AS TO THE ADMISSIBILITY OF

Application No. 25964/94
by Sharif Hussein AHMED
against Austria

The European Commission of Human Rights sitting in private on 2 March 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 December 1994 by Sharif Hussein Ahmed against Austria and registered on 15 December 1994 under file No. 25964/94;

Having regard to the President's decision of 15 December 1994 to apply Rule 36 of the Commission's Rules of Procedure and to communicate the application;

Having regard to the observations submitted by the respondent Government on 3 January 1995 and the observations in reply submitted by the applicant, after an extension of the time-limit, on 1 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, born in 1963, is a national of Somalia. At the time of lodging his application he was detained at the Graz Police Prison. In the proceedings before the Commission he is represented by

Mr. W. Vacarescu, a lawyer practising in Graz.

A. Particular circumstances of the case

On 30 October 1990 the applicant went to Austria.

On 4 November 1990 the applicant applied for asylum. Subsequently, on 11 November 1990, he was heard by the Lower Austria Public Security Authority (Sicherheitsdirektion). He submitted in particular that his uncle had been an active member of the United Somali Congress (USC). His father and his brother, who had not been members of the USC, but had supported his uncle's activities, had been executed in May 1990. Since then, he himself and his whole family were suspected of being members of the USC and of having participated in rebellious activities. His car had been confiscated and he had been beaten and injured. He had left Somalia for fear of being arrested and executed.

On 19 April 1991 the Styria Public Security Authority (Sicherheitsdirektion) dismissed the applicant's request. It found that the applicant had failed to show that he was persecuted in his home country.

On 30 July 1991 the Graz District Court (Bezirksgericht) convicted the applicant of damage to property and sentenced him to three weeks' imprisonment. The sentence was suspended.

On 15 May 1992 the Federal Ministry for the Interior (Bundesministerium für Inneres), on the applicant's appeal, granted him asylum. The Ministry referred in particular to his activities for an opposition party and the notorious situation in his country of origin. It found that there were reasonable grounds for believing that he would be persecuted in case of his return to Somalia. Therefore, he had the status of a refugee and was entitled to reside in Austria.

On 25 August 1993 the Graz Regional Court (Landesgericht) convicted the applicant of attempted robbery and sentenced him to two and a half years' imprisonment. The Court found that he had, on 30 March 1993, together with an accomplice hit a pedestrian in the face and had attempted to take the wallet from his pocket. The sentence became final on 7 March 1994.

On 15 July 1994 the Graz Federal Office for Asylum (Bundesasylamt), referring to S. 5 para. 1 subpara. 3 of the Asylum Act (Asylgesetz), withdrew the applicant's right to asylum because of his conviction.

On 12 September 1994 the Ministry for the Interior dismissed the applicant's appeal. The Ministry noted the applicant's submission that he would be persecuted upon his return on the ground that he belonged to General Aideed's clan. The Ministry referred to S. 5 para. 1 subpara. 3 of the Asylum Act in connection with Article 33 para. 2 of the Geneva Convention relating to the Status of Refugees (Refugee Convention), and stated that the right to asylum may be withdrawn if a refugee is convicted, by a final sentence, of a particularly serious crime and is, therefore, a danger to the community in the country of asylum. It followed from S. 37 para. 4 of the Austrian Aliens Act, that the Austrian legislator considered any crime punishable with more than five years' imprisonment as a particularly serious crime within the meaning of Article 33 para. 2 of the Refugee Convention. The applicant had been convicted of attempted robbery, which was punishable with one to ten years' imprisonment, and the sentence had become final. Thus, the conditions for withdrawing his right to asylum were met.

On 24 October 1994 the applicant lodged a complaint with the Administrative Court (Verwaltungsgerichtshof) and requested that this complaint be granted suspensive effect. In the proceedings before the

Administrative Court the applicant is represented by Mr. Vacarescu. These proceedings are still pending and the decision on the applicant's request for suspensive effect has not yet been taken.

The applicant submitted in particular that attempted robbery was not a particularly serious crime within the meaning of Article 33 para. 2 of the Refugee Convention. The wording suggested that only the most serious crimes, such as manslaughter, armed robbery, drug dealing or terrorist crimes, could lead to the withdrawal of asylum. Moreover, the particular circumstances of the case had to be taken into account and it had to be established that the convicted person would be a danger to the community in the country of asylum. The applicant had only been sentenced to two and a half years' imprisonment and there were no reasons to believe that he would commit further serious crimes. Finally, the applicant submitted that the Ministry had not weighed his interest in remaining in Austria against the interest in withdrawing his right to asylum.

On 14 November 1994 the Graz Federal Police Authority (Bundespolizeidirektion) imposed an unlimited residence ban (unbefristetes Aufenthaltsverbot) based on S. 18 para. 1 and para. 2 subpara. 1 of the Aliens Act (Fremdengesetz) on the applicant. It noted that the applicant had been convicted of attempted robbery. Given the seriousness of the crime, his residence would disturb public order and security. Further, the Police Authority ordered that the applicant be detained with a view to his expulsion (Schubhaft) as soon as his prison sentence was terminated.

On 22 November 1994 the Graz Federal Police Authority requested a "laissez-passer" for the applicant from the Somalian embassy. The request stated explicitly that the "laissez-passer" was needed for the purpose of returning the applicant to Somalia.

On 30 November 1994 the applicant informed the Graz Federal Police Authority that he had nominated Mr. Vacarescu as his counsel, and requested, in accordance with S. 54 of the Aliens Act, that a declaratory decision be taken that his expulsion to Somalia would be inadmissible as being contrary to Article 3 of the Convention, or for exposing him to persecution within the meaning of the Geneva Convention relating to the Status of Refugees. He referred in particular to the results of the asylum proceedings. The proceedings under S. 54 of the Aliens Act are still pending before the Graz Federal Police Authority.

On the same day the applicant lodged an appeal against the residence ban of 14 November 1994.

On 10 December 1994 the Styria Public Security Authority dismissed the applicant's appeal. However, it decided that the residence ban be only valid for ten years.

The Public Security Authority found that the issuing of the residence ban was, given the applicant's conviction for attempted robbery, in accordance with S. 18 para. 1 and para. 2 subpara. 1 of the Aliens Act. It further noted that the applicant, following the withdrawal of his right to asylum by decision of 12 September 1994, did not have the right to reside in Austria any more. The Public Security Authority also found that the interest in issuing a residence ban outweighed the applicant's interest in staying in Austria, as he had only spent four years in Austria and had not been integrated. Furthermore, he had no family ties in Austria.

On 14 December 1994 the applicant, upon his conditional release from prison, was taken into detention with a view to his expulsion at the Graz Police Prison. He has meanwhile been released.

B. Relevant domestic law

1. Asylum Act

S. 5 para. 1 subpara. 3 of the Asylum Act (Asylgesetz) provides that a refugee loses the right to asylum, inter alia, if the conditions set out in Article 33 para. 2 of the Geneva Convention relating to the Status of Refugees are met. This provision states that the benefit of asylum protection may be refused if there are reasonable grounds for believing that the purported refugee presents a danger to the host community, as shown, for example, by that person's conviction for a serious crime.

2. Aliens Act

According to S. 18 para. 1 of the Aliens Act (Fremdengesetz), a residence ban may be issued against an alien if there are reasonable grounds for believing that his stay will disturb public order or security (subpara. 1) or that it will be contrary to the public interest, as provided for in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (subpara. 2). Paragraph 2 of S. 18 illustrates cases in which "reasonable grounds" within the meaning of para. 1 are given, e.g. if an alien has been sentenced to more than three months' imprisonment by an Austrian court, and this judgment has become legally effective (subpara. 1).

S. 37 deals with cases where it is prohibited to expel an alien. Paragraph 1 states that an alien may not be expelled to a State, if there are firm reasons to believe that he would be in danger of being subjected to inhuman treatment or punishment or to capital punishment in that State.

S. 37 para. 2 refers to Article 33 (1) of the Geneva Convention relating to the Status of Refugees, and provides that an alien may not be expelled to a State if there are firm reasons to believe that in that State his life or his security would be endangered on the grounds of his race, religion, nationality or adherence to a social group or on the grounds of his political opinions.

According to S. 37 para. 4 the expulsion of an alien to a State, in which he would be endangered within the meaning of paragraph 2, may only be carried out if he is, on serious grounds, a threat to the security of the Republic of Austria or if, after a conviction for a crime which is punishable with more than five years' imprisonment, he presents a danger to the community (Article 33 para. 2 of the Geneva Convention relating to the Status of Refugees).

S. 37 para. 5 states that the asylum authority (in cases under S. 5 para. 1 subpara. 3 of the Asylum Act), or in other cases, the Public Security Authority, have to take a decision as to whether the conditions under the aforementioned paragraph 4 are met.

S. 37 para. 6 provides that an alien may not be expelled as long as this would be contrary to an interim measure taken by the European Commission of Human Rights or the European Court of Human Rights.

S. 54 para. 1 states that the Authority, at the alien's request, has to render a declaratory decision on whether or not there are firm reasons to believe that the alien, in a State indicated by him, is endangered within the meaning of S. 37 para. 1 or 2.

S. 54 para. 2 provides that such a request may, inter alia, be made during proceedings concerning the issue of a residence ban and that the alien has to be informed in time of the possibility to make the request.

According to S. 54 para. 3, the decision on an appeal against a ruling that the expulsion to a particular State is admissible has to

be taken within a week.

S. 54 para. 4 states that an expulsion may not be carried out as long as the decision relating to the request under S. 54 has not become final.

COMPLAINTS

The applicant complains under Article 3 of the Convention that his expulsion to Somalia would expose him to a serious risk of being arrested, tortured or killed. He refers in particular to the decision by the Austrian Ministry for the Interior, which granted him asylum in 1992 on the ground that he was persecuted for his alleged activities for the USC.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 December 1994 and registered on 15 December 1994.

On 15 December 1994 the President of the Commission decided to apply Rule 36 of the Commission's Rules of Procedure and to communicate the application to the respondent Government, pursuant to Rule 34 para. 3 and Rule 48 para. 2 (b) of the Rules of Procedure, for observations on its admissibility and merits.

The Government's written observations were submitted on 3 January 1995. The observations in reply by the applicant were submitted, after an extension of the time-limit, on 1 February 1995.

THE LAW

1. The applicant complains under Article 3 (Art. 3) of the Convention that his expulsion to Somalia would expose him to a serious risk of being arrested, tortured or killed.

Article 3 (Art. 3) of the Convention reads as follows:

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

2. The Government submit that the applicant has failed to exhaust domestic remedies, pursuant to Article 26 (Art. 26) of the Convention. They point out in particular that the applicant, on 30 November 1994, requested the Graz Federal Police Authority, under S. 54 of the Austrian Aliens Act, to give a ruling that his expulsion to Somalia was inadmissible, and that these proceedings are still pending. According to S. 54 para. 4 of the Aliens Act, the applicant's expulsion may not take place as long as the decision on his request has not become final.

Further, the Government submit that the Federal Office for Asylum, under S. 37 para. 5 of the Aliens Act, has to take a formal decision on whether the applicant's expulsion to Somalia, in spite of his life or freedom being threatened on the grounds mentioned in Article 33 para. 1 of the Geneva Convention relating to the Status of Refugees, may nevertheless be admissible as one of the exceptions of Article 33 para. 2 of the said Convention apply to him. They argue that the Federal Office for Asylum has not so far delivered any such decision, and that the applicant's expulsion would, thus, be inadmissible under S. 37 paras. 2 and 5 of the Aliens Act.

Finally the Government refer to S. 37 para. 6 of the Aliens Act, according to which the applicant may not be expelled as long as this would be contrary to an interim measure indicated by the Commission.

The applicant contests the Government's view as regards the proceedings under S. 54 of the Aliens Act. When he introduced his

application, he submitted that the competent authority, when issuing the residence ban against him, did not inform him of his right to request a declaratory decision on the question whether his expulsion to Somalia would be admissible. He feared that his expulsion might take place without awaiting the outcome of the proceedings under S. 54 of the Aliens Act, as soon as a "laissez-passer" would be issued by the Somalian embassy for him.

In his observations the applicant further submits that the authorities would have been obliged to assess of their own motion whether the residence ban against him could be enforced. However, they have detained him with a view to his expulsion without having done so. He argues that the authorities, given their conduct so far, are determined to expel him and that the proceedings under S. 54 of the Aliens Act, which are usually terminated within a very short time, are a mere formality with no prospects of success.

As regards S. 37 para. 2 and para. 5 of the Aliens Act, the applicant submits that the Federal Office for Asylum would have been obliged to take a formal decision on the admissibility of his return to Somalia in the course of the proceedings relating to the withdrawal of his right to asylum. However, it did not take such a decision.

The Commission recalls that exhaustion of domestic remedies under Article 26 (Art. 26) of the Convention requires the use of those remedies that relate to the breaches alleged, and that are available and sufficient (No. 11681/85, Dec. 11.12.87, D.R. 54 p. 101).

In the present case proceedings concerning the withdrawal of the applicant's right to asylum were conducted by the Federal Office for Asylum and the Ministry for the Interior, which took the final decision on 12 September 1994. It is not contested between the parties that these authorities did not take any formal decision relating to the question whether the applicant's expulsion to Somalia was admissible, as required under S. 37 paras. 4 and 5 of the Austrian Aliens Act. It appears that this decision has to be taken by the competent authorities of their own motion. The Commission therefore finds that it cannot be regarded as an effective remedy available to the applicant.

As regards the proceedings under S. 54 of the Aliens Act, the Commission notes that according to paragraph 4 of this provision a person may not be expelled before the decision becomes final. Thus, the Commission is satisfied that the proceedings under S. 54 of the Austrian Aliens Act may, in principle, provide an effective remedy against a foreigner's expulsion.

However, the Commission notes that the applicant, when introducing his application, alleged that the Austrian authorities had not duly informed him of his right to request a decision under S. 54 of the Aliens Act, and that they might expel him without awaiting the result of these proceedings. The respondent Government, in their observations, have not commented upon the applicant's allegations. In particular they have not clarified whether he, who was not represented by counsel before the Graz Federal Police Authority in the proceedings concerning the residence ban against him, was duly informed of his right to file a request under S. 54 of the Aliens Act.

The Commission also notes the applicant's submission that the conduct of the authorities shows that they are determined to expel him and that they might take their decision in a very short time. In this connection, the Commission observes that the Graz Federal Police Authority, i.e. the authority competent to deal with the applicant's request under S. 54 of the Aliens Act, had already ordered the applicant's detention with a view to his expulsion on 14 November 1994, and had requested a "laissez-passer" for the applicant from the Somalian embassy on 22 November 1994, expressly for the purpose of returning him to Somalia, before the proceedings concerning the

residence ban against him were terminated.

In these circumstances, the Commission finds that the applicant could not and still cannot reasonably be expected to await the outcome of the proceedings under S. 54 of the Aliens Act, particularly as his expulsion to Somalia might allegedly entail serious and irreparable damage.

In these circumstances, the Commission concludes that the applicant has satisfied the requirement under Article 26 (Art. 26) of the Convention to exhaust domestic remedies.

3. As to the merits of the applicant's claim, the Government consider that it is unfounded. They submit that it is not clear from the Convention organs' case-law that an expulsion to a country in a state of civil war is to be regarded as a violation of Article 3 (Art. 3) of the Convention.

The applicant submits that his return to Somalia would expose him to a serious risk of being arrested, tortured or executed. In this respect he particularly refers to the decision of the Ministry for the Interior granting him asylum in 1992 on the ground that he was persecuted for his alleged activities for the United Somali Congress.

The Commission considers, in the light of the parties' submissions, that the case raises serious issues of law and fact under Article 3 (Art. 3) of the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)