from the national territory, which was limited to five years.

### [Just satisfaction \(Article 41\)](#)

The Court held that its findings under Article 13 of the Convention taken together with Articles 2 and 3 constituted sufficient just satisfaction for any non-pecuniary damage sustained by D.

*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.