CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39964/98
by Yapo Nazaire AGNISSAN
against Denmark

The European Court of Human Rights, sitting on 4 October 2001 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr G. BONELLO,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr A. KOVLER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 10 November 1997 and registered on 19 February 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

Commented [Note1]: Judges names are to be followed by a COMMA and a MANUAL LINE BREAK (Shift+Enter). When inserting names via Alt+S please remove the substitute judge's name, if necessary, and the extra paragraph return(s). (There is to be no extra space between the judges' names and that of the Registrar.)

THE FACTS

The applicant, Yapo Nazaire Agnissan, is a citizen of the Ivory Coast, born in 1974 and living in Denmark. He is represented before the Court by Mr Anders Jensen, a lawyer practising in Roskilde, Denmark.

The respondent Government are represented by their agent, Mr Hans Klingenberg of the Ministry of Foreign Affairs.

Commented [Note2]: To be checked.

A. The circumstances of the case

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

On 18 July 1994 the applicant came to Denmark. On 21 September 1994 he approached the police and requested asylum. He presented himself as Aristide Mazimpaka, a Rwandan national. He alleged that he had just arrived and that he was not in possession of any identification papers. Pending the examination of his request for asylum the applicant was detained until 14 December 1994 under section 36 of the Aliens Act (*Udlændigeloven*).

During this period of time the applicant was interviewed by the police on 3 October 1994 and 8 November 1994. He explained, among other things, that on 29 August 1994 unknown armed men invaded the house of his family in Kigali, the capital of Rwanda, and shot his parents and his brothers. He managed to escape. He could not give specific details regarding his journey to Denmark, save that he went to Kenya first and, from there, he went as a stowaway on a ship to a port in some country where two girls helped him to a railway station and paid for his ticket.

On 13 December 1994 the aliens authorities (*Direktoratet for Udlændinge*) decided not to grant the applicant refugee status, the reason being that there were insufficient evidence to prove that the applicant was in fact a Rwandan national, especially as he did not speak kinyawanda, the main language in Rwanda; his general knowledge of Rwanda seemed very limited compared with the information given by the applicant that he had attended school there for several years; the applicant had not been involved with the Rwandan authorities in any way either in the political or the penal system; and finally the only reason given by the applicant for the asylum request was his fear concerning the general situation in Rwanda.

This decision was upheld on appeal by the Aliens Appeal Board (*Flygtningenævnet*) on 13 February 1996 with the same reasoning and a deportation order was given with the deadline for departure being 28 February 1996. It was stressed that if the applicant proved unwilling to leave the country the deportation order would be enforced.

This led the applicant to apply on 20 February 1996 to the Ministry of the Interior for exceptional leave to remain in Denmark. The Ministry refused this request on 22 February 1996 but postponed the deadline for departure until 11 March 1996. Furthermore, the Ministry referred part of the application to the aliens authorities for further consideration. On 18 December 1996 the aliens authorities rejected the application. It does not appear that the applicant appealed against this decision.

As the applicant had no travel documents it turned out to be difficult for the police authorities to enforce the deportation order. Thus, the applicant was requested to attend further interviews with the police authorities in order to gather sufficient information to determine the applicant's home country and, subsequently, to obtain the necessary travel documents.

The applicant was requested to attend interviews on 21 February, 5 March, 21 March, 24 May, 28 May and 5 September 1996 as well as on 14 March, 17 April and 27 August 1997.

The applicant did not attend the interviews scheduled for 21 February, 5 March and 28 May 1996. The Government allege that at the interview held on 5 September 1996 a language test had to be interrupted as the applicant did not co-operate. The applicant disputes this allegation, claiming that he did complete the test. At the interview held on 17 April 1997, in order to try to confirm the information given by the applicant on his nationality, the police arranged a telephone conversation between the applicant and representatives at the Rwandan Embassy in Bonn.

On 27 August 1997 the police took action under section 34, subsection 2 of the Aliens Act imposing on the applicant a duty to report in person each day at 10 o'clock to a police unit connected to an asylum centre in Sandholm. It was explained to the applicant that failure to report might result in his detention. At the time the applicant was living some distance from Sandholm in another asylum centre in Tårnby. The applicant complained in vain about this action to the Ministry of the Interior.

The applicant did not report on 28 August 1997. Thus, on 29 August 1997, the police drew the applicant's attention to the possible consequences of non-compliance with the duty to report. The applicant failed to report from 30 August until 1 September 1997. On 2 September 1997 the police turned up at the centre where the applicant was living, and with the assistance of an interpreter yet another interview was held, which included telephone conversations between the applicant and representatives at the Embassies of Rwanda in Bonn and in London in order to try to determine the applicant's nationality. These telephone calls did not, however, resolve the question of his nationality. The police pointed out once again the possible consequences of non-compliance with the duty to report. Nevertheless, the applicant did not report from 3 to 7 September 1997.

On 8 September 1997 the police decided to take the applicant into custody pursuant to the Aliens Act, section 36, subsection 1 cf. section 34, subsection, 2.

On 10 September 1997 the Hillerød Criminal Court (*kriminalretten*) found the detention to be in accordance with the provisions of the Aliens Act. On appeal, this decision was upheld on 1 October 1997 by the High Court of Eastern Denmark (*Østre Landsret*), finding that there was no basis for assuming that the reference in section 36 to the measures referred to in section 34 did not include all measures mentioned in section 34, including the measures pursuant to the latter's subsection 2. In this respect the High Court had regard to the wording of the Aliens Act, section 36, subsection 1, the preparatory rules regarding section 34, subsection 2, and the fact that Act no. 410 of 10 June 1997 did not amend section 36. Furthermore, the High Court emphasised that the applicant had not complied at all with the duty to report though the consequences thereof on two occasions had been stressed.

Application for leave to appeal to the Supreme Court (*Højesteret*) was refused on 27 October 1997.

During the applicant's detention, on 29 September 1997 the police arranged a telephone conversation between the applicant and representatives at the Rwandan Embassy in London in order to confirm the information given by the applicant on his Rwandan nationality.

Also during the applicant's detention, on 28 October 1997, the police arranged another language test for the applicant. An analysis of the test showed that in all probability the applicant was not from Rwanda as his French accent was believed to be of West African origin.

The applicant was released the following day, on 29 October 1997.

Subsequently, on 16 February 1998 the applicant was confronted with the result of the language test, on 28 October 1999 he was interviewed by the police and on 27 March 2000 having obtained his consent the applicant's fingerprints were sent to Interpol with a view to identification by inquiry in certain West African countries (Ivory Coast, Senegal, Togo, Cameroon, Benin and Guinea). Other means of inquiry included a visit to the Embassy of the Ivory Cost on 29 March 2000 during which the applicant refused to speak French. On 4 April 2000, however, a representative at the embassy could listen to the tape recording of the applicant's French.

On 19 February 2001 a member of the Danish Refugee Council informed the National Commissioner of Police that the applicant wanted to marry a Danish citizen for which reason he had now decided to disclose his true identity.

On 26 February 2001 the applicant revealed that his name was in fact Yapo Nazaire Agnissan and he was a citizen of the Ivory Coast. He flew to Denmark from Abidjan on 17 July 1994 on his Ivory Coast passport. Upon

his arrival in Copenhagen airport on 18 July 1994 he posted his passport back to his family in the Ivory Coast.

The applicant still remains in Denmark.

B. Relevant domestic law

Section 36, subsection 1 of the Aliens Act, which was amended by Act no. 410 of 10 June 1997, reads in so far as relevant:

> "If the measures referred to in section 34 are insufficient to ensure enforcement of ... deportation of an alien, who otherwise ... is not entitled to stay in Denmark, the police may decide that the alien is to be detained in custody."

Section 34, subsection 1 reads in so far as relevant:

> "Until a decision has been made as to whether an alien shall be expelled...or deported... and until such an order can be enforced, the police may decide, where it is considered necessary to ensure the alien's presence, that the alien must:
>
> 1) deposit his/her passport, other travel documents and tickets with the police;
>
> 2) present security fixed by the police;
>
> 3) take up residence in accordance with the further instructions of the police;
>
> 4) report to the police at specific intervals."

The above Act no. 407 of 10 June 1997 also amended section 34 by adding a subsection 2. In so far as relevant section 34, subsection 2 reads:

> "If it is considered appropriate for the purpose of ensuring the presence of an alien, the police may decide that an alien shall report to the police at regular intervals if:
>
> 1) the alien requests asylum on arrival, or thereafter and then does not assist in clarifying the case;
>
> 2) the alien fails to appear for an interview with the Directorate of Aliens or the police to which he/she was called;
>
> ...
>
> 5) the police are in charge of the alien's departure and the alien does not assist therein, cf. Section 40 subsection 3, final sentence".

Section 40, subsection 3 contains a duty to provide the authorities with information and to participate actively in obtaining the necessary travel documents, visa etc. and finally to co-operate physically in the deportation.

It appears from the general notes to Act No. 407 of 10 June 1997 which introduced *inter alia* subsection 2 to section 34):

> "To prevent abuse of the permit system of the Aliens Act, it is furthermore important to make it as unattractive as possible to aliens whose applications for a residence permit are being examined to obstruct the procuring of information in a

case. It is moreover important to prevent aliens whose applications for a residence permit have been finally refused from obstructing deportation from the country...

The amendments proposed are intended to motivate such persons to assist in deportation from Denmark."

It appears from the detailed notes regarding section 34, subsection 2:

"The intention of the amendment is to allow for systematic application of a duty to report (daily, if necessary).

If the measures referred to in section 34 are insufficient to ensure enforcement of refusal of entry, expulsion or deportation, the court will be able to detain an alien, cf. in detail section 36, subsection 1, first sentence. Part of this assessment might be whether, as a less coercive measure, a duty to report may be imposed pursuant to the proposed provision in section 34, subsection 2, and whether the alien has violated a decision to that effect"

COMPLAINTS

The applicant complains, under Article 3 of the Convention, that the detention from 8 September until 29 October 1997 was inhuman and degrading.

Furthermore the applicant complains under Article 5 § 1 of the Convention, that the detention from 8 September until 29 October 1997 was not in accordance with a procedure prescribed by law and was not taken "with a view to deportation" as required under Article 5 § 1 (f).

THE LAW

1. The applicant complains that his detention from 8 September until 29 October 1997 was contrary to Article 3 of the Convention, which reads as follows:

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

In this connection the applicant has relied on the same facts on which he based his complaint under Article 5 § 1 (f) of the Convention.

On the evidence before it, the Court finds that the circumstances of the case do not disclose any appearance of such a severe treatment as to come within the ambit of Article 3 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and must be rejected in accordance with Article 35 § 4.

2. The applicant also complains that his detention from 8 September until 29 October 1997 runs counter to Article 5 of the Convention which as far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition..."

"Lawful detention".

The Government submit that the applicant's detention had legal basis in domestic law, which is accessible, sufficiently clear and precise and foreseeable. It appears from the wording of section 36, subsection 1 that an alien can be detained in custody if the measures for ensuring enforcement of deportation, referred to in section 34 are insufficient. Though section 36, subsection 1 does not expressly refer to subsection 2 of section 34 of the Aliens Act, there is no basis for assuming that the reference to section 34 does not include subsection 1 as well as subsection 2. According to the wording, section 34, subsection 2 is thus not excluded from the scope of section 36, subsection 1. Furthermore, Act no. 410 of 10 June 1997 did not amend section 36, subsection 1, safe for the simultaneous amendment which is the result of the insertion of subsection 2 to section 34. It does not appear from the preparatory rules that section 36, subsection 1 cannot be applied in the cases mentioned in section 34, subsection 2. Finally, it appears from the preparatory rules regarding section 34, subsection 2 that a part of the court's assessment in deciding whether an alien can be detained may be whether, as a less coercive measure, a duty to report may be imposed, and whether the alien has failed to fulfil an order to that effect. It is thus presupposed that section 34, subsection 2 falls within the scope of the provision.

Finally, by referring to Danish case-law the Government point out that the courts in their assessment, whether a detention is in accordance with section 36, subsections 1 cf. section 34 and whether the measures pursuant to section 34 can be considered insufficient, have included a requirement that the deportation "must be possible in the near future" accordingly, a stricter requirement than enunciated by the Commission in its report of 26 February 1997 in the case Samie Ali v. Switzerland, (application no 24881/94). Furthermore, the domestic courts have considered in particular whether the police are making serious deportation efforts.

The applicant submits that his detention had no legal basis in Danish law. He alleges that although section 36, subsection 1 of the Aliens Act

prescribes that an alien may be detained if the coercive measures mentioned in section 34 are not sufficient to ensure the deportation order, only the coercive measures mentioned in section 34, subsection 1 may be taken into consideration. He submits that it must be due to an omission that the legislators did not specify this, when subsection 2 was added to section 34 in 1997.

In the applicant's view, to detain an alien pursuant to section 36, subsection 1 cf. section 34 (meaning section 34, subsection 1) requires that such a measure is necessary to secure the presence of the alien, i.e. implying a real risk that the alien will go underground. Such a risk can be established if the alien previously went underground or if the alien has threatened to do so. However, an abstract risk is not sufficient.

Accordingly, the applicant submits, his detention did not fulfil the requirement laid down in the national legislation as at the relevant time he was living at a Red Cross centre and no risks were established whatsoever that he would go underground.

Moreover, the applicant alleges that subsection 2 was added to section 34 of the Aliens Act with the sole purpose of harassing the group of aliens who, despite a deportation order, remained in the country. Nevertheless, the new measure introduced by subsection 2 only concerns a duty to report. Such a duty does not also imply an authorisation to detain the alien. In support of this understanding the applicant refers to Danish case-law, notably a decision of 8 October 1997 in which the High Court upheld a City Court's decision to release an alien on the ground that the enforcement of the deportation order could not be considered imminent. The applicant is convinced that he was released on 29 October 1997 due to the fact that the police authorities became aware of the above High Court decision.

Finally, the applicant does not consider that the provisions of the Aliens Act in question are accessible or foreseeable. In this respect he points out that the law applies to aliens who cannot read the law or afford legal counsel thus, the demands on these concepts should increase.

It falls to the Court to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1(f), with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgements and Decisions*, 1996-V, § 118).

In the instant case the Court notes that the applicant was detained in accordance with section 36, subsection 1 cf. section 34 of the Alien's Act as

interpreted by the City Court on 10 September 1997 and the High Court on 1 October 1997.

The Court finds that the wording of those provisions could reasonably justify the way they were applied in the applicant's case. Accordingly, the Court accepts that the applicant's detention was lawful under domestic law.

As to the requirement of non-arbitrariness, the Court notes that on 27 August 1997 the applicant was placed under a duty to report in person daily at 10 o'clock at another asylum centre than the one he was living at. On the same day he was informed that failure to comply with the duty to report might result in his detention. He was reminded thereof on 29 August 1997 due to his failure to report on 28 August 1997. Nevertheless, he did not report from 30 August until 1 September 1997. Accordingly, on 2 September 1997 the applicant was reminded once again of the consequences, this time with the assistance of an interpreter. However, the applicant did not report from 3 to 7 September 1997. Thus, the applicant was detained on 8 September 1997.

In these circumstances, the Court is of the opinion that the applicant's detention cannot be regarded as involving an arbitrary deprivation of liberty.

Consequently, the Court finds that the applicant's deprivation of liberty was ordered "in accordance with a procedure prescribed by law" and satisfied the requirements of being a "lawful...detention".

"With a view to deportation".

The Government maintain that the detention of the applicant fell within the scope of Article 5 § 1 (f) with a view to deportation. In this respect the Government contest the applicant's submission that this provision allows detention only if the purpose is to secure the physical presence of the alien.

The Government stress that in order for a deportation to be enforced, certain information as to the identity and country of the alien is required. Such information is generally largely dependent on the co-operation of the alien and calls for interviews, but can also be obtained by other means, including analysis of the alien's language and accent as well as contact with foreign or international authorities, including the embassies of possible countries of origin and the Interpol. The means employed by the National Commissioner of Police in the present case includes all those means and they were going on during the entire period of detention of the applicant.

The Government submit that there were no reasons to believe that the deportation order could not be enforced either at the time when the applicant was taken into custody or at any time during his detention. On the contrary, it was believed that interviews would soon reveal the applicant's identity, country of origin, language, travel route or other relevant information or that the recorded language test of the applicant's French, or contact with foreign

or international authorities, or other police investigation would soon reveal the applicant's identity and origin.

Finally, the Government point out that difficulty is inherent in the nature of deportation cases. However, difficulty is distinct form impossibility. In the Government's opinion it would lead to incalculable consequences for national authorities if Article 5 §1 (f) were interpreted in such a way as to bar national authorities from detaining persons awaiting deportation only because difficulties exist, when these difficulties do not appear insurmountable within reasonable time.

The applicant submits that at the time of his detention, from 8 September 1997 until 29 October 1997, the authorities did not take actions with a view to enforce his deportation order.

In this respect the applicant emphasises that the fact that subsequently he revealed his true identity should have no influence on the Court's assessment whether at the relevant time the authorities did take such actions.

The applicant points out that in the period before his detention he attended several interviews with the police, he participated in the language test on 5 September 1996 and he spoke with representatives at the Rwandan Embassy in Bonn on 17 April 1997. However, between 17 April 1997 and 27 August 1997 the police did not take any further actions.

The applicant does not consider that the duty to report, which was imposed on him on 27 August 1997 can be considered an action with a view to deportation. In support of this finding he recalls that though no risk had been established that he would flee or go underground, he was ordered to report in person each day at 10 o'clock to a police unit connected to an asylum centre in Sandholm approximately 40 km away from his home then, which meant that he had to spend every day, Saturdays and Sundays included, on public transportation. Thus, in the applicant's opinion, by ordering him to report each day the authorities were merely following the legislator's intent by adding subsection 2 to section 34 of the Aliens Act, namely to harass the group of aliens who, despite a deportation order, remained in the country.

Therefore, the applicant maintains, at the time when the authorities detained him, allegedly due to his failure to report, they were not taking actions against him with a view to deportation, but taking actions with a view to continue the above harassment.

The Court recalls that Article 5 § 1 (f) of the Convention does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary for example to prevent his committing an offence or fleeing; in this respect Article 5 § 1 (f) provides a different level of protection from Articles 5 § 1 (c). All that is required under this provision is that "action is being taken with a view to deportation". However, if deportation proceedings are not prosecuted with due diligence, the detention will cease

to be permissible under Article 5 § 1 (f) (see Chahal v. United Kingdom, cited above, §§ 112-113.)

In addition, the Court recalls that where the authorities are aware that a deportation order cannot be enforced a detention can no longer be considered to be detention of a person "against whom action is being taken with a view to deportation" (see Commission's report of 26 February 1997, Samie Ali v. Switzerland, application no. 24881/94, § 41).

In the present case the Court notes that before and during the applicant's detention, the authorities did not believe that he was of Rwandan origin. Consequently they took several actions in order to procure information which it hoped would reveal the applicant's identity, country of origin, language, travel route or other relevant information.

In the period between 18 December 1996, when the Ministry of the Interior refused the applicant's request for an exceptional leave to remain in Denmark and 27 August 1997, when the police imposed a duty to report on the applicant, the police summoned the applicant to interviews, a language test and a telephone conversation with the Rwandan Embassy in Bonn.

Accordingly, less severe coercive measures were imposed on the applicant before the duty to report and the subsequent detention.

As to the duty to report it is not disputed that the legislator by adding subsection 2 to section 34 intended to motivate aliens being denied a residence permit to assist in their deportation from Denmark. However, this cannot in itself exclude that a detention, having been ordered as a consequence of an alien's failure to comply with a previously order to report, cannot comply with the requirement that the detention is taken with a view to deportation.

The Court recalls that a detention under Article 5 § 1 (f) of the Convention does not have to be considered "necessary". Under the condition that the detention concerns a person against whom action is being taken with a view to deportation, it may suffice that such a detention is considered "appropriate" (see Chahal v. United Kingdom, cited above).

If an alien against whom action is taken with a view to deportation proves unwilling to co-operate in procuring information about his or her identity or in general fails to attend scheduled interviews, in the Court's opinion it may be considered appropriate to detain such an alien for a reasonable time in order to ensure his or her participation at scheduled interviews with the police or with other authorities, notably since such arrangements usually require preparation and/or summoning of other people for example interpreters, representatives at embassies or personnel trained to perform language tests.

In the present case, during the applicant's detention, which lasted for 1 month and 22 days, the applicant on 29 September 1997 took part in a telephone conversation which had been arranged with the Rwandan

Embassy in London, and on 28 October 1997 he participated in a language test. The applicant was released the following day.

Thus, the Court finds that, during his detention, relevant measures were taken to produce information about the applicant's identity. Such measures were relevant for the purpose of enforcing the deportation order. The Court notes in this respect that the authorities' suspicions that the applicant had given a false identity later proved to be substantiated. In sum, the Court finds that there is no indication that the applicant's detention was effected for any other purpose than "with the view to deportation".

As a consequence the Court finds that the facts of the case do not disclose any appearance of a violation of Article 5 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President