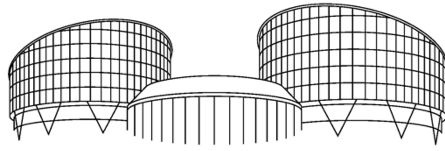

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 17675/18
Haykel Ben Khemais SAIDANI
against Germany

The European Court of Human Rights (Fifth Section), sitting on 4 September 2018 as a Committee composed of:
Yonko Grozev, *President,*
Angelika Nußberger,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 7 May 2018,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Haykel Ben Khemais Saidani, is a Tunisian national who was born in 1980. He was represented before the Court by Ms S. Basay-Yildiz, a lawyer practising in Frankfurt am Main.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant entered Germany in 2003 on a study visa. He was married to a German national from 2005 to 2009. In 2010 he was granted a residence permit in his own right, irrespective of his previous marriage. In April 2013 his place of residence was deregistered, with the authorities stating that they assumed that the applicant had left Germany. He re-entered Germany in August 2015.

1. Extradition request and charges in Germany

4. On 3 June 2016 the Tunisian authorities requested the applicant's extradition, stating that he was suspected of having been a member of a terrorist organisation which had planned and committed terrorist acts in Tunisia, including the attack on the Bardo Museum in Tunis in March 2015, where 24 persons had been killed, and the battle of the Tunisian-Libyan border city Ben Guerdane between security forces and jihadists. On 15 August 2016 the applicant was arrested. On 4 November 2016, at the request of the Public Prosecutor General, the Frankfurt am Main Court of Appeal ordered the applicant's release from detention pending extradition, because not all of the necessary documents for the extradition had been submitted by the Tunisian authorities. In April 2017 the Tunisian authorities provided additional information that the applicant had joined "Islamic State" in Syria in 2013.

5. On 26 January 2017, at the Public Prosecutor General's request, the Frankfurt am Main Court of Appeal issued an arrest warrant against the applicant based on, *inter alia*, a charge of supporting a terrorist organisation abroad. He was remanded in custody on 1 February 2017. On 17 August 2017 the Federal Supreme Court quashed the detention order, finding that there was a lack of evidence.

6. No information about the state of the extradition proceedings or the criminal proceedings in Germany was provided to the Court.

2. First set of expulsion proceedings and the asylum proceedings

7. On 9 March 2017 the migration authorities of the city of Frankfurt am Main ordered the applicant's expulsion, finding that his residence permit had expired as a result of his absence from Germany between 2013 and 2015. The authorities declared the decision immediately enforceable, arguing that, according to information gathered by the security services, the applicant was a member of "Islamic State" and planning terrorist attacks in Germany and Tunisia.

8. On 22 March 2017 the applicant lodged an asylum application, which the Federal Office for Migration and Refugees dismissed as manifestly ill-founded two days later.

9. On 5 April 2017 the Frankfurt am Main Administrative Court dismissed a request by the applicant that his appeal against the decision of 9 March 2017 be granted suspensive effect, on the condition that the Tunisian authorities provided certain diplomatic assurances prior to his deportation.

10. On 11 July 2017 the Tunisian Ministry of Foreign Affairs sent a *note verbale* stating that the applicant's right to a fair trial would be respected, that he would be treated and detained in compliance with international human rights obligations, and that he could be visited in prison by his

lawyers and certain human rights organisations (the National Authority for the Prevention of Torture, the Tunisian League for Human Rights, the International Committee of the Red Cross (ICRC), and the UN High Commissioner for Human Rights). The ministry further stated that there was a moratorium on carrying out capital punishment.

11. On 26 July 2017 the Frankfurt am Main Administrative Court stayed the applicant's deportation by way of interim measures, finding that it was doubtful whether the assurances given on 11 July 2017 met the requirements it had set out on 5 April 2017. In particular, no assurances had been given that the applicant could be visited in prison by German consular staff and that he would not be sentenced to the death penalty. The current moratorium on executions could expire or be lifted, and thus did not constitute a sufficient safeguard.

3. The proceedings at issue

12. On 1 August 2017 the Ministry of the Interior of Hesse ordered the applicant's deportation under section 58a of the Residence Act (see paragraph 28 below) because he was deemed to be a potential offender who posed a threat to national security (a *Gefährder*), based on his activities for "Islamic State". That order was immediately enforceable.

13. On 19 September 2017 the Federal Administrative Court dismissed a request by the applicant that his appeal against that order be granted suspensive effect, on the condition that the Tunisian authorities provided additional diplomatic assurances that a review with a view to commuting or reducing his sentence would be possible, should he be given a life sentence. The court assessed ample evidence for the applicant's involvement with "Islamic State", which had been provided by the security services, and concluded that it was likely that he would commit a terrorist act in Germany, without specifying any concrete plan or target. Having regard to the charges against the applicant in Tunisia, the ambiguous statements of the Tunisian authorities, the poor quality of the translation of the Tunisian documents, and a lack of experience in relation to the application of the new Tunisian Anti-Terrorism Act of 2015, it had to be assumed, in the applicant's favour, that there was a real risk that he would be sentenced to the death penalty in Tunisia. However, the death penalty would not prevent the applicant's deportation, because there was no real risk that that penalty would be executed. A moratorium on carrying out the death penalty had been in place for years, and the Tunisian Ministry of Foreign Affairs had provided assurances to that end in the *note verbale* of 11 July 2017. In practice, the death penalty would result in a *de facto* life sentence. Such a sentence was only compatible with Article 3 of the Convention where there was a possibility of review with a view to having the sentence commuted or reduced. For that reason, the applicant's deportation was subject to the condition of respective diplomatic assurances.

14. On 21 December 2017 the Tunisian Public Prosecutor General sent a *note verbale* stating that the (previous) President had pardoned 122 persons in 2012, with death penalties being commuted to life sentences, and that the applicant, if sentenced accordingly, could have the benefit of a presidential pardon.

15. The Federal Administrative Court subsequently requested, and received, additional information from the German Foreign Office on three occasions.

16. The German Foreign Office sent a written statement by the Tunisian Ministry of Justice which explicitly stated that persons convicted under the new Anti-Terrorism Act were eligible to apply for parole once they had served fifteen years in prison, under section 4 of that Act (which provided for the applicability of, *inter alia*, the Tunisian Criminal Code and the Tunisian Code of Criminal Procedure to offences within the scope of the Anti-Terrorism Act) taken in conjunction with the respective provisions of the Tunisian Code of Criminal Procedure (Articles 353 et seq.). Persons could also be pardoned by the President of Tunisia under Articles 371 et seq. of the Tunisian Code of Criminal Procedure. It was not possible to predict how an application for a pardon would be decided in the distant future. If there was no longer the perception of a terrorist threat in the future, such a measure might be more likely to be considered. Persons convicted of terrorist acts had been among those 122 persons pardoned in 2012. In that same statement, the Tunisian Ministry of Justice elaborated on the charges against the applicant in Tunisia, which included planning and organising the terrorist attack on the Bardo museum and attempting to conquer the city of Ben Guerdane as a member of “Islamic State”, and planning to commit terrorist attacks on two specific military institutions in Tunisia. In the light of the conclusions reached by the Tunis investigating judge, it was possible that the applicant would be sentenced to the death penalty.

17. The German Foreign Office added that Articles 353 et seq. of the Tunisian Code of Criminal Procedure were directly applicable only to persons sentenced to imprisonment. The applicant could have the benefit of those provisions nonetheless, as each and every death penalty was sooner or later commuted to a life sentence by way of presidential pardon, in view of the moratorium on carrying out capital punishment that had been in place since 1991. The provisions on parole were applicable after such commutation. The President’s right to pardon, as set out in Articles 371 et seq. of the Tunisian Code of Criminal Procedure (which was also applicable to convictions under the Anti-Terrorism Act), not only covered the commutation of a death penalty to a life sentence, but also the granting of release on parole, and was regularly made use of in practice.

18. On 26 March 2018 the Federal Administrative Court amended its decision of 19 September 2017 and rejected the applicant’s request that his

pending appeal be granted suspensive effect, on that occasion without imposing any conditions. It noted that the Tunisian authorities had provided information on the various charges against the applicant and considered that there was a real risk that he would be sentenced to the death penalty or a life sentence. However, in the light of the moratorium and the assurances of 11 July 2017 (see paragraph 10 above), there was no real risk that the applicant would be executed. In practice, the death penalty would constitute a life sentence and the applicant would have the possibility to have his (life) sentence reviewed with a view to being released on parole, in accordance with objective and pre-determined criteria which he would be aware of at the time of the imposition of the sentence.

19. The provisions of the Code of Criminal Procedure concerning parole, which provided for parole if a prisoner showed, through his conduct in detention, that he had changed, or if his or her release was in the public interest, met the standards set out in the Court's case-law on Article 3 of the Convention, and were applicable to convictions under the Anti-Terrorism Act. While those provisions were not directly applicable to persons sentenced to the death penalty, each and every death penalty was commuted to a life sentence by presidential pardon, rendering the provisions on parole applicable. The President's right to pardon, as set out in Articles 371 et seq. of the Tunisian Code of Criminal Procedure (which was also applicable to convictions under the Anti-Terrorism Act), not only covered the commutation of a death penalty to a life sentence, but also the granting of release on parole, and was regularly made use of in practice.

20. There was no reason to doubt the information provided by the Tunisian authorities that persons convicted of terrorist offences had been among those 122 persons pardoned in 2012. With regard to the statement of the German Foreign Office in January 2017 that persons convicted of terrorist offences were not eligible for presidential pardons, the Foreign Office had explicitly revised that position and explained that the previous position had been based on a political statement that could not legally bind the President. Media reports (one of which mentioned the applicant's name) in which the President of Tunisia had been quoted as saying that there would be no amnesty for persons convicted of terrorist offences and that he was opposed to a "law of repentance" did not rule out the possibility of the applicant receiving an individual pardon after he had served a considerable period of time in prison. Statements made in a political context, including that of the Tunisian Minister of Justice that Tunisia would, in connection with the reform of the law of pardoning, continue not to pardon terrorists, could not legally bind the President. It did not follow that commutation of a death penalty to a life sentence was permanently excluded or uncertain. The applicant, if sentenced to the death penalty, would have a realistic chance of being released.

21. Lastly, the Federal Administrative Court considered that the mechanism for reviewing a life sentence with a view to possible release satisfied the criteria set out by the Court under Article 3 of the Convention, that is, it was a review mechanism based on objective pre-determined criteria of which a prisoner was aware at the time of the imposition of the sentence. As each and every death penalty was sooner or later commuted to a life sentence by presidential pardon, at the moment the death penalty was imposed the applicant would know that that sentence would sooner or later be commuted to a life sentence. The provisions on the President's right to pardon were clear in that a prisoner could apply for a pardon at any time and the President could issue a pardon at any time. The fact that persons sentenced to life imprisonment were eligible to apply for release on parole after serving fifteen years' imprisonment was evidence of the right to pardon being exercised. The practice on pardoning and commutation, which had been established over a long period of time, was a sufficiently reliable guarantee in this respect, and there were no indications that that practice would be changed. Once the death penalty was commuted to a life sentence, the possibility of subsequent release on parole was governed not only by the rules on pardoning (Articles 371 et seq. of the Tunisian Code of Criminal Procedure), but also by the provisions of the Code of Criminal Procedure on that matter (Articles 353 et seq. of that Code), which constituted objective and pre-determined criteria.

22. The operative provisions of that decision were served on the applicant's counsel by fax on the morning of 27 March 2018. At 1 p.m. on that same day, prior to the written reasons for the decision being served, the applicant was taken to the airport for the purposes of being deported. The applicant's counsel lodged a request for interim measures and a constitutional complaint with the Federal Constitutional Court, which ordered, on that same day, that the applicant's deportation should be stayed until it rendered a decision on his request for interim measures.

23. On 3 April 2018 the applicant's counsel submitted the reasons for the applicant's constitutional complaint, alleging that there was no mechanism in Tunisia for the review of the *de facto* life sentence which the applicant was liable to face in the light of the non-enforcement of the death penalty – there was no possibility of a reduction in sentence based on objective pre-determined criteria of which a prisoner was aware at the time of the imposition of the sentence. The death penalty could not be commuted and the provisions of the Tunisian Code of Criminal Procedure concerning parole were not applicable. The latter required a presidential pardon as a prerequisite in order for the death penalty to be commuted to a life sentence. It was evident that the applicant would not have the benefit of such a pardon, in the light of the clear public statements of the President and senior Government officials that there would not be an amnesty for Tunisians convicted of terrorist acts. The possibility of a presidential pardon was

merely theoretical in his case. Moreover, the decision of the Federal Administrative Court had been arbitrary, in that it had relied on the information provided by the German Foreign Office that each and every death penalty would be commuted to a life sentence by way of presidential pardon. In the light of the public statements of the Tunisian President and senior Government officials to the contrary, as well as a previous report of the German Foreign Office, it would be necessary to investigate the matter further or require diplomatic assurances from the Tunisian authorities to that end.

24. By a decision of 4 May 2018, served on the parties on 7 May 2018, the Federal Constitutional Court declined to admit the constitutional complaint for adjudication (no. 2 BvR 632/18). It considered firstly that the Federal Administrative Court had comprehensively established the circumstances of the case, notably as regards the consequences of the imposition of the death penalty in Tunisia. The fact that neither the Tunisian authorities nor the German Foreign Office could provide concrete and detailed information on the practice of pardoning persons sentenced to the death penalty under the Anti-Terrorism Act was not imputable to the Federal Administrative Court. Rather, it was impossible to establish the full details regarding that factual question, as the Anti-Terrorism Act had entered in force only in 2015 and it was too early to have any established practice in respect of pardoning or parole. The Federal Constitutional Court considered that the political statements by the Tunisian President and his State Secretary that they objected to an "amnesty" for terrorists were to be understood as referring to a general practice of exempting persons convicted of terrorist offences from criminal liability. They did not contain any indication as regards pardoning in an individual case, which was a discretionary decision. The German Foreign Office had provided sufficient reasons for revising its position as to the possibility of terrorist offenders having the benefit of a pardon. The Federal Administrative Court could thus rely on the revised position.

25. The Federal Constitutional Court endorsed the Federal Administrative Court's finding that the applicant would not be executed, in the light of the moratorium on carrying out the death penalty which had been respected without exception since 1991 and in relation to which diplomatic assurances had been received from the Tunisian authorities. While there was a real risk that the applicant would be sentenced to the death penalty in Tunisia, his deportation would not amount to a breach of Article 2 of the Convention. Nor would it amount to a breach of Article 3 of the Convention or Article 1 of Protocol No. 13 to the Convention, because the applicant would not have a well-founded fear of being executed.

26. Nor would the life sentence which the applicant risked incurring in the light of the non-enforcement of the death penalty breach Article 3 of the Convention. The Federal Administrative Court had not exceeded its margin

of appreciation when it had considered that the sentence which the applicant could expect in Tunisia would be reducible, both *de jure* and *de facto*, and that he had a realistic prospect of being released after serving a certain period of time in prison. Reports were consistent that a two-step procedure was required in order to be released from prison after being sentenced to the death penalty. Firstly, the death penalty had to be commuted to a life sentence by way of presidential pardon, which was not limited to specific grounds or situations. According to the information provided by the German Foreign Office, each and every death penalty in Tunisia was commuted to a life sentence by way of presidential pardon. Secondly, the life sentence could be reduced either following the procedure concerning release on parole (Articles 353 and 354 of the Tunisian Code of Criminal Procedure) or through another presidential pardon (Articles 371 and 372 of that same Code), with parole based on presidential pardons being more common in practice. Both of these instruments constituted equally valid possibilities for having a life sentence reduced, and would come into play after the person had served at least fifteen years in prison. There were no indications that the existing possibilities for commuting a death penalty to a life sentence and subsequently reducing that sentence would not be applied to persons convicted under the new Anti-Terrorism Act, given that the Code of Criminal Procedure was applicable to convictions under that Act. Even though the point in time at which the Tunisian President would pardon a person sentenced to the death penalty was not foreseeable under that Act, there were no indications that the President would alter the existing practice of pardoning persons convicted of terrorist offences, such pardons had been granted in 2012. Therefore, if the applicant were sentenced to the death penalty in Tunisia, he would be aware of the conditions under which that sentence would be commuted to a life sentence and under which his release on parole would be considered at the time of the imposition of that sentence.

4. *Request for interim measures before the Court*

27. On 7 May 2018 the Court (the duty judge) rejected a request by the applicant under Rule 39 of the Rules of Court to stay his deportation to Tunisia for the duration of the proceedings before the Court.

B. Relevant domestic law

28. The deportation of a *Gefährder* (a potential offender who poses a threat to national security) is regulated in section 58a of the Residence Act, which reads:

> “(1) The supreme Land authority may, based on an assessment of the facts and without a prior expulsion order, issue a deportation order for a foreigner in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist

threat. The deportation order shall be immediately enforceable; no notice of intention to deport shall be necessary.

...”

C. Relevant country information on Tunisia

29. The 11 July 2017 Report of the Working Group on the Universal Periodic Review: Tunisia of the UN Human Rights Council (A/HRC/36/5) stated:

> “80. ... The number of cases in which the death sentence had been handed down currently stood at 26, with 35 cases still pending appeal. However, Tunisia had not enforced the death penalty since 1991 ...”

COMPLAINT

30. The applicant complained that it would be in breach of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 to deport him to Tunisia. He argued that it was evident from the submissions of the Tunisian authorities and the assessment by the German authorities that he would be sentenced to the death penalty in Tunisia. The current moratorium on executing that penalty could expire or be lifted. Being detained under such circumstances would amount to immense psychological suffering. Moreover, if he were not executed, the death penalty would constitute a *de facto* life sentence that was non-reducible. There was no sufficient mechanism to review and possibly reduce a life sentence given to persons originally sentenced to the death penalty. Given the nature of the offences with which he was charged, he was not going to have the benefit of a pardon from the President of Tunisia, which was a prerequisite for commuting the death penalty to a life sentence *de jure* and having the possibility to have that life sentence subsequently reviewed and reduced.

THE LAW

31. Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 read as follows:

Article 2

> “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ...”

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 1 of Protocol No. 13

"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

32. The Court observes that Tunisia sought the applicant's extradition on charges relating to terrorist offences in Tunisia. However, the removal at issue in the present case was the result of the German authorities' decision to order the applicant's deportation to Tunisia because they considered him to be a potential offender who posed a threat to Germany's national security (see also *X v. Germany* (dec.), no. 54646/17, 7 November 2017), and the proceedings before the domestic courts leading up to the application concerned the same decision. In Tunisia, the applicant continues to face charges on which the Tunisian authorities previously sought his extradition from Germany (see paragraphs 4 and 16 above). In this scenario, there is little difference between extradition and deportation, and it has to be reiterated that the assessment of whether there is an obligation under the Convention not to deport or extradite a person to another State does not depend on the legal basis for the measure (see *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 and 4 others, §§ 168 and 176, 10 April 2012, and *Trabelsi v. Belgium*, no. 140/10, § 116, ECHR 2014 (extracts)). The Court reiterates that Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there, as does Article 3 of the Convention in relation to a real risk of treatment contrary to that Article (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 123, ECHR 2010, with further references; see also *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 183-189, ECHR 2012 (extracts) concerning the deportation of persons deemed to be threats to national security).

33. The Court notes that the charges against the applicant in Tunisia carry the death penalty, and that the Tunisian authorities themselves confirmed that there was a real risk that he would be given that penalty (see paragraph 16 above). However, it is not in dispute that there is a moratorium on carrying out executions in Tunisia, a moratorium which has been respected without exception since 1991, and that the Tunisian authorities provided diplomatic assurances to that end in the applicant's case. Against this background, and distinguishing the present case from that of *Al-Saadoon and Mufdhi* (cited above, §§ 137 and 144), the Court sees no reason to depart from the assessment of the domestic courts that there was no real risk that the applicant would be executed in Tunisia and that he

could not claim to have a well-founded fear of being executed entailing immense psychological suffering (see paragraphs 13, 18 and 25 above). The possible imposition of the death penalty in Tunisia therefore does not in itself result in the applicant's deportation being prohibited, either under Article 2 of the Convention and Article 1 of Protocol No. 13 or under Article 3 of the Convention.

34. The Court agrees with the domestic courts' determination that, if the applicant were given the death penalty in Tunisia, that penalty would *de facto* constitute a life sentence (see paragraphs 13, 18 and 26 above). The relevant general principles concerning the requirements under which the imposition of a life sentence on an adult offender is compatible with Article 3 of the Convention have recently been summarised in *Murray v. the Netherlands* [GC], no. 10511/10, §§ 99-104, ECHR 2016; as to the relevance of these standards in the context of deportation or extradition to a State that is not a Contracting Party to the Convention, see *Trabelsi*, cited above, § 119).

35. The Court observes that the Federal Administrative Court repeatedly requested information and assurances as to, *inter alia*, the possibility of such a *de facto* life sentence being reviewed and its reducibility *de jure* and *de facto* (see paragraphs 13 and 15 above). Based on the information it received, that court gave thorough reasons as to why it considered that the sentence which the applicant was liable to receive in Tunisia was reducible both *de jure* and *de facto*, and why he had a realistic prospect of being released after serving a certain period of time in prison (see paragraphs 18-21 above). Those findings were confirmed by the Federal Constitutional Court, which gave extensive reasons in its own decision in this respect (see paragraphs 24 and 26 above).

36. The Court sees no reason to depart from the domestic courts' findings as regards the reducibility *de jure* of the death penalty imposed under the Tunisian Anti-Terrorism Act which the applicant risked incurring. That Act explicitly provided for the applicability of the Tunisian Code of Criminal Procedure, and the Tunisian authorities gave diplomatic assurances confirming this (see paragraphs 16, 17, 19 and 26 above). Thus, two steps have to be taken in order for the applicant to be released from prison. Firstly, the death penalty has to be commuted to a life sentence by way of presidential pardon, which in itself does not raise issues under Article 3, as commutation is not limited to grounds such as ill-health, physical incapacity or old age (see *Murray*, cited above, §§ 99-100, with further references). Secondly, the life sentence could be reduced either following the procedure on parole set out in the Tunisian Code of Criminal Procedure or by way of another presidential pardon, with both instruments constituting equally valid possibilities for reducing the life sentence (see paragraphs 19, 21 and 26 above).

37. As regards reducibility *de facto*, at the explicit request of the Federal Administrative Court, the German Foreign Office advised the court that each and every death penalty in Tunisia was sooner or later commuted to a life sentence by way of presidential pardon (see paragraph 17 above). Having regard also to the reasons given by the German Foreign Office for revising its earlier position (see paragraphs 20 and 24 above), the Court notes that there are no international or other reports to the contrary. In so far as the applicant submitted that he was not going to have the benefit of a pardon, given the nature of the offences with which he was charged and public statements made by the President and other senior Government officials, the domestic courts found that those statements were of a political nature and not legally binding on the President (see paragraphs 20 and 24 above). Moreover, those statements referred to a general practice of exempting persons convicted of terrorist offences from criminal liability, and did not contain any indication as regards pardoning in an individual case, which was a discretionary decision (see paragraphs 20 and 24 above). The domestic courts considered that persons convicted of terrorist offences had previously been pardoned, that there were no precedents in respect of persons convicted under the Anti-Terrorism Act owing to insufficient time having elapsed, and that there were no indications that the practice of issuing presidential pardons would be changed or not applied to persons convicted under the Anti-Terrorism Act (see paragraphs 19, 20, 24 and 26 above). The Court does not see any reason to depart from the findings and the conclusion of the domestic courts in this respect.

38. Lastly, the Court concurs with the findings of the Federal Administrative Court and the Federal Constitutional Court that the mechanism for reviewing a life sentence with a view to possible release satisfied the criteria set out by the Court under Article 3 of the Convention (see paragraphs 18, 21 and 26 above; see also *Murray*, cited above, § 100, with further references). Should the applicant be sentenced to the death penalty, at the time of the imposition of that sentence, it will be sufficiently foreseeable for him that the sentence will sooner or later be commuted to a life sentence, given that each and every death penalty in Tunisia is sooner or later commuted to a life sentence by presidential pardon (see paragraphs 21 and 26 above). The provisions on the President's right to pardon are clear in that a prisoner can apply for a pardon at any time and the President can issue a pardon at any time (see paragraph 21 above; see also, *mutatis mutandis*, *Hutchinson v. the United Kingdom* [GC], no. 57592/08, §§ 44 and 69, ECHR 2017). Once the death penalty is commuted to a life sentence, the possibility of subsequent release on parole will be governed not only by the rules on pardoning (Articles 371 et seq. of the Tunisian Code of Criminal Procedure), but also by the provisions of the Code of Criminal Procedure on that matter (Articles 353 et seq. of that Code), which constitute objective and pre-determined criteria (see paragraphs 21 and 26 above).

39. In the light of the foregoing, the Court concludes that, even though there is a real risk that the death penalty will be imposed on the applicant in Tunisia, there is no real risk that that sentence, which would *de facto* constitute a life sentence, would be imposed in a manner that is incompatible with the requirements established in the Court's case-law under Article 3 of the Convention.

40. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 27 September 2018.

Milan Blaško Deputy Registrar	Yonko Grozev President