



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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 44294/04  
by Sunday E. OMWENYEKE  
against Germany

The European Court of Human Rights (Fifth Section), sitting on 20 November 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,

Mrs S. BOTOCHAROVA,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr R. MARUSTE,

Mr J. BORREGO BORREGO,

Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 9 December 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Sunday E. Omwenyeke, is a Nigerian national who was born in 1965 and lives in Bremen. He was represented before the Court by Ms N. Mole, a lawyer working for the AIRE (Advice on Individual Rights in Europe) Centre in London.

## **A. The circumstances of the case**

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

### *1. Background to the case*

On 22 June 1998 the applicant entered Germany and requested asylum.

On 12 October 1998 the Federal Office for Refugees rejected his asylum request and declared that there was no prohibition on deporting him because he did not face political persecution in Nigeria. The applicant brought an action in the Hannover Administrative Court seeking to have this decision quashed.

On 29 October 1998 the applicant, who had been issued with a provisional residence permit (*Aufenthaltsgestattung*, see 'Relevant domestic law' below), was directed to reside and remain within the city of Wolfsburg pending the decision on his asylum request.

Between 12 November 1998 and 11 January 2000 the Wolfsburg Aliens Office granted the applicant leave to quit the city of Wolfsburg on six occasions in order to attend conferences for refugees and on one occasion to meet a lawyer.

In April 2000 the applicant left the city of Wolfsburg in order to help in preparations for and to attend another congress for refugees, despite the fact that the Aliens Office had refused him permission to leave the city. The applicant left Wolfsburg on three further occasions without having requested authorisation to do so. On 6 February 2001 the Wolfsburg District Court discontinued the criminal proceedings instituted against the applicant for repeated disregard of a territorial restriction of residence, since it considered the applicant's offence to be of a minor nature.

On 3 May 2001 the applicant was again stopped by the police outside the Wolfsburg city limits; again, he had not requested and obtained the necessary authorisation.

On 16 July 2001 the applicant was granted a residence permit (*Aufenthaltserlaubnis*) following his marriage to a German national and was thus no longer subject to restrictions on his movements.

### *2. The proceedings at issue*

#### **a. Proceedings before the Bremen District Court**

On 9 October 2003 the Bremen District Court convicted the applicant of repeated disregard of a territorial restriction of residence in view of his residence outside Wolfsburg in 2000 and on 3 May 2001, and ordered him to pay a fine of 112.50 euros (EUR).

The Bremen District Court conceded that the application of section 56 § 1 of the Asylum Procedure Act (see 'Relevant domestic law' below) led to

hardships for asylum seekers in many cases. Nevertheless, contrary to the applicant's view, that provision was compatible with the Basic Law. This had been confirmed by the Federal Constitutional Court, in particular, in its decision dated 10 April 1997. The legislator had restricted the right to free development of one's personality, guaranteed by Article 2 § 1 of the Basic Law in a proportionate manner. The impugned provision was intended to accelerate the treatment of asylum requests by securing the asylum seekers' availability, and to distribute between the *Länder* and cities the tasks and costs incurred by taking in asylum seekers. There was no milder, equally effective means to secure the achievement of the aims pursued by the provision. In particular, the option of restricting merely longer absences from the assigned district and authorising shorter absences without prior permission could not be controlled in practice and would entail considerable administrative expense. Given that section 57 § 1 of the Asylum Procedure Act (see 'Relevant domestic law' below) allowed for exceptions from the restriction of residence, that restriction was not disproportionate. Likewise, it was not disproportionate to enforce the restriction by means of criminal law (section 85 no. 2 of the Asylum Procedure Act).

The District Court further found that the territorial restriction of residence pursuant to section 56 § 1 of the Asylum Procedure Act did not contravene any provisions of public international law. Both Article 26 of the Geneva Convention relating to the Status of Refugees and Article 12 § 1 of the International Covenant on Civil and Political Rights (ICCPR; see 'Relevant domestic and public international law' below) granted freedom of movement only to refugees who were lawfully on the territory of the Contracting State. This was only the case where an asylum seeker was recognised by a final decision as a person being persecuted for political reasons. The applicant had resided lawfully in Germany only since 16 July 2001, when he was granted a residence permit following his marriage to a German national.

#### **b. Proceedings before the Bremen Regional Court**

On 13 February 2004 the Bremen Regional Court dismissed the applicant's appeal. It found that the appeal, which had been lodged in accordance with the formal requirements and time-limit laid down in the Code of Criminal Procedure, was manifestly ill-founded and therefore inadmissible. Endorsing the reasons given by the District Court, the Regional Court confirmed that the applicable provisions of the Asylum Procedure Act complied with the provisions of the Basic Law and of public international law.

### c. Proceedings before the Federal Constitutional Court

On 27 May 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 554/04).

The Federal Constitutional Court found that the complaint had no prospects of success. In so far as the applicant considered sections 56 and 85 no. 2 of the Asylum Procedure Act to be unconstitutional, he had not sufficiently substantiated his complaint. He had failed to address the reasons given in the Federal Constitutional Court's decision of 10 April 1997 in which it had found that the impugned provisions complied with the Basic Law. In so far as the applicant contested the application of the impugned provisions to his case, his submissions were inconsistent. He now claimed to have travelled for the benefit of a refugee organisation on 3 May 2001, a fact which he had failed to mention in the proceedings before the criminal courts.

The decision was served on the applicant's counsel on 11 June 2004.

## B. Relevant domestic and international law

### 1. Provisions of the Asylum Procedure Act

The Asylum Procedure Act (*Asylverfahrensgesetz*) lays down the rules which are applicable to foreigners who seek asylum on account of political persecution or who seek protection from deportation to a country where their life or freedom would be at risk.

Under section 55 § 1 of the Asylum Procedure Act, a foreigner who requests asylum is permitted to reside on the Federal Territory while the relevant asylum proceedings are pending (provisional residence permit – *Aufenthaltsgestattung*). He or she is not entitled to reside in a particular *Land* or place.

Section 56 § 1 of the Asylum Procedure Act provides that the provisional residence permit is territorially restricted to the district of the Aliens Office in which the institution responsible for reception of the foreigner is located.

Under section 58 § 1 of the Asylum Procedure Act, the Aliens Office may grant a foreigner who is not or is no longer obliged to live in a reception centre authorisation to leave temporarily the district for which his or her provisional residence permit is valid or, generally, to reside in a neighbouring district. Leave must be granted if there is a pressing public interest or compelling grounds to do so, or if a refusal to grant leave would entail an undue hardship. Section 58 § 2 stipulates that leave is to be granted to facilitate appointments with representatives, with the United Nations High Commissioner for Refugees and with organisations providing care for refugees. Under section 58 § 3, a foreigner does not require permission to keep appointments with authorities and courts where his or her appearance in person is necessary.

Section 85 no. 2 of the Asylum Procedure Act provides that anyone who repeatedly contravenes a restriction of residence imposed under section 56 § 1 shall be sentenced to a term of imprisonment not exceeding one year, or to a fine.

## 2. Provisions in international treaties

The relevant provision of the United Nations Geneva Convention relating to the Status of Refugees, adopted on 28 July 1951, reads:

### Article 26. Freedom of movement

“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

Article 12 § 1 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966, provides:

“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

## COMPLAINTS

1. The applicant complained that the restrictions placed on his liberty of movement by sections 56 § 1 and 58 of the Asylum Procedure Act and the application of these provisions to him, penalising the exercise of his right to move freely within the territory, had violated Article 2 of Protocol No. 4 to the Convention.

The applicant argued, *inter alia*, that he had been lawfully resident within the territory of Germany for the purposes of Article 2 of Protocol No. 4. Under section 55 of the Asylum Procedure Act, he was permitted to remain in German territory while the asylum proceedings in his case were pending. The lawfulness of his residence in German territory as an asylum seeker also derived from international law. Pursuant to Article 12 of the ICCPR, as interpreted by the Human Rights Committee of the United Nations, section 55 of the Asylum Procedure Act provided for lawful residence within the meaning of that Article for the duration of the asylum proceedings. His disregard of the territorial restrictions of residence under section 56 of the Asylum Procedure Act had not rendered his stay in German territory unlawful.

2. The applicant further argued that the restrictions on movement violated Article 8 of the Convention in that they disproportionately interfered with his private life, since they prevented him from visiting friends who lived outside the city of Wolfsburg. Likewise, they prevented him from gathering with other refugees living outside his district and from

promoting his interests together with them, contrary to Articles 11 and 10 of the Convention.

The applicant further submitted that the decision by the Federal Constitutional Court, which declined to review its previous decision on the compatibility of the restrictions on movement with the Basic Law, had denied him an effective remedy in the German courts, contrary to Article 13 of the Convention.

## THE LAW

1. The applicant complained that the obligation on asylum seekers under sections 56 § 1 and 58 of the Asylum Procedure Act to remain within an assigned district of residence, and his conviction for having breached this obligation, had violated his right to liberty of movement under Article 2 of Protocol No. 4 to the Convention, which, in so far as relevant, provides:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

The Court reiterates that in cases arising from individual applications its task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see *Olsson v. Sweden*, judgment of 24 March 1988, Series A no. 130, pp. 27-28, § 54, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 86, ECHR 2003-VIII).

The Court further reiterates that Article 2 of Protocol No. 4 secures freedom of movement to persons “lawfully within the territory of a State”. This condition refers to the domestic law of the State concerned. It is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered “lawful” (see *Sisojeva and Others v. Latvia* (dec.), no. 60654/00, 9 November 2000, and *Makuc and Others v. Slovenia* (dec.), no. 26828/06, § 210, 31 May 2007). Article 2 of Protocol No. 4 cannot be interpreted as awarding an alien the right to reside or continue residing in a country of which he or she is not a citizen and it does not concern the conditions under which a person has the right to remain in a country (see *Fedorova and Others v. Latvia* (dec.), no. 69405/01, 9 October 2003, and *Makuc*, cited above, § 210).

Thus, foreigners provisionally admitted to a certain district of the territory of a State, pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can only be regarded as “lawfully” in the territory as long as they comply with the conditions to which their admission and stay are subjected (compare *U. and S. v. Germany*, no. 11825/85, Commission decision of 1 December 1986; *Paramanathan v. Germany*, no. 12068/86, Commission

decision of 1 December 1986, Decisions and Reports (DR) 51, p. 240; and *Aygün v. Sweden*, no. 14102/88, Commission decision of 9 October 1989, DR 63, pp. 195 *et seq.*, 199).

In the present case the Court notes that from his entry into Germany in 1998 until 16 July 2001 the applicant had a provisional residence permit (see section 55 § 1 of the Asylum Procedure Act), which, at the relevant time, was restricted to the territory of the city of Wolfsburg, in accordance with section 56 § 1 of the Asylum Procedure Act (see 'Relevant domestic law' above). Thus, his stay on German territory was provisionally authorised, subject to the condition that he remained in the city of Wolfsburg. As was found by the domestic courts, whose findings do not disclose any appearance of arbitrariness, when outside this city he was therefore not “lawfully” within German territory according to the applicable provisions of national and public international law, unless he had previously obtained leave to leave the district in accordance with section 58 of the Asylum Procedure Act (see 'Relevant domestic and public international law' above). As he had not obtained such leave for the journeys outside the city of Wolfsburg in respect of which he had been convicted, he had not been “lawfully” within the territory of Germany at those times and could not therefore rely on the right to liberty of movement under Article 2 of Protocol No. 4.

It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant further claimed that the restrictions on his freedom of movement had disproportionately interfered with his right to respect for his private life, his freedom of expression and his freedom to peaceful assembly and association safeguarded by Articles 8, 10 and 11 of the Convention respectively. Relying on Article 13 of the Convention, he argued that he had not had an effective remedy to complain about these restrictions, as the Federal Constitutional Court had declined to review its previous case-law on this issue.

The Court has examined the applicant's complaints as submitted by him. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that the remainder of the application must likewise be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, by a majority,

*Declares* the application inadmissible.

Claudia WESTERDIEK  
Registrar

Peer LORENZEN  
President