CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF ALI v. SWITZERLAND

(69/1997/853/1060)

JUDGMENT

STRASBOURG

5 August 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Switzerland – administrative detention of an alien with a view to his expulsion

RULE 51 § 2 OF RULES OF COURT B

No friendly settlement, arrangement or "other fact of a kind to provide a solution of the matter" in the case. Applicant had disappeared on 15 November 1994, approximately two months after application had been lodged with Commission by his counsel and four months after giving instructions to the latter, expressing his intention of continuing proceedings before Convention institutions notwithstanding his absence and his silence.

Case referred to Court by counsel for the applicant – given impossibility of establishing any communication with applicant, the Court considered that his representative could not meaningfully continue proceedings before it on sole basis of old instructions.

Conclusion: case struck out of the list, subject to restoration in the event of fresh circumstances capable of justifying such a course (unanimously).

1. This summary by the registry does not bind the Court.

In the case of Ali v. Switzerland[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr I. FOIGHEL,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr P. JAMBREK,
Mr U. LÕHMUS,
Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 25 May and 28 July 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Swiss Government ("the Government") on 9 July 1997 and by Mr R. Monferini, counsel for Mr Samie Ali and acting on his behalf, on 15 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 24881/94) against the Swiss Confederation lodged by Mr Ali with the European Commission of Human Rights ("the Commission") under Article 25 on 14 September 1994.

Both applications referred to Articles 44 and 48 as amended by Protocol No. 9, which Switzerland has ratified. The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 1 (f) of the Convention.

Notes by the Registrar

1. The case is numbered 69/1997/853/1060. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b) of Rules of Court B). On 27 August 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr I. Foighel, Mr G. Mifsud Bonnici, Mr D. Gotchev, Mr B. Repik, Mr P. Jambrek, Mr U. Lõhmus and Mr P. van Dijk (Article 43 *in fine* of the Convention and Rule 21 § 5).

3. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, Mr P. Boillat, the applicant's lawyer and the Delegate of the Commission, Mr A. Arabadjiev, on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 12 and 17 February 1998 respectively.

4. On 20 February 1998 the Commission lodged with the registry the file on the proceedings before it.

5. In his memorial of 17 February 1998 Mr Monferini wrote, *inter alia*:

> "… Mr Samie Ali is currently in Somalia and I have been unable to contact him for several months.
>
> Since he had envisaged the possibility that he might have to leave Switzerland, the applicant gave … a statement dated 23 June 1994 to the effect that he intended to pursue to their conclusion the proceedings he had instituted before the Commission and the Court. It is for that reason that I have hitherto continued to defend Mr Samie Ali's interests in those proceedings.
>
> …
>
> However, it is now too difficult for me to make a quantified proposal for just satisfaction …, as I am not in a position to know the applicant's claims against the Swiss Confederation. It should also be pointed out that if the Court were to award compensation …, my office would not know where … to send it to him in Somalia."

6. In a letter of 26 March 1998 the Government maintained that this situation could justify striking the case out of the Court's list. Mr Monferini and the Delegate of the Commission were asked to express a view on this question and the registry received their observations on 8 and 16 April 1998 respectively (see paragraphs 28 and 29 below).

7. On 5 May 1998 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the condition for this derogation from its usual procedure had been met (Rules 27 and 40).

8. On 14 May 1998 Mr Monferini filed at the registry his observations on the Government's memorial; the Government replied to them on 19 May.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant entered Switzerland on 18 November 1991 and on the next day applied to the administrative authorities for political asylum. He already had permission to reside in Italy under the name of Jean Bourgeois Samawel, born in Djibouti.

10. From July 1992 onwards several sets of criminal proceedings were brought against the applicant. In a judgment delivered on 27 August 1992 by the Criminal Youth Court of the Canton of Fribourg he was found guilty of theft and of contravening the Federal Dangerous Drugs Act. On 16 March 1993 he was convicted of theft, aiding and abetting forgery of documents, drunken driving, driving a motorcycle without a licence and contravening the Federal Public Transport Act, and on 14 July 1993 of having illegally crossed the border. In March 1993 he had committed acts of violence on a female Red Cross worker, whom he had insulted and threatened with a hammer. The penalty imposed in each instance was a fine and/or a suspended prison sentence.

11. On 17 August 1993 the Federal Office for Refugees refused Mr Ali's application for asylum and ordered that he should be expelled from Switzerland. The number of offences committed prompted the administrative authorities to take the view that the primacy of the public interest in rapid implementation of the expulsion had justified overriding the suspensive effect of an appeal.

On the same day, the Geneva cantonal police stopped the applicant, who was found to be in possession of a temporary residence permit issued by the Annecy Prefecture in the name of Ali Stef following an application for asylum made to the French Office for the Protection of Refugees and Stateless Persons.

12. On 18 August 1993 the Fribourg cantonal immigration department detained the applicant with a view to his removal. However, as it was impossible to expel him because he had no travel documents, he was released on 9 September 1993.

13. In September 1993 a fresh criminal complaint was lodged against Mr Ali for threatening two immigration officials.

14. On 28 October 1993 the Swiss Asylum Appeals Board struck out of its list an appeal by the applicant against the decision of 17 August 1993, which accordingly became final.

15. In November 1993 two further criminal complaints were lodged against the applicant, one for obtaining services by deception and the other for making threats. On 9 December 1993 he was detained in Fribourg Prison pending trial. His detention was due to last until 21 January 1994.

16. On 13 December 1993 the Fribourg cantonal immigration department proposed under sections 14*b* and 14*d* of the Aliens (Temporary and Permanent Residence) Act that the applicant should be held in administrative detention as, firstly, his expulsion was impossible for the time being and it was no longer feasible to hold him in the usual reception centres in view of the danger to those around him and, secondly, he had seriously jeopardised public order on account of the numerous offences he had committed. Mr Ali was interviewed in this connection on the same day and opposed his administrative detention, stating that he wished to be given time to leave Switzerland.

17. In a decision of 24 December 1993 that was notified to the applicant on 24 January 1994 the Federal Office for Refugees ordered his administrative detention until 23 June 1994, subject to earlier release if, in particular, a travel document could be obtained for him. The Office considered that the succession of offences committed by the applicant since his arrival in Switzerland and his general behaviour showed that his presence had seriously jeopardised public order. As to the administrative detention, it noted that the applicant had not put forward any valid objection and that his earlier behaviour had made it impossible to lend any credence to his statement about his voluntary departure from Switzerland.

18. On 10 February 1994 Mr Ali lodged a public-law appeal with the Federal Court, seeking to have the decision of 24 December 1993 quashed and stating that he wished to leave Switzerland as soon as possible. On 16 February 1994 the Federal Office for Refugees submitted that the appeal should be dismissed. On 8 March 1994 counsel for the applicant said that his client did not wish to make any submissions. He simultaneously filed a detailed application for legal aid in which he argued, in particular, that the applicant's administrative detention was not justified under Article 5 § 1 (f) of the Convention.

19. In a judgment of 14 March 1994 the Federal Court dismissed the appeal as being manifestly ill-founded. It held, *inter alia*, that the legal requirements for ordering the applicant's administrative detention had been satisfied and that the measure was justified under Article 5 § 1 (f) of the

Convention. It noted, in particular, that it had temporarily been impossible to execute the expulsion decision of 17 August 1993 and that the applicant had shown himself to be incapable of abiding by the conventions of social life and adapting to life in Switzerland because of his personal difficulties; the numerous offences he had committed proved that.

20. On 21 June 1994 the Immigration and Passports Department informed Mr Ali that he would be released on 23 June 1994 and reminded him of his obligation to "do everything possible to comply with the federal decision to expel him from Switzerland, which was still in force" and that "his continued presence in Switzerland could not be tolerated for longer than necessary".

21. As soon as he was released on 23 June 1994, the applicant instructed Mr Monferini to institute proceedings before the Convention institutions to challenge the Federal Court's judgment of 14 March 1994. The lawyer made an application to the Commission on 14 September 1994.

22. On 15 November 1994 the applicant left the hostel where he was living in Switzerland, without leaving any address.

II. RELEVANT DOMESTIC LAW

23. Sections 14, 14*a*, 14*b* and 14*d* of the Aliens (Temporary and Permanent Residence) Act provided at the material time:

Section 14

"[1] An alien who has allowed the time granted him for leaving to expire or whose return to his country of origin or expulsion cannot be delayed may be removed on the orders of the appropriate cantonal authorities.

[2] If the alien's return to the country of origin or expulsion is enforceable and there is a strong presumption that he intends to evade removal, he may be detained.

…"

Section 14*a*

"[1] Where execution of the return to the country of origin or expulsion is not possible, is unlawful or cannot reasonably be required, the Federal Office for Refugees shall decide to grant the alien temporary leave to enter or to take him into administrative detention.

…"

Section 14*b*

"[1] Temporary leave to enter or administrative detention may be proposed by … the cantonal immigration department. The alien shall be given a hearing before being taken into administrative detention.

[2] Temporary leave to enter and administrative detention must be revoked if execution is lawful, if it is possible for the alien to go legally to a third State or to return to his country of origin or the country in which he last resided and if this may reasonably be required of him. These measures shall end if the alien voluntarily leaves Switzerland or obtains permission to reside there.

…"

Section 14*d*

"[1] Administrative detention may be ordered for a period of six months. The Federal Office for Refugees may extend its duration, in each instance for a maximum of six months. The length of administrative detention shall not, however, exceed two years; at that point, at the latest, it must be replaced by temporary leave to enter.

The Federal Office for Refugees shall hold an alien in administrative detention in an appropriate institution if

(a) he jeopardises Switzerland's internal or external security or the internal security of a canton;

(b) his presence … seriously jeopardises public order.

…"

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Ali applied to the Commission on 14 September 1994. He made the following complaints:

(1) his administrative detention had not satisfied the requirements of Article 5 § 1 (f) of the Convention;

(2) the measure amounted to discrimination contrary to Article 14 because it was based on nationality;

(3) he had not been informed promptly of the adoption of the measure, contrary to Article 6 § 3 (a);

(4) he had not been able to take proceedings by which the lawfulness of his administrative detention would have been decided speedily by a court, as required by Article 5 § 4; and

(5) he had not had an oral or public hearing by the Federal Court and it had been impossible to examine a witness against him, in breach of Article 6 §§ 1 and 3 (d).

25. On 17 May 1995 the Commission (Second Chamber), after considering the complaint under Article 6 § 3 (a) from the point of view of paragraph 2 of Article 5, adjourned the application (no. 24881/94) in respect of that point and of the first two complaints and dismissed it as to the remainder. On 28 February 1996 it declared admissible the complaints relating to Articles 5 § 1 (f) and 14 and dismissed the remainder. In its report of 26 February 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 5 § 1 of the Convention but did not express any opinion on the complaint under Article 14. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

AS TO THE LAW

26. On the basis of the statements in Mr Monferini's memorial of 17 February 1998 (see paragraph 5 above) the Government asked the Court to strike the case out of its list "for want of any current interest on the part of the applicant" in pursuing the proceedings.

27. Under Rule 51 § 2 of Rules of Court B,

> "When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary, the parties and the Delegates of the Commission, strike the case out of the list.
>
> The same shall apply where the circumstances warrant the conclusion that a party who filed an application by virtue of Article 48 § 1 (e) of the Convention does not intend to pursue the application or if, for any other reason, further examination of the case is not justified."

28. The Delegate of the Commission noted "nothing in the respondent Government's observations that justifie[d] the conclusion that the applicant [could] no longer claim to be a victim within the meaning of Article 25 of the Convention".

29. Mr Monferini submitted that, despite Mr Ali's silence, his duty as the applicant's representative required him, in the absence of any express withdrawal by his client, to pursue the proceedings before the Convention institutions to their conclusion. His office could not unilaterally cancel the instructions of 23 June 1994.

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1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

30. The Court notes at the outset that there has been no friendly settlement or arrangement or "other fact of a kind to provide a solution of the matter" (Rule 51 § 2, first sub-paragraph). Even if the circumstances do not warrant concluding once and for all that Mr Ali does not intend to pursue his application, the Court holds that it should consider whether further examination of the case is justified.

31. The applicant disappeared without leaving an address on 15 November 1994 (see paragraph 22 above), approximately two months after the application was lodged with the Commission by Mr Monferini and four months after giving instructions to the latter (see paragraph 21 above). Nevertheless, annexed to the instructions of 23 June 1994 was the following statement:

> "By way of clarifying the instructions and authority to act which I have given this day to Mr René Monferini, *avocat*, I wish to state, in the event of my having to leave Switzerland and being unable to contact my representative, that I intend to pursue to their conclusion the proceedings I have brought before the Commission and the European Court of Human Rights.
>
> No abandonment of these proceedings may be inferred from my absence."

Mr Ali therefore expressed his intention of continuing the proceedings before the Convention institutions notwithstanding his absence and his silence. After the Government, counsel for the applicant, acting on the latter's behalf, applied to the Court in his turn, on 15 July 1997 (see paragraph 1 above). The applicant did not submit any fresh instructions in support of the application bringing the case before the Court. He thus never signed the form, sent to him by the registry on 10 July 1997 pursuant to Rule 35 § 3 (d) of Rules of Court B, by means of which he was requested to indicate his wish to take part in the proceedings before the Court and to designate his representative. On 25 August 1997 Mr Monferini reported that he had not succeeded in contacting his client, who was in Somalia, and forwarded a copy of the instructions of 23 June 1994 to make up for his inability to sign the aforementioned form. In his pleadings of 17 February and 8 April 1998 he confirmed that he was unable to contact the applicant and that, failing any express communication from Mr Ali cancelling the instructions of 23 June 1994, he could not cancel them unilaterally.

32. The Court considers that the instructions in question, although giving Mr Monferini full authority to act, do not, irrespective of the circumstances, justify pursuing the examination of the case. The proceedings before the Court in this instance are of an adversarial nature, as counsel for the applicant has applied to it and submitted argument. However, counsel and, consequently, the Court are not in a position to communicate with the applicant, who has made no further contact with his lawyer. Given the impossibility of establishing any communication with the applicant, the

Court considers that his representative cannot meaningfully continue the proceedings before it. Mr Monferini indeed admitted that it was difficult for him to make a quantified proposal for just satisfaction since he was not in a position to know the applicant's claims and, moreover, that if the Court were to award compensation under Article 50 of the Convention, his office would not know where to send it (see paragraph 5 above).

Having regard to those considerations, the Court holds that further examination of the case is not justified.

33. The Ali case should consequently be struck out of the list. The Court, however, reserves the power to restore the case to the list in the event of fresh circumstances capable of justifying such a course.

FOR THESE REASONS AND WITH THIS RESERVATION, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing on 5 August 1998, pursuant to Rule 57 § 2 of Rules of Court B.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar