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. 9886/05
by Mohammed Ibrahim AHMED
against Sweden

The European Court of Human Rights (Second Section), sitting on 16 May 2006 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar,*

Having regard to the above application lodged on 15 March 2005,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of 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:

THE FACTS

The applicant, Mr Mohammed Ibrahim Ahmed, originates from the eastern coast of Africa and was born in 1972. He is currently staying in

Sweden. He is represented before the Court by Mr J. Tamm, a lawyer practising in Stockholm.

The respondent Government are represented by their Agent Mr C. H. Ehrenkrona, Ministry for Foreign Affairs.

A. The circumstances of the case

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

1. Background and the request for asylum in Sweden

On 9 February 1993 the applicant arrived in Sweden and, on the following day, he applied for political asylum. During the first asylum interview which was held with him on the same day in English, the applicant stated that he had been born and raised in Kismayu, in Somalia, and belonged to a Swahili speaking minority, the Bajuni. His father had been a wealthy man with four wives and sixteen children (of which two had the same mother as the applicant). However, in 1992, the village had been attacked by the military and his father, among many others, had been killed. He had been forced to flee, with an uncle, to Kenya and from there he had continued, via Amsterdam, to Sweden. He claimed that he had travelled using a Kenyan passport which, on his uncle's advice, he had destroyed upon arrival in Sweden.

In April 1993 the applicant underwent a medical examination which showed that he was infected with the HIV virus and treatment commenced immediately at the Huddinge hospital. At this point he was informed about the nature of the disease and told that he was obliged to disclose to every sexual partner that he might have that he carried the virus.

The applicant also had to do some language tests. In an analysis of these tests, dated 20 July 1994, it was concluded that the applicant did not speak the dialect of Swahili (Kibayoni) that was used in Kismayo, where the applicant had claimed to originate from. The Swahili he spoke was rather considered to belong to northern Kenya. However, the issue of the applicant's origin was not investigated any further at this time.

In a submission to the Immigration Board (*Invandrarverket*) of 13 August 1993, the applicant submitted, *inter alia*, that his younger brother was staying with his mother's uncle in Kenya.

On 27 October 1994 the Immigration Board rejected the applicant's request for asylum since it did not find that he was in need of protection or, for any other reason, could be considered a refugee. However, it granted him a permanent residence permit on humanitarian grounds, referring to a guiding decision of 17 March 1994 by the Swedish Government in which it was considered that the security situation in large parts of Somalia was so serious that it would be contrary to the requirement of humanity to force

Somali citizens to return there. In the residence permit, the applicant was registered as a citizen of Somalia.

During 1995 the applicant met a Swedish woman and, in June 2001, they married. Because of the military conflict in Somalia, the applicant has stated that he has had no contact with his family or relatives there since 1994 and does not know what has happened to them.

2. The first set of criminal proceedings

On 29 December 1995 the District Court (*tingsrätten*) in Södertälje convicted the applicant of attempted murder and sentenced him to five years' imprisonment and life-time expulsion from Sweden. He was found guilty of having attempted to stab another man to death because he had thought that this man had told people that the applicant was infected with HIV. The District Court noted that each of the knife wounds could have been fatal for the victim and that it was only because he had received medical attention in time that his life had been saved.

As concerned the question of expulsion, the Immigration Board had been consulted and it had stated that, although the security situation in Somalia had not improved since the Government's decision in March 1994, there did not exist any general impediments against expelling a person to the area where his clan lived. Thus, it considered that there were no impediments to the expulsion of the applicant to Somalia. Having regard to the Board's view and noting that the applicant had no close connection to Sweden and that he had committed a very serious crime, the District Court concluded that he should be expelled for life from Sweden. However, in deciding the prison sentence, the District Court had regard to the detriment caused to the applicant by the expulsion order and reduced the normal prison sentence accordingly.

The applicant and the prosecutor appealed against the judgment to the Svea Court of Appeal (*hovrätten*). On 12 February 1996 an oral hearing was held in the case where the applicant was present. However, the same afternoon he withdrew his appeal and, as a result, the prosecutor's appeal lapsed. Consequently, the Court of Appeal discontinued its consideration of the case and the District Court's judgment gained legal force.

On 11 March 1999 the applicant was conditionally released from prison. While in prison, he had lodged two requests with the Swedish Government to revoke the expulsion order against him and to grant him a residence permit since he would not be able to receive adequate treatment for his illness in Somalia. On 12 March 1998 the Government rejected the first request but, prior to its second decision, the Government asked the Immigration Board to carry out a thorough investigation into the applicant's identity. Accordingly, the Board held two interviews with the applicant, the first on 24 February 1999 and the second on 22 March 1999. During these, the applicant stated that he had no documents to prove his identity but that

he had lived all his life in Somalia. He claimed that his father was deceased and that he did not know the whereabouts of his mother or siblings as he had had no contact with any of them since his arrival in Sweden.

Moreover, the applicant underwent two language analyses, on 11 and 18 March 1999 respectively, from which it appeared that he could not speak Somali as he had not been able to count to twenty in that language when requested to do so. From the recordings, the analyst concluded with great certainty that the applicant did not come from Somalia as even Somali people whose mother tongue was not Somali could in general still speak the language relatively well and it was difficult to live in any part of the country without speaking it. Instead, the applicant was found to speak a Swahili dialect that most closely could be placed at the south coast of Kenya or possibly its northern coast.

In its statement of 22 April 1999 to the Government, the Immigration Board considered that, although the applicant had knowledge about Somalia and the conditions there, the investigation indicated that he might be a citizen of another country than Somalia, in particular having regard to the result of the language analyses. The Board then stated that there were in any event no impediments against expelling the applicant either to Somalia, Kenya or even Tanzania.

On 1 July 1999, the Government rejected the applicant's second request in so far as it concerned the revocation of the expulsion order. However, it granted him a temporary residence permit until 1 January 2000 due to the particular circumstances of the case.

Subsequently, on 3 February 2000, the Government rejected a new request by the applicant to revoke the expulsion order, but granted him another temporary residence permit, valid until 2 February 2001. On 22 February 2001 the Government again refused to revoke the expulsion order upon request by the applicant, but prolonged the temporary residence permit until 21 February 2002.

3. The second set of criminal proceedings

On 10 June 2002 the District Court in Karlstad convicted the applicant of battery and assault, attempted aggravated battery and assault, making illegal threats and threatening a civil servant. He was sentenced to four years' imprisonment. The District Court noted that there was already an expulsion order in force against him, for which reason it dismissed the prosecutor's request with regard to this matter. The court found that the applicant had had sexual relations with a woman between August and December 2001 without telling her that he was infected with the HIV virus. During this period they had had sexual intercourse on at least 20 occasions without using any protection. Since the woman had not been infected, the court convicted the applicant of attempted aggravated battery and assault. Moreover, on 19 December 2001, he had attacked and beaten several

persons at the school he attended, including threatening the police who came to arrest him with a knife.

The applicant claimed that he did not remember anything and that he had been psychotic at the time of the events and therefore could not be held responsible for his actions. A chief physician, H. Kleine, considered that it was probable that the applicant had committed the crimes under the influence of a psychosis and recommended that he should undergo a forensic psychiatric examination. Such an examination was carried out by chief physician, T. Bondesson, a specialist in psychiatry and forensic psychiatry who, in a certificate dated 14 March 2002, asserted, *inter alia*, that the applicant had acted under the influence of a "serious mental disturbance" (*allvarlig psykisk störning*) and should be committed to forensic psychiatric care for treatment. In the circumstances, the District Court decided to request the opinion of the Board of Health and Welfare (*Socialstyrelsen*) on the assessment of Dr. Bondesson. The Board in turn requested an opinion from chief physician, J. Ahlberg, a specialist in forensic and general psychiatry. Her assessment was that the applicant had not acted under the influence of a "serious mental disturbance". She considered that he had had a brief paranoid disturbance which had been self-induced since he lived under much pressure, being HIV-positive, being involved with two women and, moreover, being dissatisfied with the authorities. Furthermore, the applicant had tested positive for having taken cannabis which, in combination with his HIV medication, had created his aggressive reaction. The Board declared, in its opinion to the court, that it shared Dr. Ahlberg's assessment. The District Court accepted the Board's opinion and thus found that the applicant must be held responsible for the crimes which he had committed and therefore had to be sentenced to imprisonment.

Upon appeal, the Court of Appeal (*hovrätten*) for Western Sweden upheld the lower court's judgment in full and, on 10 September 2002, the Supreme Court (*Högsta domstolen*) refused leave to appeal.

4. Request for the expulsion order to be revoked

On 23 August 2004 the applicant was conditionally released from prison. However, on 20 August 2004, the Government had decided to stay the expulsion until it had considered a new request by him, lodged on 27 July 2004, to revoke the expulsion order and grant him a residence permit. Further, it had decided to place him in custody awaiting the decision. The applicant appealed against the custody decision but, on 15 October 2004, the Supreme Administrative Court (*Regeringsrätten*) rejected that appeal.

The Government then proceeded to request the Migration Board (*Migrationsverket*) to examine from where the applicant originated since there were still some doubts as to whether he was actually from Somalia.

The Board held two interviews with the applicant, the first on 17 November 2004 and the second on 24 January 2005, and language analyses were then carried out in respect of them. During the first interview the applicant first spoke in English and then in Swahili. The tape recordings from the interview were of very bad quality but the language analyst stated that it was clear that the applicant's mother tongue was Swahili and that his dialect belonged most closely in east Africa. His English indicated that he came from an English speaking country in Africa. It also appeared from the recordings that the applicant was unwilling to talk about his home town or country of origin and that he alleged that he had no contact with his family or anybody else in Somalia.

From the recordings of the second interview, the language analyst noted that the applicant did not use any of the dialectal or local terminology concerning the fishing in his home town despite the fact that his father, at one time, had been a fisherman. Moreover, his description of southern Somalia was general and could apply to any urban society in the Swahili speaking costal area of Africa. The analyst considered that the applicant's dialect most closely indicated that he was from the southern coast of Kenya.

On 1 February 2005 the Migration Board submitted its observations to the Government. It considered that the applicant was not from Somalia since he could only answer questions about Somalia, and his purported ethnic connections, in a very vague and partly incorrect manner. Moreover, it was unlikely that he had grown up in Kismayo without speaking at least some basic Somali, which he did not. In this respect, the Board noted that the applicant had, on several points, changed the information he had originally provided upon arrival in Sweden in 1993. As the language tests also indicated that he was not from Somalia but probably from Kenya, the Migration Board concluded that he was not from Somalia and considered that the expulsion should be enforced to Kenya.

In preparation for their decision, the Government also requested the Swedish Embassy in Nairobi to provide information about the health care available in Kenya to persons infected with the HIV virus. The Embassy replied that there were several institutions, both private and public, where all forms of care were provided. Two of these institutions provided care and treatment of the highest quality. However, the care available depended on the person's ability to pay, as there was no social security system in Kenya ensuring medical care for everyone. As a result, those with low income had little access to qualitative care.

The Government further requested *Médecins sans Frontières* (MSF) in Belgium to provide information about the health care available in Somalia to persons infected with the HIV virus. On 10 November 2004, MSF responded by referring to the UNHCR Position on the Return of Rejected Asylum-Seekers to Somalia (January 2004), which stated that no medical facilities in Somalia were equipped to render the necessary assistance to

HIV patients and that, except for those who could afford to import the drugs, anti-retroviral treatment was not available in Somalia. According to the UNHCR, the involuntary removal of persons with HIV/AIDS should therefore be strictly avoided.

The applicant contested the conclusions of the Migration Board and maintained that he was from Somalia and belonged to the Bajuni people. He further stated that he had no close relatives or friends in Kenya. Moreover, as he had no economic resources, he would not be able to benefit from the care which existed in Kenya. He also underlined that, because of his very weak immune system, he would not survive for very long if his treatment were interrupted.

By decisions of 22 October 2004, 22 December 2004 and 22 February 2005, the applicant was kept in detention.

On 24 February 2005 the Government decided not to revoke the expulsion order and rejected the applicant's request for a residence permit. It found that there was neither any impediment to the enforcement of the expulsion nor any other special reason under the Aliens Act to revoke the expulsion order. Moreover, in their reasons for the decision, the Government expressed the opinion that the applicant originated from Kenya.

On 22 March 2005 the border police responsible for the enforcement of the expulsion of the applicant visited him in detention to prepare for the expulsion. After the meeting, the applicant was informed that the border police intended to expel him to Somalia, not to Kenya.

On 24 March 2005, following the Court's indication under Rule 39 of the Rules of Court, the Government stayed the execution of the expulsion order until further notice.

On 6 April 2005 the applicant made yet another request to the Government to revoke his expulsion order and grant him a residence permit. He invoked essentially the same circumstances as before. The request is still pending.

On 16 February 2006 the Supreme Administrative Court ordered that the applicant should be released from custody but that he should be placed under supervision by the police authority. In reaching its decision, the court took into account, *inter alia*, the fact that the applicant suffered from an advanced HIV infection for which he was dependent on strong medication and close contact with his physicians. The applicant was released on the same day and is, apparently, living with his wife.

5. The applicant's state of health

The applicant has received treatment for his HIV infection since it was diagnosed in April 1993. His immune system was already at that time very weak and it has not improved. According to a medical certificate, dated 22 April 2004, by a specialised physician, A. Thalme, at Karolinska

University Hospital, the applicant's "HIV amount" was over 100,000, a sign of express treatment rejection, and his immune defences were very low.

Another medical certificate, dated 23 June 2004, by Dr L. Moberg, Chief Physician at the Infection Clinic at Karolinska University Hospital, stated that, during the autumn of 2001, the applicant had become psychotic, probably due to an HIV medicine, *Storcin*, which he was taking at the time but that this had not been investigated during the trial against him.

In a further certificate, dated 10 November 2004, also by Dr Moberg, it was stated that the applicant was not in need of "HIV medication in general" but that he was dependent on those medicines which he was receiving at the moment. He had an HIV virus which was highly resistant to almost all medication. He was receiving *Fuseon*, a "Fusion Inhibitor" (it prevents HIV entry into cells), which he injected into his stomach twice a day. This medication cost about SEK 14-15,000 (EUR 1,550-1,650) per month and it had to be kept in a fridge.

Further, he took a licenced medication, *Tipranavir*, a "Protease Inhibitor" (it disables protease, a protein that HIV needs to make more copies of itself), 2 capsules twice a day, which was also very costly. Moreover, the applicant took a number of other medicines to alleviate the remaining effects and provide him with satisfactory treatment (*Norvir*, also a Protease Inhibitor, *Ziagen*, a Nucleoside Reverse Transcriptase Inhibitor [it stalls the reproduction of HIV] and *Viramum*, a Nonnucleoside Reverse Transcriptase Inhibitor [it binds to and disables reverse transcriptase, a protein that HIV needs to make more copies of itself]). According to the certificate, without this very specific HIV treatment, which the applicant could only get in Sweden, he would probably die within a very short time.

His future was difficult to predict but, with the treatment he received in Sweden and the possibilities to treat him successfully until new treatments were developed within a few years, his prospects were considered relatively good.

The latest medical certificate, dated 4 October 2005 (i.e. after the Government had submitted their observations), by Dr Moberg, indicated that the applicant's CD4-cell count was 8% (=89), which meant that, at any time, a number of complications could arise in connection with his HIV infection. Already in 2003, he had had a yeast infection (*candidaesofagit*) in his oesophagus which is an AIDS-related diagnosis. Since the antiretroviral treatment had not re-established the applicant's immune system following the infection, the physician considered that the applicant must now be considered to have developed AIDS. Moreover, the yeast infection re-appeared regularly and he had just started another such treatment. The applicant had also been receiving preventive medication against pneumonia and toxoplasma encephalitis for several years. Because the applicant's HIV infection had become highly resistant, he was dependent on very specific medication (see previous medical certificate). The physician repeated that

he considered it absurd and unrealistic to believe that the applicant would be able to get adequate treatment outside Sweden.

B. Relevant domestic law

Pursuant to Chapter 1, Article 8 of the Penal Code (*Brottsbalken*), a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a consequence.

Provisions on expulsion on this ground are laid down in the Aliens Act. According to Chapter 4, section 7 of the Act, an alien may not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are satisfied. First, he or she must have been convicted of a crime that is punishable by imprisonment. Secondly, he or she may only be expelled if the sentence is more severe than a fine, and if (1) it may be assumed, on account of the nature of the crime and other circumstances, that he or she will continue committing crimes in Sweden, or (2) the offence, in view of the damage, danger or violation involved for private or public interests, is so serious that he or she ought not to be allowed to remain in the country.

Furthermore, under Chapter 4, section 10 of the Act, when considering whether or not an alien should be expelled, the court shall take into account the person's links to Swedish society. In doing so, the court shall pay particular attention to the living conditions and family circumstances of the alien and the length of time that he or she has resided in Sweden. An alien who has held a permanent residence permit for at least four years when proceedings are initiated against him or her, or who has at that time been residing in Sweden for at least five years, may not be expelled unless there are exceptional reasons for the expulsion. As regards aliens who are considered to be refugees, special rules apply.

Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to Chapter 8, section 1 of the Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment. Further, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

A decision to expel an alien on account of having committed a criminal offence is, according to Chapter 8, section 11 § 2(2) of the Act, enforced by the police authority. If the police authority finds that there exist impediments against the enforcement, it shall notify the Migration Board which shall refer the matter to the Government for examination as to whether the expulsion can be executed. If there are no impediments to the

enforcement, the alien shall normally be sent to his or her country of origin or, if possible, to the country from which he came to Sweden (Chapter 8, section 5 of the Act).

According to Chapter 7, section 16 § 1 of the Act, if the Government find that a judgment or decision to expel a person on account of having committed a criminal offence cannot be executed or if there are otherwise special reasons not to enforce the decision, the Government may repeal, in part or completely, the judgment or decision of the court. When considering whether to repeal an expulsion order, the Government shall above all take into account any new circumstances, i.e. circumstances that did not exist at the time of the courts' examination of the criminal case. In the *travaux préparatoires* to this provision (Government Bill 1988/89:86, p. 193), strong family ties and severe illness are given as examples of such "special reasons" that may warrant revocation of an expulsion order. The Government may also, in accordance with Chapter 11, Article 13, of the Instrument of Government (*Regeringsformen*), pardon or reduce a penal sanction or other legal effect of a criminal act.

In cases where the expulsion order is not revoked, the Government may still grant a temporary residence permit and work permit. For as long as such a permit is valid, the expulsion order may not be executed (Chapter 7, section 16 § 2 of the Act).

COMPLAINT

The applicant complains that his expulsion to either Somalia or Kenya would amount to treatment contrary to Article 3 of the Convention as it would considerably reduce his life expectancy because the specific medical treatment and medicines required by his HIV infection are not available in these countries.

THE LAW

The applicant claims that his expulsion to either Somalia or Kenya would violate his rights under Article 3 of the Convention, which reads as follows:

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

A. Exhaustion of domestic remedies

The respondent Government contend that the applicant has not exhausted domestic remedies as required under Article 35 § 1 of the Convention. They note that the case concerns the enforcement of the expulsion order against the applicant which was issued by the District Court in its judgment of 29 December 1995. As the applicant withdrew his appeal before the Court of Appeal, the District Court's judgment, including the expulsion order, gained legal force. The Government state that the applicant has provided no information as to why he did not pursue his appeal before the appellate courts or on what basis this failure should be without prejudice to the admissibility of the present application. In the Government's opinion there can be no doubt that an appeal to the competent court of appeal and, if necessary, a further appeal to the Supreme Court constitute precisely the type of domestic remedies that the applicant was obliged to exhaust in order for the Court to be competent to examine his application.

Moreover, they submit that the remedy afforded an applicant through the regular appellate process cannot, as regards the question of exhaustion of domestic remedies, be replaced by a petition to the Government under the Aliens Act as such a petition must be seen as an outflow of the system of pardons and therefore be considered an extraordinary remedy. Thus, in the Government's view, the fact that the applicant, on several occasions, has applied to the Government for a revocation of the expulsion order cannot make up for his failure to exhaust the ordinary remedies available to him at the time when the relevant judgment was issued.

The Government contend that, as in the case of *Heidari v. Sweden* (application no. 36800/97, Commission decision of 22 January 1998, unreported), there is nothing in the present material before them to indicate that the grounds relied on by the applicant in support of his application before the Court (i.e. that he is from Somalia, has HIV and that no treatment would be available for him for his disease in his country of origin) could not have been invoked already in the criminal proceedings in 1995 and argued in subsequent appellate proceedings. In support of this, they submit that the applicant was diagnosed as HIV positive and started treatment already in 1993 and that it was a well-known fact already at this time that HIV was a serious disease which, if not treated adequately, was likely to considerably reduce the life expectancy of the infected person. Moreover, they claim that the applicant's HIV infection cannot be considered to have changed since 1995 so as to render his subsequent requests to the Government for revocation of his expulsion order a remedy for the purposes of Article 35 of the Convention. Thus, in conclusion, they insist that the application should be declared inadmissible for non-exhaustion of domestic remedies.

The applicant maintains that he has exhausted domestic remedies as required by the Article 35 of the Convention. While acknowledging that he

did not pursue the appeal against the District Court's judgment of 29 December 1995, comprising the expulsion order against him, he submits that, given the circumstances of the case, the final judicial recourse of relevance for the assessment of Article 35 § 1 of the Convention was the Government's decision of 24 February 2005 in which his request for a revocation of the expulsion order was rejected. In this respect the applicant claims that his present application is not against the expulsion order *per se*, but against the execution of the said order in the circumstances at hand, because he would not receive the medication and treatment for his HIV infection that are absolutely vital for his survival.

The applicant notes that at the time of the District Court's judgment in December 1995 no deportations or expulsions were forcibly executed to Somalia according to prevailing practice. Thus, at the relevant time, there was no imminent risk that the order would be executed within a foreseeable future which was also confirmed by the Government granting him, repeatedly, temporary residence permits between 1 July 1999 and 21 February 2002. As the Government, in their decisions, only referred to the "special circumstances of the case", the applicant contends that this logically refers to his HIV infection, the situation in his native country, Somalia, and his possibilities to get treatment there, as these were the main grounds invoked by him before the Government. Furthermore, in the Government's decisions on 12 March 1998 and 22 February 2001, it was stated that the applicant was from Somalia. Thus, the applicant alleges that the Government's sudden change in its last decision of 24 February 2005, to consider that he was from Kenya and should be expelled to this country, was a completely new circumstance in relation to his case.

With reference to the Court's case-law, the applicant observes that the requirement to exhaust domestic remedies is not absolute and must be interpreted with a degree of flexibility and with due consideration to the circumstances of each specific case. He points out that the District Court's judgment, including the expulsion order, was rendered in December 1995 more than nine years before the Government decided that the expulsion order should be enforced in February 2005. During this time, he claims that his HIV infection has become more serious as it has become highly resistant to most of the medication available, which has drastically diminished his possibility to get adequate treatment and medication if expelled. Moreover, in 2003 he contracted a fungal infection in his throat, a symptom of AIDS, for which he currently receives medication. Thus, in the specific circumstances of the present case, the applicant submits that his request to the Government to revoke the expulsion order was an effective opportunity to achieve the result that he wished to obtain, namely to stop the execution of the expulsion order, and that it must therefore be considered as the final domestic remedy for the purposes of Article 35 § 1 of the Convention.

The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system before turning to the Court. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. However, the Court has recognised that the rule must be applied with some degree of flexibility and without excessive formalism, and that it is neither absolute nor capable of being applied automatically. In reviewing whether the rule had been observed it is essential to have regard to the particular circumstances of each individual case (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210-11, §§ 65-69).

In the present case, the Court observes that the relevant expulsion order was rendered in a judgment by the District Court on 29 December 1995 which gained legal force after the applicant had withdrawn his appeal before the appellate court. Thus, he did not use the possibility available to him at that time to appeal against the expulsion order.

However, the Court notes that this judgment dates from more than ten years ago. The Government have argued that the gist of the applicant's complaint before the Court could have been raised already at that time before the national courts while the applicant has maintained that new circumstances have arisen which have made the Government's decision of 24 February 2005 the only effective remedy available to him. The Court agrees with the applicant for the following reasons.

After the applicant had served his first prison sentence, the Government, upon request by the applicant, granted him a temporary residence permit due to the special circumstances of his case. This temporary permit was subsequently renewed for one year at a time on two occasions until the applicant was arrested on suspicion of having committed new crimes. Thus, it could be argued that, already at this time, there existed certain new circumstances which led the Government to allow the applicant to stay in Sweden and not to enforce the expulsion order against him. It was only through the second criminal proceedings against the applicant that the expulsion order was "activated" again. However, since the order had gained legal force through the first criminal proceedings, the applicant was hindered from complaining about it in the second set of proceedings.

In July 2004, just before the end of his second prison sentence, the applicant renewed his request to the Government to revoke his expulsion order and to grant him a residence permit. At this point the Government decided to stay the enforcement of the order until it had considered the applicant's new request. Moreover, the Government asked the Migration Board to carry out further investigations into the applicant's origins and also asked both the Swedish Embassy in Kenya and MSF for information about treatment for HIV in Kenya and in Somalia. The Court considers that, had

there been no new circumstances or developments in the applicant's case since 1995, the Government would not have needed so much up-to-date information. The Court also attaches importance to the fact that the Government, on the basis of all the new information collected, found that the applicant most likely originated, not from Somalia, but from Kenya. This must most certainly be qualified as a new circumstance of importance to the case, in particular as the applicant had been registered as a Somali national since his arrival in Sweden in 1993 and the consequences for him to be expelled to Kenya instead of to Somalia would be very different.

Furthermore, although recognising that the applicant was aware of his HIV infection in 1995 and received treatment for it, the Court disagrees with the Government's argument that it has not changed much since that time. In the Court's view, and as appears from the medical certificates of the applicant's treating physician, the applicant's HIV infection has over the years become more and more resistant to medication and he has also, during the last couple of years, attracted a recurring yeast infection which is considered an AIDS-related illness. The Court also finds that the medication which the applicant is currently taking on a daily basis clearly indicates that his HIV infection has become much more serious over the years.

Moreover, the Court notes that, in July 2001, the applicant married a Swedish woman with whom he is currently living.

Thus, in the very special circumstances of the present case, the Court finds that the Government's decision of 24 February 2005 was in fact the only remedy available to the applicant, at the relevant time, in respect of the complaint invoked by him before the Court. Moreover, as the Government stayed the execution of the expulsion order during their consideration of the applicant's request and made a complete examination of all aspects of the case, it must be considered an effective remedy. It follows that the application cannot be declared inadmissible for failure to exhaust domestic remedies.

B. Failure to observe the six-month rule

With reference to their submissions concerning the question of non-exhaustion of domestic remedies, the Government also contend that the applicant has failed to observe the six-month time limit in Article 35 § 1 of the Convention. They consider that the final domestic decision for the purposes of this rule was the District Court's judgment of 29 December 1995.

The applicant maintains that the final domestic decision was the Government's decision of 24 February 2005, and that he has complied with the six-month rule.

As the Court has concluded that the final domestic decision in the circumstances of the present case was the Government's decision of

24 February 2005, and the applicant lodged his application with the Court on 15 March 2005, the Court is satisfied that the applicant has complied with the six-moth time limit in Article 35 § 1 of the Convention.

C. Substance of the applicant's complaint

The Government submit in the alternative that the application should be declared inadmissible as being manifestly ill-founded. They maintain their view that the applicant originates from Kenya and the Swedish Police Authority has now confirmed to the Government that it will expel him to this country, should the stay of the expulsion order be lifted. The Government base their view on the interviews with the applicant and the language analyses carried out in respect of him. They consider it highly unlikely that the applicant would have lived in Somalia for the first twenty years of his life without having learnt even rudimentary Somali or been capable of providing the interviewers with anything but general and vague information about Somalia and Kismayo. They also rely on several of the language analyses which found that the applicant's Swahili dialect belongs in east Africa and most likely the southern coast of Kenya. Thus, the Government base their observations on the presumption that the applicant is from Kenya.

While recognising the seriousness of the applicant's medical condition and his continued need of treatment, the Government observe that there is no indication in the medical documentation invoked by the applicant that he has reached the stage of AIDS or that he suffers from any HIV-related illness. Moreover, they allege that the applicant would be able to benefit from treatment for his HIV infection in Kenya, albeit at a certain cost, since there are at least two hospitals in Nairobi which have both the physical infrastructure and medication available to treat all types and stages of HIV and AIDS and provide care of the highest quality. There would also be qualitative care available in other parts of the country such as Mombasa and Kisumu. The Government acknowledge that there is no public, social welfare system in Kenya and that, consequently, access to treatment and medication depends on the individual's ability to pay for it. Still, they stress that the Kenyan Government are giving priority to the matter of introducing measures to extend the access to care to everyone suffering from HIV and AIDS. Referring to the Court's case-law, they stress that the fact that the applicant's circumstances in Kenya would be less favourable than those he enjoys in Sweden cannot be decisive from the point of view of Article 3 of the Convention (*Bensaid v. the United Kingdom*, no. 44599/98, § 38, ECHR 2001-I, and *Amegnigan v. the Netherlands* (dec.), no. 25629/04, 25 November 2004, unreported).

The Government further state that they have no other information about the applicant's family situation than that provided to the Swedish authorities

on different occasions by the applicant himself. However, they note that the applicant has not been consistent on this point. While claiming before the Court that he has no knowledge of the whereabouts of any of his family members, the Government observes that, in a submission to the Immigration Board in 1993, he stated that a younger brother of his was staying with an uncle on his mother's side in Kenya. More importantly, in the interview with the Migration Board in November 2004, he submitted that his mother and sister were residing in Kenya. The Government find no reason to doubt that this information is correct and that the applicant later changed his statement in this regard because he realised that it would serve his interests better to deny any knowledge of the whereabouts of his family members. They consider that the reliability in general of the applicant's statements with a bearing on the issue of his origin, including his family relations, may be called into question. Thus, the Government submits that the applicant has family in Kenya and may expect to receive support and comfort from close relatives upon his return to that country. They also note that the applicant has stated that he has sixteen brothers and sisters and that he comes from a wealthy family which would indicate, in the Government's view, that there are people who can contribute financially to cover the costs of the applicant's medical treatment in Kenya.

In conclusion the Government contend that the enforcement of the order to expel the applicant would not be contrary to the standards of Article 3 of the Convention as it has not been shown that his illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. In reaching this conclusion, the Government have regard to the high threshold set by Article 3 particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm.

The applicant maintains that he is from Somalia and that an expulsion to that country or to Kenya would violate Article 3 of the Convention. However, he states that, since the Government and the Swedish Police Authority have decided that the expulsion order will be enforced to Kenya and the Government have based their observations on this presumption, he will do the same. Still, he underlines that the Swedish authorities accepted that he was from Somalia by officially registering him as a native from this country when, on 27 October 1994, he was granted a permanent residence permit in Sweden. This decision was based on written material and oral interviews as well as a language analysis. Moreover, in the Government's decisions of 12 March 1999 and 22 February 2001, it was stated that he was a citizen of Somalia. The applicant questions how the Government can now be so certain that he is from Kenya as, apart from some language tests, there is no proof that he originates from that country. Moreover, the different interviews with him have been carried out over a period of twelve years and he finds it perfectly understandable that a person during such a time span

can offer some degree of internally divergent information. However, in the present case, the applicant insists that he has, on all major issues, consistently maintained the information provided by him and he has given specific information about Somalia. In this respect, he observes that the Migration Board, in a statement to the Government in April 1999, mentioned that he had knowledge about Somalia and the situation there and that this assessment was suddenly changed in the Board's submission to the Government in February 2005, i.e. six years later, for unclear reasons.

As concerns his state of health, the applicant submits that it has continuously deteriorated and that his cell count is now so low that he is liable to attract virtually any type of infection or complication due to his HIV infection. He also stresses that, already in 2003, he was given an AIDS determining diagnosis in the form of a yeast infection for which he is still receiving treatment. Moreover, he has to take several different kinds of advanced medication which are of vital importance to him, partly because the virus has become resistant to most drugs and partly to prevent new infections. In the applicant's view, it is very unlikely that he would have access to adequate medication and treatment in Kenya, and this is supported by his treating physician in Sweden who has been in contact with the Nairobi Hospital in Kenya. This hospital does not have the specific medication on which the applicant is dependent (*Fuzeon* and *Tipranavir*). In any event, he claims that he has no economic resources to pay for any medication or treatment.

With regard to his family relations, the applicant submits that, as far as he is aware, he has no relatives in Kenya and he has had no contact with his family in Somalia since he left the country more than twelve years ago. Thus, he claims that he does not know anything about them. In this context, he admits that during the interview in November 2004 he said that his mother and sister might be in Kenya, but that this information was taken out of context as the rest of the statement was left out due to the very poor quality of the tape recording. The applicant alleges that he got this piece of information after having paid about EUR 500 to a Somali national who undertook journeys to Somalia and Kenya for people to look for their relatives. However, he has not been able to verify this piece of information and seriously doubts its veracity.

Thus, the applicant concludes that it would be in violation of Article 3 of the Convention to send him to Kenya where he has no relatives, friends or accommodation, and where he would be totally outside the Kenyan society without any economic means, and suffering from a serious illness.

In supplementary observations, the Government inform the Court that the drugs *Fuzeon* and *Tipranavir* are currently not available in Kenya but may be imported directly from the manufacturer on behalf of an individual patient and at his cost (approximately US$ 30,000 annually for the two drugs).

By letter of 13 February 2006, the applicant informs the Court that the drug *Tipranavir* has temporarily been replaced by *Reyataz*, due to certain side-effects caused by the former drug. However, *Tipranavir* will probably be needed again in the near future if no better drugs become available.

The Court considers, in the light of the parties' submissions, that the complaint raises 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 complaint 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.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President