

## Case Summary

*By Gillian Higgins, 7 December 2011*

### **Application No 002/2011 - Soufiane Ababou v. People's Democratic Republic of Algeria**

#### Application

On 20 February 2011, an application was received by the Registry of the African Court on Human and Peoples' Rights (AfCHPR) submitted by Mr Youssef Ababou who alleged that his son, Mr Soufiane Ababou, (the "Applicant") had been forced to join the military in Algeria against his will.

The application states that Soufiane Ababou was summoned to report to the Military Tribunal in Oran by State Counsel on 30 January 2011 for "refusing to undergo military training". After reporting to the Tribunal, the Applicant has not been heard from since. The summary explains that his father fears that he has been "incorporated into the army forcefully" and that his son is a "cardiac patient".

The application submitted on behalf of Soufiane Ababou was not signed, nor was there any indication of "evidence of exhaustion of local remedies or the inordinate delay thereof." A signed copy was subsequently submitted on 25 March 2011 in which the Applicant's representative also set out those steps taken to exhaust domestic remedies.

On 10 June 2011, the Registry of the AfCHPR made enquiries from the African Union Commission as to whether the People's Democratic Republic of Algeria had deposited the declaration accepting the Court's competence to hear cases brought under Article 5(3) of the Protocol to the African Charter. Such a declaration is required in order to allow individuals to petition the AfCHPR directly (See Articles 5(3) and 34(6) of the Protocol). The Court was informed that the Respondent had not deposited the declaration and determined therefore that it did not have jurisdiction to consider the application. The Court sent the case back to the African Commission under Article 6(3) of the Protocol.

#### Comment

The publicly available summary of this application does detail the article of the African Charter allegedly breached by Algeria. Indeed, the substance of the application did not receive any scrutiny, as it was determined correctly that the Court lacked jurisdiction as Algeria had not signed the requisite declaration allowing individuals to petition the Court directly.

The case of Soufiane Ababou has been reported widely. The reason Mr Ababou resisted military service was because he was a pacifist. Interestingly, at the time of writing, there is no legal provision for conscientious objection and no substitute civil service in Algeria. Any individual claiming to be a conscientious objector will be considered to be a draft evader.

The interesting question that would have arisen for determination before the Court, is whether or not Soufiane Ababou's right to freedom of conscience under Article 8 of the African Charter had been breached by the State of Algeria. Article 8 provides that "Freedom of conscience, the profession and

free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms”.

A similar issue has recently been addressed in a relevant decision of the Grand Chamber of the European Court of Human Rights in a ground-breaking judgement in the case of *Bayatyan v Armenia* (Application no. 23459/03, 1/6/2011), in which the Grand Chamber ruled that states have a duty to respect individuals’ right to conscientious objection to military service as part of their obligation to respect the right to freedom of thought, conscience and religion set out in Article 9 of the European Convention on Human Rights. This is the first time that the right of conscientious objection to military service has been explicitly recognised under the European Convention on Human Rights.

Given the judgment in *Bayatyan* and the important subject matter of Soufiane Ababou’s application, the question arises as to whether it would be possible, and indeed desirable, for the African Commission to refer the case back for determination by the ACHPR. The advantages for the Applicant are obvious, as the Court unlike the Commission would deliver a binding judgment within 90 days of having completed its deliberations, if the application was admissible. In principle, the Commission has the power under Article 5 of the Protocol to the African Charter to submit cases to the Court. Interestingly, referral of the case by the Commission in this manner would provide the Court with the jurisdiction it lacked initially, when approached by Soufiane Ababou in his individual capacity.

Further or in the alternative, the Applicant’s representative could submit a separate “communication” to the African Commission (See Rules 93-113 of the Rules of Procedure of the African Commission) requesting its urgent transfer to the Court. After receiving a case submitted by an individual, the Commission may then decide to bring the case before the AfCHPR. The modalities of such a transfer have not been determined by the Protocol and would therefore largely depend on the willingness of the Commission to do so. Provision would also need to be made for the representation of the victim in proceedings where the AfCHPR is referred a case by the Commission.

The author agrees with the dissenting opinion of Judge Fatsag Ouguergouz in the application of *Ekollo Moundi Alexandre v Cameroon and Nigeria* in which he determined that in cases where the AfCHPR does not have jurisdiction, the application should nonetheless be communicated to the State concerned for information purposes in order to give the State party the opportunity to accept the Court’s jurisdiction. No such communication was made in the case of Soufiane Ababou to Algeria. Furthermore, HHJ Judge Ouguergouz criticised the Chamber for failing to provide any reasons as to why it transferred the case back to the Commission and stated that although “it lies within the discretionary powers of the Court, such a choice cannot be made in an arbitrary manner, in other words, in a hazardous and unpredictable way or in a manner bereft of any apparent logical approach.” (para. 23)

Given the importance of the issues in the application of Soufiane Ababou, and the existence of a mechanism under Article 5 of the Protocol by which the Commission could submit the case to the Court on his behalf, perhaps it is time for the Commission to consider its next move carefully in relation to assisting this all-important fledgling institution.