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JUDGEMENT
IN THE NAME OF THE SLOVAK REPUBLIC

The Regional Court in Bratislava pronounced and the Judge publicly announced this

J u d g m e n t

at the public hearing held on 25th March 2004 in the legal matter of the **plaintiff: Alli Abdulla Mohamed Nasser Buchiet**, most probably born on 7th November 1964 in Aden, Yemen of Yemeni nationality, Arabic ethnic origin, of Moslem religion, without an identification document, latest permanent residence abroad in Aden, Alajdarus Street No. 7, Yemen, currently residing at the Accommodation Camp in Gabcikovo, temporarily staying at the address of Tatiana Zemlickova of Holicska 8, Bratislava, legally represented by Mgr. Martin Skamel of Slovak Helsinki Committee of Grosslingova 4, Bratislava, **against the defendant, the Migration Office of the Ministry of Interior of the Slovak Republic of Pribinova 2, Bratislava** in the matter of appeal against the decision of the defendant administrative authority of 18th November 2003, file No.: MU-4768/PO-Z/2003.

The Regional Court **c a n c e l s** and **r e t u r n s** the contested decision of the defendant administrative authority No.: MU-4768/PO-Z/2003 of 18th November 2003 to the defendant **for further proceeding**.

None of the participants of the proceeding have the right to compensation of legal charges.

R a t i o n a l e

Based on the Law No. 480/2002 Coll. on Asylum and on change and amendments of some laws, based on the §20, sec. 1 of the law on asylum and because the plaintiff did not fulfill the conditions established by §§8 to 10 of this law, the defendant administrative authority did not grant asylum to the alien Ali Abdulla Mohamed Nasser Buchiet, the plaintiff, by a decision No.: MU-4768/PO-Z/2003 of 18th November 2003.

At the same time the defendant authority decided in accordance with the §20, sec. 3 of the Law on Asylum, that the prohibition of expulsion or refoulement to Yemen according to the §47 of the Law on Asylum does not apply in the case of the alien Ali Abdulla Mohamed Nasser Buchiet.

In disagreement with the decision of the defendant authority and based on the opinion of the plaintiff that he fulfils conditions for grating of asylum, the plaintiff requested, by mail on 12th January 2004 via his authorized legal representative, a revision of the decision of the defendant administrative authority. In the written reasons of the appeal he pointed out inter alia, also to the fact that in the context of the legal aspects the defendant assessed the matter incorrectly. According to his view, the defendant administrative authority did not sufficiently ascertain all circumstances and assessed the situation in Yemen incorrectly. He also pointed out to the available sources of information, particularly the web pages whereby this source provides converse to what is stated by the defendant party in the rationale of the written decision.

The plaintiff objects, rather extensively, that in the rationale of the contested decision the defendant states that in the course of the asylum procedure no facts preventing the plaintiff's return to his country of origin were ascertained in accordance with the §47 of the law on asylum. According to the plaintiff, the defendant carried out insufficient fact finding and this part of the decision is non-examinable for lack of reasons due to the fact that the defendant in its decision and also during the whole procedure did not take into consideration issues regarding obstacles to expulsion. Moreover, the plaintiff stated that he lives on the territory of the Slovak Republic together with his common-law wife, a Slovak national, with whom he has a daughter named Amani Chadiga Buchiet. The plaintiff attached to his appeal the birth certificate of this child. In the conclusion of his appeal, the plaintiff proposed that the court cancels the contested decision of the defendant administrative authority and returns same for further proceeding or alternatively, that the court cancels the contested decision only in the part considering the issue of the prohibition of expulsion or refoulement and returns the case regarding the cancelled part to the defendant administrative authority for further proceeding.

The defendant administrative authority (further only "the defendant") provided a written statement in reaction to the appeal, wherein proposing that the Regional Court shall proceeds the case and issue a decision without ordering a hearing and confirms the contested decision.

In her final speech, the legal representative of the defendant expressed a firm objection against the interpretation of the plaintiff concerning his references to international agreement regarding the respect for family life and in this connection also the prohibition of expulsion. She further stated that as a matter of principle the defendant disagrees with the fact that unsuccessful applicants for asylum resolve the issue of unification of their families with Slovak nationals through applications for asylum. In accordance with the Law on Stay of Aliens, the Office of Alien and Border Police is the competent authority dealing with issues of expulsion and issuing decisions of this kind,

therefore it is this authority which should in its conduct apply the relevant international agreements.

According to the regulation of §21, sec. 6 of the Law on Asylum, the Regional Court is competent to decide in regard to an appeal as per sections 1 to 5 of the cited law.

According to the §246, sec. 1 of the Civic Court Rule (further only "CCR"), the examination of legitimacy of decisions and procedures falls under the material competence of regional courts, if the law does not provide otherwise.

The Regional Court in Bratislava, as the materially and locally competent body for examination of legitimacy of decision and procedures of the administrative authorities, examined the contested decision in accordance with Chapter Three of the CCR, §§250l to 250s of the CCR applying the regulations of Chapter Two with the exception of §250a as per the §250l, sec. 2 of the CCR and came to the conclusion that the appeal lodged by the plaintiff is legitimate and the contested decision must be cancelled. Actually, the court ascertained beyond the frame of the appeal that a correct, respectively an exact **date of birth of the plaintiff** absents in the whole documentary file and particularly in the verdict of the contested decision. This is a fact of great importance especially because of the plaintiff's identity and in light of potential mistaking of his person with someone else. On the basis of this fact, the court was not able to cancel the contested decision of the defendant only in one part, but had to cancel the decision as a whole, that is including the verdict on not granting of asylum, although it appears to the court to be legally correct if in further proceeding it shall contain a fixed date of birth of the plaintiff, and also in the context of the supplemented probation of evidence before the court.

According to the regulation of §250i, sec. 1 of the CCR, the situation prevailing at the time of issuing of the decision is considered decisive for the court.

For purpose of interviewing the participants and in accordance with the §250q, sec. 1 of the CCR, the court ordered a hearing, supplemented and conducted probation in the matter by interviewing the plaintiff, legal representatives of the plaintiff and the defendant, the witness Tatiana Zemlickova, by familiarizing itself with the contents of the court file, including the attached file of the defendant and came to the conclusion, that the defendant administrative authority did not err, when on the basis probation of evidence came to the conclusion that the plaintiff does not fulfill the conditions for granting of asylum as intended by the law on asylum in its regulations of §§ 8 to 10.

By examination of the defendant's decision, as well as the whole contents of the file, the Regional Court ascertained, as already mentioned above, an evident administrative inaccuracy in number of documents contained in the given defendant's file regarding the procedure on asylum application of the plaintiff. If the date of birth of the plaintiff in the contested decision would be same as provided by the plaintiff, that is the 7th November 1969, whereby the plaintiff was allegedly a member of Yemen socialist part (YSP) since 1982, he would have to joint the party as 13 year old which is

nonsensical. Therefore, it is necessary to rectify this inaccuracy. The Regional Court also noted the testimony of the plaintiff before the court, where he stated that he came to Slovakia for the purpose of study sometime in 1987, that for the last time he visited his parents in Yemen in 1993 during summer holidays and stayed for one and half month, whereby in his country of origin he did not experience any problems not even political. As can be seen upon the above mentioned, the plaintiff lives on the territory of the Slovak Republic for almost 20 years, therefore it would be only naive to assume that upon his return to the country of origin he would face persecution as described by regulation of §8 of the Law on Asylum. Despite this, the Regional Court assumes that this part of the contested decision of the administrative authority may rest without change upon returning the matter to the defendant and in the course of new proceeding and decisions (provided the date of birth shall be ascertained).

The probation of evidence carried out particularly by the administration of the Office of Alien and Border Police of the Police Force, the Department of the Alien and Border Police Bratislava, the Division of the Alien and Passport Services, Bratislava I of 13th November 2003 under the file No.: HCP-849-1/CP-BA-I-D/2003 proved before the court that the plaintiff's stay on the territory of the Slovak Republic was permitted for the purposed of study on 13th January 1988. This permit was than regularly extended until 31st August 1996. On 16th August 1996 the plaintiff applied for exit visa which was granted to him with the validity until 6th January 1997. On the basis of the plaintiff's request lodged on 30th October 1996, extension of the exit visa was granted, valid until 7th February 1997. The plaintiff was definitely expelled from the studies in 1996 by an edict No. 03/96/5153. The exit visa was granted to the plaintiff on the basis of his Yemeni travel document No. 0135246, valid until 22nd January 2001. The plaintiff duly finalized his stay and also handed back his identification card of an alien. The court noted that this authority states that the date of birth of the plaintiff is **7th November 1963**. Upon examination of the file, the court must reproach the defendant because no credible ascertaining regarding the person of plaintiff and particularly his date of birth was made and the defendant settled for variously given versions almost in every page number of the file.

The situation regarding the statement of prohibition on expulsion or refoulement Yemen according to §47 of the Law on Asylum constituting the second part of the verdict of the contested decision is different.

In regard to this part, the Regional Court must accept the reasons stated in the appeal of the plaintiff, subsequently presented at the verbal and public hearing, that although the contested decision contains the verdict in accordance with the §20, sec. 3 of the Law on Asylum, this verdict or respectively this part of the verdict of the contested decision is non-examinable and incomprehensible.

According to the regulation of §20, sec. 3 of the Law No. 480/2002 Coll. on Asylum, if the ministry rejects the application as manifestly unfounded, decides not to grant asylum or withdraws asylum, it shall state in the verdict of the decision whether the prohibition on expulsion or refoulement under §47 applies to an alien.

Based on the cited regulation it is clear, that the verdict, on whether the prohibition of expulsion or refoulement according to the §47 of the Law on Asylum is applicable in the case of the given alien, constitutes a compulsory part of the decision of the defendant on not granting of asylum.

In the interest of legal certainty, it is necessary (as can also be understood through logic interpretation of this regulation) that, if the defendant comes to the conclusion that the prohibition of expulsion or refoulement does not apply in the case of the plaintiff, it must provide verdict of a corresponding wording, whereby **in the rationale of the decision it shall settle** the facts constituting ground for such a decision, provide considerations used as a guidance in evaluation of the evidence and legal regulations forming ground of the decision (§47, sec. 3 of the Law on Administrative Procedure).

In fact, **the reason explaining why the prohibition of expulsion** or refoulement to Yemen as the country of origin **does not apply** on the plaintiff is **missing**.

According to §47, sec. 1 of the Law on Asylum no applicant, recognized refugee, alien applying for temporary protection or de facto refugee may be expelled in any way whatsoever or returned to the borders of the territory of the state, where his or her life or freedom would be endangered on account of his or her race, religion, nationality, membership of a particular social group or political opinion; the benefit of this provision shall, however, not apply to a person that can reasonably be regarded as a danger to the security of the Slovak Republic or who having been convicted by a final judgment of a particularly serious crime constitutes a danger to the society.

Although the policymaker qualifies the institute of prohibition or refoulement in the cited regulation of the Law on Asylum by enumerating the conditions, the Regional Court in this connection adds that when passing a decision on whether the prohibition of expulsion or refoulement does or does not apply on the plaintiff, it is necessary to take into consideration also the international agreements and treaties accessed and binding for the Slovak Republic. It concerns supranational legal acts which surpass by its force the nationally set norms and legislation, i.e. the European Convention on Human Rights and the Geneva Convention. It will be necessary that the defendant also takes into consideration the criteria and procedures for determining refugee status issued by the Office of the United Nations High Commissioner for Refugees.

The plaintiff together with the witness Tatiana Zemlickova confirmed at the hearing before the court that they live in a common-law relationship in a common household on Holicska 8 in Bratislava – Petrzalka in a flat owned by the parents of the witness. The witness is a Slovak national and is currently on mothers leave with plaintiff's child. The plaintiff confirmed paternity of this child – Amani Chadiga Buchiet, born 24th June 2003, as can be seen from the birth certificate dated 12th November 2003 registered on 191st page of the volume 1/158 of 2003 under the serial number 779 in the Birth Register of Bratislava – Stare Mesto.

It is necessary that the defendant shall settle this issue in its new decision on verdict regarding the prohibition of expulsion in the context of domestic law of the Slovak Republic, namely the Law No. 94/1963 on Family as amended as well as in the context of valid international conventions.

The Regional Court takes this opportunity to react to the statement of the defendant and to the final speech of its legal representative as follows:

The fact that the applicant for asylum did not solve his problem with the stay on the territory of the Slovak Republic in other way (for example as stated by the defendant that he did not request the Office of Alien and Border police responsible for issuing decision on stay of aliens in the context of the law on aliens) does not rid the court of responsibility to decide in accordance with the law and international agreements since the applicant exercised his right in the context of the Slovak law on asylum and applied for asylum on the territory of the Slovak Republic. It is not necessary to remind that courts are obliged to decide in accordance with the Constitution and other laws.

According to §46, section 1 of the Constitution of the Slovak Republic: "Every person may claim his or her right by procedures established by law at an independent and impartial court of law or other public authority of the Slovak Republic in cases specified by law."

According to §46, section 2 of the Constitution of the Slovak Republic: "Any person claiming to have been denied his or her rights through a decision made by a public authority may turn to a court of law to have the legitimacy of the decision reviewed, unless otherwise provided by law. **The review of decisions in matters of fundamental rights and freedoms must not be excluded from the jurisdiction of courts of law.**"

Therefore, if the court is deciding on appeals against the decisions of administrative authorities and reviews them, it may not be held against the court that it respects the Constitution and its cogent regulations which are binding not only for a court, but also for all natural and legal person and state authorities as well. If the defendant administrative authority is of the opinion that the court should not decide in regard to the right or obligation of expulsion in accordance with the Constitution and other laws referred to by the Constitution as the prescriptive legal act of supreme power, than the court hereby wants to quote the Article 2 of the Constitution, according to which: "**The Slovak Republic recognizes and observes the general rules of international law, international agreements binding to the Slovak Republic and other international obligations.**". Expressed in other way, the jurisdiction of courts as the third power of the state has an obligation to observe the afore cited regulation, whereby the fulfilling of the obligation of the Slovak Republic in outward direction is applied through this regulation in form of a decision issued by the courts.

Therefore, it shall be the obligation of the defendant to proceed in further proceeding in the above indicated direction and to decide, upon consideration of all facts that may form ground for the decision on whether the prohibition of expulsion or

refoulement to Yemen applies in the case of the plaintiff, not only in the context of regulation of §47 of the Law on Asylum, but also in the view of the Article 7, section 5 of the Constitution of the Slovak Republic, according to which "International agreements on human rights and fundamental freedoms, international agreements application of which does not require executive law and international agreements which directly establish **the rights** or the obligations of **natural** or legal persons and were ratified and promulgated as prescribed by the law **take precedence over national laws** ."

The Regional Court reminds the defendant administrative authority not to omit in future decision-making particularly the consideration of the Convention on Protection of Human Rights and Fundamental Freedoms (further only "Convention"), signed in the name of Czech and Slovak Federative Republic on 21st February 1991 and entering into effect on 19th March 1992 and also the Resolution of the Committee of Ministers No. 33/93 of 30th June 1993 on the basis of which the Slovak Republic is considered to be a contracting party of the Convention with retroactive effect from 1st January 1993.

In this context, the Convention takes precedence over laws of the Slovak Republic, thereby also over the Law on Asylum.

Article 8 of the Convention establishes that:

"1) Everyone has the right for respect of his private and family life, home and correspondence.

2) The state authority cannot infringe the exercise of this right with the exception of legally justified cases and in a democratic society in the interest of national security, public safety, economic prosperity of the country, preventing turbulences and criminality, protection of health or ethics or protection of rights and freedoms of other persons."

It shall be necessary that the defendant provides and inserts into file also the transcription of the plaintiff's criminal record, in order to ascertain whether the plaintiff fulfills the conditions of Article 8, sec. 2 of the above quoted Convention. Nothing prevents the defendant to undertake other investigations providing information on reputation of the plaintiff, a person whose exact date of birth is currently unknown to the defendant.

In regard to the legal charges for the proceeding, the Regional Court decided in accordance with the regulation of §250k, sec. 1 of the CCR as follows: despite the success of the plaintiff, the court did not grant compensation of legal charges as he did not incur any in this proceeding.

Instruction: Appeal against this decision is not admissible (§250j, sec. 4 of the CCR).

Regional Court in Bratislava
On the 25th March 2004

Responsible for correctness of the copy
(Signature)

Gabriela Simonova, J.D.
Judge