CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34082/02
by Cornelia RUSU
against Austria

The European Court of Human Rights (First Section), sitting on 29 June 2006 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 12 August 2002,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Cornelia Rusu, is a Romanian national who was born in 1967 and lives in Timisoara (Romania). She was represented before the Court by Mrs C. Vasii-Kolla, a lawyer practising in Timisoara. The respondent Government were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs. The Romanian Government were

informed of their right to intervene, but did not avail themselves of that right.

A. The circumstances of the case

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

On 24 February 2002 the applicant's passport and luggage were stolen in Nice when she was on her way back to Romania from a journey in Spain. After the French police had procured her with a certificate of her declaration of the theft, she continued her trip via Italy and Austria.

On 25 February 2002 the Hungarian border police refused the applicant to enter Hungary and sent her back to the Austrian border police, where, on the same day, the Neusiedl/See District Administrative Authority (*Bezirkshauptmannschaft*) ordered her detention with a view to her expulsion pursuant to Section 61 § 1 of the Aliens Act 1997 (*Fremdengesetz 1997*).

The order for detention with a view to expulsion (*Schubhaftbescheid*), issued in German language and consisting of two pages, included the instructions as to available remedies (*Rechtsmittelbelehrung*), in particular a complaint with the Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) against the lawfulness of that order, of the arrest or the detention. In its reasoning the authority referred to the applicant's unlawful entry and stay in Austria as she had no travel documents. It noted that she would not be able to ensure her subsistence and accommodation in Austria and that it had opened proceedings with a view to her expulsion. For these reasons, it would be feared that, if being released, she would hide and escape these proceedings.

The decision was handed out to the applicant at around 6 p.m. together with two Information Sheets in Romanian language.

Information Sheet I reads as follows:

"Section A

You are informed that you have been arrested by one of the Security Organs (Federal Police/Customs Guards/Austrian Federal Army) according to § 43 subparagraph 1 number 2 Aliens Act because you have entered Austria by bypassing the Border Control Office and have been caught immediately after this.

You are entitled to have one of your relatives or another person of your confidence advised of your arrest upon your demand without unnecessary delay and according to your choice. Besides, the consular representation of your native country will be immediately informed of your detention.

You will be immediately brought before the authority responsible, i.e. the Neusiedl am See District Administrative Authority which will issue the subsequent orders.

Section B

I...(Name)...(Date of Birth)..., would like the following person to be advised of my arrest: (...)

Would you like your consular representation in Austria to be informed on you arrest? Yes O No O

By my signature, I also confirm the receipt of the Information Sheet I.

(Signature)"

The applicant filled in the form, asking that Mr L. B. [full name], whose address and telephone number she indicated, be informed of her arrest and ticked the box indicating that she whished the consular representation to be informed of her arrest. The applicant duly signed the form.

Information Sheet II reads as follows:

"Section A

(1) You are informed that the District Administrative Authority/Direction of the Federal Police Neusiedl am See have, according to § 41 subparagraph 1 and 2 of the Aliens Act, ordered your detention prior to deportation because this is necessary to safeguard your expulsion or deportation into your native country.

Aliens, i.e. persons that are no Austrian citizens, can, according to § 35 subparagraph 1 number 1 Aliens Act, be forced to return to a foreign country if they have entered Austria by bypassing the Border Control Office and have been caught within 7 days.

According to § 17 (2) number 6, aliens can, in the interest of public order, be expelled by means of an order if they have entered Austria by bypassing the Border Control Office and have been caught within 1 month.

As for you, you have been arrested by Security Organs on the 25.02.02 at 10.30 o'clock after you have entered federal territory in the local administrative area (...) on the 25.02.02 at (...) o'clock by bypassing the Border Control Office and thus illegally.

(2) You are entitled to appeal to the Independent Administrative Panel ("*UVS*" – "*Unabhängiger Verwaltungssenat*") of the Province of Burgenland by asserting the unlawfulness of the order concerning the custody prior to deportation and arrest or detention. This appeal can be addressed to the Independent Administrative Panel Burgenland, Neusiedlerstraße, 7000 Eisenstadt or to the Bezirkshauptmannschaft Neusiedl/See, Eisenstädterstr. 1a, 7100 Neusiedl am See (Designation and Address of the Chief Office of the County).

Could you, please, put the note "*UVS-Beschwerde*" ("UVS Appeal") on the envelope.

(3) If you have not taken part in the determination of your identity and nationality to the required extent or if the approval necessary for the entry has not been given by a different country, detention prior to deportation can last 6 months if a prior deportation is not possible for these reasons.

Therefore, it is, above all, in your interest to state identity papers possibly handed over to other persons or hidden or thrown away in Austria, in particular travel documents, or to have them sent by your relatives from your native country. It is also your participation in the determination of your identity by your representation office that can considerably shorten your detention prior to deportation.

(4) If you have further questions, you can also address them in writing to Bezirkshauptmannschaft Neusiedl/See, Eisenstädterstr. 1a, 7100 Neusiedl am See (Designation and Address of the Chief Office of the County).

Section B

(1) Can you contribute to the determination of your identity? Yes O No O

(2) Furthermore, I confirm by this signature the receipt of the Information Sheet II dated (...)

(Signature)"

The applicant ticked the box stating that she could contribute to the determination of her identity and signed the information sheet confirming that she had received it on 25 February 2002.

In the evening of that day she was transferred to the Graz Police Detention Centre, where she was handed out a leaflet in Romanian language informing her about her rights as a detainee (*Informationsblatt für Festgenommene*), such as the maximum length of police detention, the right to consult a lawyer, to inform a person of her confidence and the consulate, to obtain medical care and about the rights during an interrogation. She also received and signed a sheet on "Information about Minders for Persons, being in Detention prior to Deportation" (*Information über die Schubhaftbetreuung*) in Romanian and ticked the box in favour of obtaining such assistance. She also received a short version of the internal prison rules.

According to the applicant, she then asked for a lawyer and an interpreter in order to know the reasons for her arrest. She alleges that her request was ignored. In the Government's view these submissions are misleading since the relevant information had been provided to the applicant through Information Sheets I and II.

On 26 February 2002 the Neusiedl/See District Administrative Authority requested the Romanian Embassy in Vienna to issue a provisional travel document to ensure the applicant's return and to issue it speedily given the applicant's detention with a view to her expulsion. This letter was dispatched and sent by registered mail on 27 February 2002 and arrived at the Romanian Embassy on 1 March 2002.

Also on 26 February 2002 the applicant called the Romanian Embassy in Vienna, where she was promised to receive a provisional travel document by 1 March 2002. That did not happen, even after two more phone calls by her to that effect.

On 7 March 2002 the applicant was questioned at the Graz Police Detention Centre in the presence of an interpreter for the purpose of issuing an expulsion order. The minutes of this interview were prepared in German. According to the minutes the interpreter translated the decision of 25 February 2002 ordering the applicant's detention with a view to her expulsion into Romanian.

While the applicant submitted that it was only then that she learned for the first time that she was going to be expelled from Austria, the Government contested this statement as being incorrect in the light of the above submissions concerning Information Sheet II handed out to the applicant on 25 February 2002.

On 13 March 2002 the Neusiedl/See District Administrative Authority issued a deportation order (*Ausweisungsbescheid*) against the applicant. The order was transmitted by fax to the Graz Police Detention Centre and handed over to the applicant on 14 March 2002.

On the same day the Romanian Embassy in Vienna issued a provisional travel certificate, valid from 13 March until 13 May 2002, which arrived at the Neusiedl/See District Authority on 15 March 2002. This certificate was transmitted to the Graz Federal Police Directorate on 18 March 2002 and from there immediately to the Graz Police Detention Centre.

On 15 March 2002 the Austro-Hungarian liaison office (*Kontaktbüro*) examined whether the applicant was prohibited from entering Hungary.

On 22 March 2002 she was expelled by train from Austria via Hungary to Romania.

On 26 November 2002 the applicant, coming from Hungary on her way to visit her husband in Spain, was refused to enter Austria (*Zurückweisung*) under Section 52 § 1 of the Aliens Act, which was noted in her new passport.

B. Relevant domestic law

The pertinent provisions are contained in the Aliens Act 1997 (*Fremdengesetz* 1997 - FrG, BGBl. I Nr. 75/1997, Federal Law Gazette no. 75/1997).

1. Arrest and detention with a view to expulsion

Section 61 § 1 of the Aliens Act provides that a person may be arrested and detained if it is necessary to ensure the proceedings on issuing a residence prohibition or an expulsion order until the order becomes effective or to secure that person's deportation.

Section 63 § 1 (2) enables the authority to detain a person, who within seven days after his entry of the Federal territory, has been caught to have bypassed the Border Control Office.

Section 66 § 1 enables the authority to refrain from issuing an order to detain a person with a view to expulsion if there are reasons to assume that less intrusive measures (*gelindere Mittel)* would suffice to ensure the expulsion proceedings.

2. Complaint to the Independent Administrative Panel

Section 72 of the Aliens Act provides for the possibility of filing a complaint with the Independent Administrative Panel against the lawfulness of a decision ordering detention with a view to a person's expulsion, as well as his/her arrest or detention.

Pursuant to Section 73 § 2 (2) the Independent Administrative Panel must take a decision within one week unless the alien's detention was terminated earlier. That time-limit is interrupted, in case the Independent Administrative Panel returns a complaint for the removal of shortcomings pursuant to Section 13 § 3 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) and sets a time-limit for this purpose.

Decisions given by the Independent Administrative Panel may be challenged before the Constitutional Court (*Verfassungsgerichtshof*) and the Administrative Court (*Verwaltungsgerichtshof*).

COMPLAINTS

1. The applicant complained about her arrest and detention with a view to her deportation for almost one month in Austria for lacking a travel document which had been stolen in France on her return trip from Spain to Romania. In particular she complained that she was only expelled on 22 March 2002, while the provisional travel document had already been issued on 13 March 2002.

She also complained under Article 5 § 2 of the Convention that she was not informed promptly, in a language which she understood, of the reasons for her detention.

2. In this respect, she also relied on Article 6 § 3 of the Convention and complained that she was not given legal assistance by the Austrian authorities.

3. The applicant alleged that the Austrian authorities' failure to react to her requests amounted to degrading treatment.

4. Finally, the applicant complained about further repercussions resulting from her expulsion on 22 March 2002, such as the refusal by the Austrian border police to allow her to enter Austria on 26 November 2002.

THE LAW

1. The applicant raised complaints under Article 5 §§ 1 and 2 of the Convention. Article 5 of the Convention, as far as material, 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.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

The Government contended that the applicant had not exhausted domestic remedies as she had failed to lodge a complaint with the Independent Administrative Panel against the alleged unlawfulness of her detention though having been informed of this remedy in the Information Sheets she received. She had not made use of this remedy throughout the entire period of her detention.

The Government observed that complaints lodged with the Independent Administrative Panel had to be written in German. However, complaints submitted in another language were not rejected but were returned for improvement (Section 13 § 3 of the General Administrative Procedure Act in conjunction with Section 73 § 3 of the Aliens Act). The applicant did not even try to exhaust the legal remedies known to her, either by making submissions in Romanian or by filing a complaint in German with the help of a minder or another German-speaking person.

Turning to the specific needs of legal protection by persons detained with a view to their expulsion, the Government explained that the Federal Minister of the Interior concluded private-law contracts with various relief organisations each year to ensure the humanitarian, social and legal assistance of detainees (*Schubhaftbetreuung*). Persons detained with a view to their expulsion were immediately informed in a language they understood of the opportunity to obtain such assistance. Even if they did not express the wish to make use of their right to assistance the persons rendering assistance had to be informed.

The applicant contested the Government's view and maintained that she had not been able to file a complaint to the Independent Administrative Panel since she had not received the decision ordering her detention with a view to her expulsion in a language she understood. Nor had she been informed of the possibility to file a complaint against it in a language she understood.

The Court considers that the question of exhaustion of domestic remedies is closely linked to the substance of the applicant's complaint under

Article 5 § 2 of the Convention and should, therefore be joined to the merits.

As regards the merits of the applicant's complaint under Article 5 § 1 (f), the Government submitted that the applicant had been arrested on 25 February 2002 under Section 63 § 1 (2) of the Aliens Act 1997 for having entered Austrian territory via Italy without a valid travel document. Therefore, the detention with a view to her expulsion was lawful as it served the purpose of securing her deportation. After the travel certificate issued by he Romanian consulate had been received by the Austrian authorities on 15 March 2002, the applicant was expelled via Hungary to Romania on 22 March 2002. Therefore the prerequisites for the applicant's detention with a view to her expulsion existed throughout the entire period of her detention with a view to her expulsion.

Furthermore, the Neusiedl am See District Administrative Authority, by a letter of 26 February 2002, had requested the Romanian consulate to issue the travel document for the applicant's return as soon as possible because of her detention. The fact that the travel document was not issued until 13 March 2002 and arrived at the District Authority only on 15 March 2002 was not imputable to the Austrian authorities. Finally, as regards the applicant's argument that she should have been expelled immediately when the travel document arrived, the Government asserted that the authorities had by no means been inactive during the remaining seven days. The applicant's expulsion to Hungary had to be prepared and coordinated with the Hungarian border officials.

The applicant maintained that her detention was unlawful. She argued in particular that she had never had the intention to enter Austria illegally, she had simply not been aware that the provisional document issued y the French police was insufficient for the purpose of travelling. In her view the Austrian authorities were not entitled to detain her with a view to her expulsion, since less intrusive measures would have sufficed to secure the expulsion procedure.

As to the merits of the applicant's complaint under Article 5 § 2 of the Convention, the Government maintained that, on the day of her arrest, the applicant had been informed in Romanian of the reasons of her arrest and the institution of expulsion proceedings against her. She had confirmed receipt of that information with her signature on Information Sheets I and II.

The applicant contested the Government's view and maintained that she had not been informed promptly of the reasons of her arrest and of the possibility of contesting her detention.

The Court considers in the light of the parties' submissions, that these complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. In so far as the applicant complained under Article 6 of the Convention, the Court reiterates that Article 6 is not applicable to proceedings concerning the entry, stay and deportation of aliens (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3, and must be rejected, in accordance with Article 35 § 4.

3. As regards the applicant's complaint that the Austrian authorities' failure to react to her requests amounted to degrading treatment, the Court reiterates that, in order to fall within the scope of Article 3, the alleged treatment must attain a minimum level of severity which depends on all the circumstances of the case (see, among many other authorities, *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III). In the present case there is no indication that the treatment complained of reached the threshold of severity required to bring the matter within the scope of Article 3.

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

4. Insofar as the applicant complained about further repercussions resulting from her expulsion on 22 March 2002, such as the refusal by the Austrian border police to enter Austria on 26 November 2002, the Court reiterates that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the enty of non-nationals into its territory (see, among many others, *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 174-75, § 38). The complaint, as submitted by the applicant, does not disclose any indication of a violation of her Convention rights.

It follows that this complaint 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

Joins the Government's objection of non-exhaustion to the merits of the applicant's complaints under Article 5 §§ 1 (f) and 2 of the Convention;

Declares admissible the applicant's complaints under Article 5 §§ 1 (f) and 2 of the Convention without prejudging their merits; and

Declares inadmissible the remainder of the application.

Søren NIELSEN
Registrar

Christos ROZAKIS
President