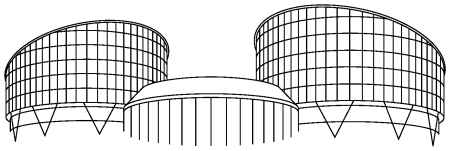

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF AHMED v. THE UNITED KINGDOM

(Application no. 59727/13)

JUDGMENT

STRASBOURG

2 March 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ahmed v. the United Kingdom,

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

Mirjana Lazarova Trajkovska, *President,*
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan,
Tim Eicke, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 31 January 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 59727/13) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Somali national Mr Liban Mohamud Ahmed.

2. The applicant was represented by Mr Z. Yazdani of Deighton Pierce Glynn Solicitors, Mr R. Husain QC of Matrix Chambers, and Ms L. Dubinsky of Doughty Street Chambers. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. McLeod.

3. On 15 October 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1977 and lives in London.

A. The applicant's immigration history

5. The applicant left Somalia with his family for the Netherlands in 1992 when he was fifteen years old. After claiming asylum, it would appear that the family were given a period of leave to remain in the Netherlands. During

this period the applicant married and had a son, born in 1994. The applicant's family travelled to the United Kingdom in 1998. The applicant initially remained in the Netherlands but on 11 December 1999 he arrived in the United Kingdom, where he claimed asylum. In doing so, he provided the immigration authorities with a false name and a false immigration history in order to avoid being sent back to the Netherlands. Although the asylum application was unsuccessful the applicant was granted exceptional leave to remain until 2004.

6. The applicant received ten criminal convictions over the period from 16 November 2001 to 4 August 2005. In December 2007 he was convicted of a public order offence and of failing to surrender. He was sentenced to four and a half months' imprisonment.

7. On 29 January 2008 the applicant was served with notice that the Secretary of State intended to make a deportation order against him. The same letter refused an application for indefinite leave to remain in the United Kingdom. The applicant lodged an appeal against the decision to deport him on 1 February 2008. That appeal was dismissed on 30 June 2008 and his appeal rights were exhausted on 8 July 2008.

B. The applicant's immigration detention

8. On 8 February 2008, when the applicant had served half of his final custodial sentence and was eligible for release from prison, he was detained under paragraph 2(2) of Schedule 3 to the Immigration Act 1971 pending the making of a deportation order against him. The Secretary of State signed the deportation order on 29 October 2008 and he was thereafter detained under paragraph 2(2) of Schedule 3 to the Immigration Act 1971 pending his removal from the United Kingdom.

9. On 2 June 2009 removal directions were set for 17 June 2009. However, they were cancelled on 16 June 2009 when the applicant made an application to this Court (application no. 26023/09), which granted an interim measure under Rule 39 of the Rules of Court.

10. The applicant's detention was reviewed monthly and the review forms set out the reasons for maintaining detention. The form from July 2009 includes the following statement in reference to the Rule 39 measure: "Whilst this means that enforced removal is not possible, [the applicant] could reduce the length of time he spends in detention by withdrawing voluntarily". A similar point features in some, if not all, of the later forms. The form for February 2010 notes that "Rule 39 ECHR is a barrier to removal but I note that FRS [Facilitated Return Scheme] is an option that should be explored to the full to expedite his removal from the UK". Likewise, the form for July 2010 states that "[t]he length of detention is a direct result of his appeals against deportation and, although it is now 29 months, he has the real option of return to Somalia with the Facilitated

Returns Scheme. This option should be further explained to the subject". Furthermore, the form from December 2010 indicated that the applicant "could minimise his time in detention by withdrawing [the application to the ECHR] and taking up FRS which is offered each month" and that he could "end his detention by volunteering to return (with or without FRS) at any time".

11. Applications for bail were refused on 9 November 2009, 21 April 2010 and 14 July 2010 as the Immigration Judges were not satisfied that the applicant would answer to any conditions set. On 9 November 2009 the Immigration Judge further noted that although the applicant had been in detention for a lengthy period, "the most recent period of detention is on account of delays with his own application to the European Court of Human Rights".

12. The applicant made further representations against removal on 10 June 2010. Those representations were treated as an application for revocation of the deportation order, but on 17 November 2010 the Secretary of State refused to revoke the order. However, following an appeal by the applicant, the Secretary of State withdrew the refusal decision on 12 July 2011.

13. On 19 November 2010 the applicant filed a claim for judicial review, contending that his ongoing detention was unlawful. Permission was granted on 17 June 2011 but a further application for bail was refused. On 13 July 2011, some two weeks after the Court ruled in *Sufi and Elmi v. the United Kingdom* (nos. 8319/07 and 11449/07, 28 June 2011), the applicant was granted bail.

14. A hearing took place on 7 October 2011. Pursuant to the principles set down by the High Court in *R. v. Durham Prison Governor ex parte Hardial Singh* [1984] 1 WLR 704 (see section on domestic law below), the Secretary of State cannot lawfully detain a person pending removal for longer than a reasonable period and, if it becomes apparent that the deportation cannot be effected within a reasonable period, the detention will become unlawful even if the reasonable period has not yet expired. The applicant claimed that his detention was in breach of the principles (a) on or after 16 June 2009 when the Court granted an interim measure under Rule 39 of the Rules of Court; (b) on or immediately after 16 June 2010 when he applied to revoke the deportation order; or (c) at all points after the revocation refusal on 17 November 2010.

15. In a judgment dated 14 November 2011 the Administrative Court dismissed the claim. It noted that in deciding whether or not there was a realistic prospect that deportation would take place within a reasonable time, the risk of absconding or re-offending were "of paramount importance" but neither risk could be regarded as a "trump card". Moreover, the fact that the period of detention occurred while the applicant was

pursuing an appeal or comparable judicial process would also be a highly relevant factor, especially if there was a risk of absconding or reoffending.

16. The court noted that the applicant in the present case had six convictions for absconding and the Immigration Judges had consistently concluded that he was a significant abscond risk. It agreed with the Immigration Judges and also concluded that the risk was plainly substantial on the evidence available. Equally, the court took into account the fact that the applicant had family in the country at the times he absconded and therefore, contrary to his assertions, their presence did not remove the risk of absconding. Likewise, the Secretary of State's detention reviews had characterised the risk of the applicant reoffending as "high". The court further noted that the applicant's offences became less serious and more intermittent as time went on. However, the fact remained that while he was free he was committing offences of such seriousness as to require him to be imprisoned, including robbery and public order offences. The court also considered whether alternatives to detention could be used such as electronic tagging, monitoring by telephone and regular reporting. However, given the applicant's history of absconding, it concluded that the alternatives would not have been sufficient and there was an absence of adequate assurances from the applicant.

17. At the time the Administrative Court noted that the interim measure under Rule 39 of the Rules of Court, was awaiting a lead judgment on returns to Mogadishu (*Sufi and Elmi*, cited above) and it was clear that there would be no resolution of the applicant's claim - and the interim measure would therefore not be lifted - before that judgment was handed down. However, the Administrative Court observed that at the time the interim measure was indicated, there was uncertainty about when that judgment could be expected. Moreover, while the applicants in *Sufi and Elmi* would have had a reasonable to good prospect of success, a positive outcome had not been inevitable. Consequently, the Administrative Court did not accept that there was not, at the time the interim measure was indicated, a realistic prospect of removing the applicant within a reasonable time.

18. Furthermore, the court did not accept that by the time of the applicant's application for a revocation order, a reasonable period had already expired or that there was no realistic prospect of deportation within a reasonable time. In addition, it observed that the Secretary of State had been entitled to take two weeks to consider the applicant's personal situation in light of the judgment in *Sufi and Elmi*. It therefore did not consider his continued detention up to 13 July 2011 to be unlawful.

19. The applicant was granted permission to appeal to the Court of Appeal. On appeal, he restated his arguments concerning the *Hardial Singh* principles which had been advanced in the court below. In addition, he submitted that the detention was vitiated by two public law errors that bore directly on the decision to detain: first, following the indication of the

interim measure the Secretary of State had failed to take any reasonable steps to acquaint herself with when it might be lifted; and secondly, that the detention was maintained on the unlawful basis that the applicant could reduce the length of time in detention by withdrawing his application to the Court and returning voluntarily to Somalia. Finally, the applicant argued that his detention was in breach of Article 5 of the Convention.

20. In its judgment of 20 October 2012, the Court of Appeal conducted an extensive review of the circumstances of the case, in particular the fact that the applicant's appeal against deportation as well as three separate bail applications had been rejected by immigration judges, as well as the broader context in relation to the on-going litigation concerning removals to Somalia both before the domestic courts and tribunals as well as before this Court (see §§ 28 to 32). It took into consideration the fact that the Rule 39 measure applied in the applicant's case did not involve any specific assessment of risk towards him by this Court, since at the material time this Court had adopted a fact-insensitive approach towards Rule 39 measures in respect of removals to Somalia, and noted the consequence that from October 2008 this Court had adjourned 116 applications concerning removal to Somalia. It also took account of correspondence between the Government and the registry of this Court from which it was clear that from April 2009 the Court would be granting a fact-insensitive Rule 39 measure to any applicant with removal directions to Mogadishu as well as the separate correspondence between the Government and this Court concerning the progress of *Sufi and Elmi*, cited above and the linked domestic case law.

21. With regard to the *Hardial Singh* ground, the Court of Appeal stated that there could be a realistic prospect of success without it being possible to specify or predict the date by which, or the period in which, removal can reasonably be expected to occur. It accepted that at the time of receipt of the Rule 39 measure in the applicant's case, although it was not possible to say when the proceedings before the Court would be concluded, there was nonetheless a reasonable prospect of their being concluded and of removal being effected within a reasonable time. Likewise, the Court of Appeal saw no reason to differ from the overall conclusion of the lower court on the lawfulness of the applicant's detention at the time of the application for revocation of the deportation order or after the judgment in *Sufi and Elmi* was handed down. Lord Justice Elias dissented on one point only: acknowledging that "there is no one right answer to the question what is a reasonable period", he believed that the period of two weeks which elapsed following the judgment in *Sufi and Elmi* before the applicant was released from detention was not reasonable in all the circumstances.

22. With regard to the second ground of appeal, the court accepted that if the applicant were able to show that the decisions to maintain his detention were vitiated by public law he would succeed in establishing that

the detention was unlawful and would have a claim of false imprisonment. However, the Court of Appeal found that although some of the passages in the review forms were not very happily expressed, they did not involve any legal error. Moreover, as the same conclusion was reached regardless of whether or not reference was made to the question of voluntary return, it appeared that the applicant's refusal of this offer played no material part in the assessment of whether detention should be maintained.

23. Finally, the court found that Article 5 § 1(f) of the Convention added nothing of substance in the present case. In reaching this conclusion, it rejected the applicant's assertion that *Mikolenko v. Estonia*, no. 10664/05, 8 October 2009 was authority for the proposition that the lack of a realistic prospect of deportation within a defined period rendered detention under Article 5 § 1(f) unlawful.

24. The Supreme Court refused the applicant leave to appeal on 26 March 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention pending deportation

25. The power to detain a person pending deportation is contained in Paragraph 2 of Schedule 3 to the Immigration Act 1971 ("the 1971 Act"), (for details see *V.M. v. the United Kingdom*, no. 49734/12, § 52, 1 September 2016).

B. Challenges to detention

26. In the United Kingdom, a person in immigration detention may at any time bring an application for judicial review in order to challenge the "lawfulness" and Article 5 § 1(f) compliance of his detention. In considering any such application, the domestic courts must apply the *Hardial Singh* principles. These principles require that detention be for the purpose of exercising the power to deport; the period of detention must be reasonable in all the circumstances; a detainee must be released if it becomes apparent that deportation cannot be effected within a reasonable period; and the authorities must act with due diligence and expedition to effect removal.

27. Failing compliance with the requisite conditions, the detention becomes unlawful under domestic law, with the attendant obligation on the authorities to release the individual. The test applied by the United Kingdom courts has been considered almost identical to that applied by this Court under Article 5 § 1(f) of the Convention in determining whether or

not detention has become "arbitrary" (see *J.N. v. the United Kingdom*, no. 37289/12, § 97, 19 May 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (f) OF THE CONVENTION

28. The applicant complained that his detention from 8 February 2008 to 13 July 2011 fell short of the requirements of Article 5 § 1 (f) of the Convention, which 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."

29 The Government contested that argument.

A. Admissibility

30. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

31. The applicant submitted that the domestic law governing administrative detention of immigrants for the purposes of expulsion was not sufficiently precise, accessible and foreseeable in its consequences to meet the standard of lawfulness and, as such, it lacked the quality of law necessary to deprive him of his liberty.

32. He also argued that his detention was not, throughout its duration, with a view to deportation because during the last 25 months of his detention there was a Rule 39 measure in place preventing his expulsion to Somalia and no other destination was being explored as a possibility; there were protracted periods of inactivity by the Respondent Government during

his detention amounting to a failure to act with "due diligence"; and the detention period overall was excessive.

33. The Government submitted that the domestic law governing administrative detention of migrants was precise and foreseeable. The applicant's other arguments about the circumstances of his detention had already been considered in detail by the domestic courts and rejected. In this respect they submitted that the *Hardial Singh* test applied by the domestic courts to assess whether detention was arbitrary was more restrictive than the equivalent test under Article 5 § 1 (f), and so gave the applicant greater protection at domestic level than that available under the Convention. The domestic courts had properly applied the *Hardial Singh* principles and nothing in the applicant's arguments showed otherwise. Accordingly, there could be no violation of Article 5 § 1 (f). In any event, they argue that his detention was lawful and they did act with the necessary due diligence.

2. The Court's assessment

(a) General principles

34. For a detailed summary of the general principles see *J.N.*, cited above, §§ 74-88. In that case, the Court found "that the system of immigration detention in the United Kingdom does not, in principle, fall short of the requirements of Article 5 § 1 (f) of the Convention" (*J.N.*, cited above, § 101).

35. In asking whether "action is being taken with a view to deportation", this Court has found that removal must be a realistic prospect (*Louled Massoud v. Malta*, no. 24340/08, § 69, 27 July 2010, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 167, ECHR 2009, *Amie and Others v. Bulgaria*, no. 58149/08, § 144, 12 February 2013 and *Mikolenko*, cited above, § 68). A Rule 39 measure cannot be employed as a justification for the indefinite detention of persons without resolving their legal status (*Ryabikin v. Russia*, no. 8320/04, § 132, 19 June 2008).

(b) Application of the general principles to the present case

36. The applicant's complaints include a submission that the system of immigration detention in the United Kingdom – in particular, the absence of fixed time-limits and automatic judicial review – does not comply with the "quality-of-law" requirements of Article 5 § 1 (f) of the Convention. In the recent case of *J.N.*, cited above, §§ 90-93, the Court expressly rejected this argument.

37. Therefore, the applicable law was sufficiently accessible, precise and foreseeable and the applicant's complaints concerning the "lawfulness" of his detention must be rejected.

38. Consequently, the principal question for the Court to consider is whether, at any time, the applicant's detention could be said to have been

"arbitrary". Before turning to this question, the Court notes that the applicant raises his arguments in respect of the period from 8 February 2008 (when his criminal sentence ended – see paragraph 8 above) to 13 July 2011 when he was released. In this respect the Court, however, observes that the Court of Appeal expressly noted that the parties had accepted that the detention was lawful until 16 June 2009, when the Rule 39 measure was granted by this Court (see paragraph 9 above). Accordingly, this Court will only examine the question of whether the applicant's detention was "arbitrary" for the period from 16 June 2009 to 13 July 2011 (2 years and 27 days).

39. Turning to the question of "arbitrariness", the Court notes at the outset that the Government have submitted that the *Hardial Singh* test applied by the domestic courts is more restrictive than that applied by this Court when examining "arbitrariness" under Article 5 § 1 (f), so providing greater protection at the domestic level. However, this Court has previously noted that the two approaches are "almost identical" (see *J.N.,* cited above, § 97).

40. Nonetheless, the Court observes that in the present case the domestic courts considered that a more stringent approach should be applied due to the length of time the applicant was detained. The High Court therefore carried out its analysis with "anxious scrutiny". The Court of Appeal in turn described the applicant's detention being "of great concern" and requiring "close examination". As such, they applied the *Hardial Singh* principles in a particularly rigorous manner. The Court therefore considers that as applied in this case, the *Hardial Singh* principles afforded the applicant robust protection against arbitrary detention. The applicant would therefore need to adduce particularly compelling reasons for this Court to depart from the conclusions of the domestic courts.

41. The applicant has argued that "no action was being taken with a view to deportation". That argument relied on three elements. The first was the imposition of the interim measure under Rule 39. The second was that he could not be deported to Somalia in light of domestic case law dating from January 2009 which found that it was not safe to return deportees to Somalia (for a detailed overview of the domestic case law see *Sufi and Elmi*, cited above, §§ 57-78). This claim was also reinforced through the imposition of the Rule 39 measure. The third was because he was exercising a right of in-country appeal with suspensive effect against his deportation notice from 10 June 2010, and from at least 25 November 2010 there was a statutory bar on his removal until those proceedings completed on 12 July 2011.

42. The Court observes that the domestic courts concluded action was being taken with a view to deportation because it was always possible that the proceedings in this Court and related domestic litigation would be resolved within a reasonable period, at which point the Rule 39 interim

measure would no longer be a barrier to deportation. Also, the applicant had a good prospect of success in that litigation, but this did not mean that deportation was an unrealistic possibility (see above §§ 17-20). They also concluded that the fact the applicant appealed against his deportation order did not mean that no action was being taken with a view to deportation.

43. The applicant has not adduced any arguments before this Court that were not considered by the domestic courts, or that challenge their conclusions in a compelling manner. Accordingly this Court agrees with the findings of the domestic courts, relying on the fact that they undertook their analysis with particular care given the overall length of detention (see paragraph 40, above).

44. However, noting that the authorities detained the applicant for a significant period of time after the Rule 39 measure had first been granted the Court considers that his situation merits particular scrutiny. In this connection, it is recalled that the fact that expulsion proceedings are provisionally suspended as a result of the application of an interim measure does not in itself render the detention of the person concerned unlawful, provided that the authorities still envisage expulsion at a later stage, so that "action is being taken" although the proceedings are suspended and on condition that the detention must not be unreasonably prolonged (*Keshmiri v. Turkey (no. 2)*, no. 22426/10, § 34, 17 January 2012, and *K. v. Russia*, no. 69235/11, § 91-92, 23 May 2013).

45. In light of the authorities' decision to continue to detain the applicant whilst the Rule 39 measure was in place, the period for which that interim measure was imposed becomes relevant to assessing whether action was being taken to with a view to deportation. At the outset the Court notes that it is well documented that around that time it faced a significant increase in the number of cases coming before it. The Declaration made at the High Level conference on the Future of the European Court of Human Rights in April 2011 in Izmir[1] also recorded the increase in the number of interim measures requested in accordance with Rule 39 and emphasised the importance of speedily examining the merits of the case concerned by the Rule 39 measure. Indeed, this general context is referred to by the Court of Appeal, who characterised the interaction between the Rule 39 measure; the lead case before this Court on deportations to Somalia; and related domestic litigation as complex, and the inevitable result of the volume of migration and proliferation of litigation.

46. Notwithstanding that at the time this Court faced some significant challenges, as the domestic courts concluded while the process of litigation might have been uncertain there was no suggestion that this Court or the domestic courts would take longer than usual.

1. Declaration of the High Level Conferences on the Future of the European Court of Human Rights, Izmir Turkey 26-27 April 2011, Section A "Individual measures".

47. It is true that the Government decided to maintain detention at the same time as requesting that the lead judgment from this Court on expulsions to Mogadishu (to which the applicant's Rule 39 measure was linked) be adjourned behind the test cases in the Court of Appeal (see *Sufi and Elmi*, cited above, § 7). However, that request for adjournment appeared reasonable in light of the need to ensure a consistent outcome from the proliferation of litigation mentioned above. Indeed it was granted by the Court. Moreover, as soon as the adjournment was lifted when the Court of Appeal delivered its judgment on 23 April 2010, this Court applied priority treatment to *Sufi and Elmi*, cited above, under Rule 41 of the Rules of Court.

48. Accordingly, the applicant's detention was not unreasonably prolonged by the authorities' decisions to maintain his detention awaiting the outcome of this Court's judgment in *Sufi and Elmi*, cited above, and the consequent lifting of the Rule 39 measure. In this respect, the Court also notes that aside from the litigation there were no other barriers to the applicant's expulsion, as all other issues concerning his immigration status had been dealt with. The fact that the applicant was detained for two weeks following the decision in *Sufi and Elmi*, cited above does not affect this conclusion in light of the particular circumstances of the applicant's case and the broader context (see paragraph 20, above). In this regard, the Court also notes that the applicant's representative accepted that one week would have been reasonable and all members of the Court of Appeal agreed that there was "no one right answer to the question what is a reasonable period" (see paragraph 20, above). Moreover, in a decision of 26 June 2012 (see *Musa and 176 other applications v. the United Kingdom* [dec.] no. 8276/07, 26 June 2012) this Court accepted that, following its judgment in *Sufi and Elmi*, cited above, and the follow up "country guidance" decision from the Immigration and Asylum Tribunal (*AMM & Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG* [2011] UKUT 445 (IAC) (28 November 2011), the Government would need to conduct a fresh assessment of the circumstances of each of the 177 individuals who had been subject of a fact-insensitive Rule 39 measure. The Court further notes that, whilst taking into account the fact that the judgment in *Sufi and Elmi* was not yet final and a request for referral to the Grand Chamber had been made, the Tribunal in *AMM & Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG* expressly and in some detail considered the consequences of that judgment on the ability of the Government to resume removals to Somalia (§§ 55-133).

49. This conclusion also demonstrates that the Rule 39 measure was not used as a justification for the indefinite detention of the applicant, without resolving his legal status. In this connection, the Court highlights the contrast with the situation of the applicant in the case of *Ryabikin* (cited

above, § 132) where the absence of any decisions about the applicant's immigration status contributed to its finding of a violation.

50. Moreover, as the present application demonstrates, the Court notes that the applicant had at all times the possibility to apply for judicial review of his situation. His detention was also regularly reviewed on a monthly basis. This is in contrast to cases where the Court has found a violation where applicants remained in detention following a Rule 39 measure (see for example *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, §§ 148-149, 15 October 2015). In *L.M. and Others*, the domestic courts did not take into account whether the applicant's expulsion was a realistic possibility, or whether the authorities were taking steps to effect deportation. Moreover, there were no provisions in Russian law which would have allowed the applicants to bring proceedings for a judicial review of their detention pending expulsion, nor was there automatic review of detention at regular intervals.

51. The Court considers that the applicant's submission concerning the domestic case law does not affect its conclusions. As the Court of Appeal noted, the Rule 39 measure did not take into account a specific risk assessment of the applicant's individual situation, but rather that he was liable to deportation to Somalia. The interim measure was therefore imposed awaiting clarification in the lead case of *Sufi and Elmi*, cited above, of the country conditions in Somalia. The Court was evidently satisfied that there was an imminent risk of irreparable damage to the applicant (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 104, ECHR 2005-I) and indeed that risk was later confirmed. However, it cannot be said that at the time the Rule 39 measure was given the domestic case law had created a presumption that the applicant himself could not eventually be deported.

52. Detention will also be arbitrary where there has been bad faith on the part of the authorities, where detention is not closely connected to the grounds relied on by the authorities, where the place and conditions of detention are not appropriate for its purpose, or where the length of the detention exceeds that reasonably required for the purpose pursued (see *V.M.*, cited above, § 92).

53. In the present case there is no suggestion that the authorities have at any time acted in "bad faith". Furthermore, it cannot be said that the place and conditions of detention were not appropriate for its purpose.

54. It is of some concern that the period of detention under challenge lasted for nearly two and a half years, during which time the applicant was exercising his right to bring proceedings challenging the decision to deport him. Nevertheless, the Court is satisfied that, in the particular circumstances, the requirements of Article 5 § 1 (f) have been met.

55. First, it observes that pursuant to the Secretary of State's published policy on immigration detention, "wherever possible, alternatives to detention should be used" (see *V.M.*, cited above, § 95).

56. Second, the Court also notes the consideration given by the domestic decision makers and the domestic courts to the applicant's particular circumstances. In addition to the number and seriousness of the offences he had committed in the past and the substantial likelihood of his re-offending, which was characterised as "high", the High Court also took into account the fact he had previously absconded six times. Therefore, it concluded that alternatives to detention such as electronic tagging, monitoring by telephone and/or regular reporting to an immigration officer would not be effective, as the applicant had not respected them in the past. The fact that the applicant had family in the country who could act as sureties was unlikely to prevent him absconding again, as it had not prevented him from doing so previously (see paragraph 16 above). Similar conclusions can be found in the decisions rejecting the applicant's bail applications (see paragraph 11 above).

57. Finally, in determining whether the length of detention exceeded that reasonably required for the purpose pursued, the Court must ask whether the authorities acted with "due diligence". In this connection, the applicant directed specific criticism towards the periods of time taken by the Government to decide on his appeals against the deportation orders. His first appeal was made on 10 June 2010, and decided on 17 November 2010 a period of 5 months, 8 days. His second appeal was lodged on 25 November 2010 and decided on 12 July 2011 by virtue of the Secretary of State's decision to revoke the deportation order, a period of just over 7 months, with a hearing in June 2011.

58. The domestic courts concluded that this timescale was reasonable. This Court agrees and taking into account the fact a hearing was held in June 2011, it does not consider there was any period of inactivity in the deportation proceedings that would amount to a lack of "due diligence".

59. In light of the above, no violation of Article 5 § 1 (f) of the Convention is disclosed.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

60. The applicant argued that the wording of his detention reviews and repeated offers made to him by immigration officers to join a "facilitated returns scheme" to Somalia were in violation of Article 34 of the Convention which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

61. The Government contested that argument.

A. The parties' submissions

62. The applicant submitted that the Government justified the prolongation of his detention on his failure to withdraw his application to this Court, including his request under Rule 39. The applicant referred to monthly review decisions authorising an extension of his detention which cited his Rule 39 measure as evidence that he was obstructive and would abscond, and indicated that he could reduce the time spent in detention if he withdrew his application to this Court and accepted facilitated voluntary return. The applicant argued that although these decisions were internal documents, they had a chilling effect on him. He also stated that he was repeatedly informed about the decisions orally by immigration officers who told him that if he signed a document agreeing to withdraw his application from this Court and return voluntarily to Somalia, he would be free in Somalia, whereas if he refused to sign he would remain in detention. He also argued that as other detainees were now aware of these decisions through the present litigation, they could also have a chilling effect on those detainees.

63. The Government argued that the comments were made in an internal review document and were self-evident statements of fact. As such, they had no negative effect on the applicant. The Government also referred more generally to the fact that the authorities had provided the applicant with legal aid to pursue his claims and that he had successfully applied to the Court. Concerning the applicant's argument that the immigration officers had conveyed the content of the decisions to him orally, they underlined that the Court of Appeal had considered the matter and relied on its conclusions.

B. The Court's assessment

1. General principles

64. According to the Court's case-law, a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see *Ergi v. Turkey*, 28 July 1998, § 105, *Reports of Judgments and Decisions* 1998-IV, *Cooke v. Austria*, no. 25878/94, § 46, 8 February 2000 and *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 176, 17 March 2016).

65. It is of utmost importance for the effective operation of the system of individual petition guaranteed by Article 34 of the Convention that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others*

v. Turkey, 16 September 1996, § 105, Reports 1996-IV, and *Kurt v. Turkey*, 25 May 1998, § 159, Reports 1998-III). In this context, "any form of pressure" includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or communication designed to dissuade or discourage applicants from pursuing a Convention complaint, or having a "chilling effect" on the exercise of the right of individual petition of applicants and their representatives (see *Kurt*, cited above, §§ 160 and 164; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 130, ECHR 1999-IV; and *Fedotova v. Russia*, no. 73225/01, § 48, 13 April 2006).

66. The fact that an individual has managed to pursue his application does not prevent an issue arising under Article 34. Should a government's actions make it more difficult for an individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 (see *Akdivar and Others*, cited above, § 105). The intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34 (see *Paladi v. Moldova* [GC], no. 39806/05, § 87, 10 March 2009). Moreover, the Court must assess the vulnerability of the complainant and the risk of his being influenced by the authorities. An applicant's position might be particularly vulnerable when he is held in custody with limited contact with his family or the outside world (see *Cotleţ v. Romania*, no. 38565/97, § 71, 3 June 2003).

2. Application of the general principles to the present case

67. At the outset, the Court considers it unclear from the parties' submissions what the immigration officers actually said: whether they indicated solely that voluntary return would reduce the length of the applicant's detention as contended by the Government; or whether they also said that he should sign a document agreeing to withdraw his application from the Court, as contended by the applicant.

68. The Court will therefore make its evaluation based on the facts as established by the Court of Appeal. Namely, that the applicant was presented with written copies of the detention reviews which included statements that his detention would be reduced if he were to withdraw his application and accept voluntary return; and that immigration officers also indicated to the applicant orally that voluntary return would reduce the length of detention (but did not also say that he should withdraw his application to this Court).

69. Whether or not contacts between the authorities and an applicant are tantamount to unacceptable practice from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities

(*Konstantin Markin v. Russia* [GC], no. 30078/06, § 159, ECHR 2012 (extracts).

70. In this connection the Court observes that there is a narrow distinction between repeatedly pointing out the options available to the applicant in a neutral manner, and "dissuading or discouraging" him from pursuing his complaint, especially given his vulnerable situation as a detainee, and the fact that the only element preventing his deportation was the Court's Rule 39 measure, and related litigation.

71. However, having examined all the decisions taken in the applicant's detention reviews, the Court notes that the language used was for the most part factual, professional and neutral (see paragraph 10 above). It did not contain expressions of a threatening or dissuasive nature (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 121, ECHR 2007-I, and *Tarariyeva v. Russia*, no. 4353/03, § 121, ECHR 2006-XV (extracts)). The comments in issue (see paragraph 68 above) formed a small part of each review which also detailed the applicant's circumstances and his complete detention history in a factual and neutral manner. Therefore, the Court finds that in the circumstances of this case, it has not been demonstrated that the authorities were improperly seeking to "dissuade or discourage him" from pursuing his application to this Court. In addition, the Court also notes the wider context and in particular the fact that, by providing the applicant with legal aid, the authorities were not seeking to make it more difficult for the applicant to pursue his claim but on the contrary providing him with the means to do so, thereby reducing his susceptibility to influence.

72. As to the applicant's claim that the authorities' actions may have a chilling effect on other detainees in a similar situation, the Court would note that whereas this argument appears to be speculative, it must as far as possible confine itself to examining the issues raised by the case before it (see *S.H. and Others v. Austria* [GC], no. 57813/00, §§ 91-92, ECHR 2011 with further references).

73. Consequently, the respondent State has not failed to comply with its obligations under the last sentence of Article 34 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has not been a violation of Article 5 § 1 (f) of the Convention;

3. *Holds*, by six votes to one, that the State has not failed to comply with its obligations under Article 34 of the Convention.

Done in English, and notified in writing on 2 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Mirjana Lazarova Trajkovska President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sicilianos is annexed to this judgment.

M.L.T.
A.C.

PARTLY DISSENTING OPINION OF JUDGE SICILIANOS

1. I fully agree with all the points set out in the judgment except the finding, in paragraph 73, that "the respondent State has not failed to comply with its obligations under the last sentence of Article 34 of the Convention", namely the duty "not to hinder in any way the effective exercise" of the right to submit an individual application to the Court.

2. *In Mamatkulov and Askarov v. Turkey* the Grand Chamber of the Court emphasised that the right of individual petition constitutes the cornerstone of the whole Convention system. Having also in mind the special character of the Convention and its object and purpose, the Grand Chamber has analysed the content of the obligation contained in the last sentence of Article 34 as follows:

> "100. The Court has previously stated that the provision concerning the right of individual application (Article 34, formerly Article 25 of the Convention before Protocol No. 11 came into force) is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection. In interpreting such a key provision, the Court must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement' (see, *mutatis mutandis*, *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 26, § 70).
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> 101. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see *Soering*, cited above, p. 34, § 87, and, *mutatis mutandis*, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 18, § 34).
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> 102. The undertaking not to hinder the effective exercise of the right of individual application precludes any interference with the individual's right to present and pursue his complaint before the Court effectively. That issue has been considered by the Court in previous decisions. It is of the utmost importance for the effective operation of the system of individual application instituted under Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. As the Court has noted in previous decisions, 'pressure' includes not only direct coercion and flagrant acts of intimidation against actual or potential applicants, members of their family or their legal representatives, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see, among other authorities, *Petra v. Romania*, judgment of 23 September 1998, *Reports* 1998-VII, pp. 2854-55, § 43; *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2288, § 105; and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1219, § 105)"

(see *Mamatkulov and Askarov v. Turkey*, [GC], nos. 46827/99 and 46951/99, §§ 100-102, ECHR 2005-I).

3. In the same vein, the present judgment reaffirms that "'any form of pressure' includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or communication designed to dissuade or discourage applicants from pursuing a Convention complaint, or having a "chilling effect" on the exercise of the right of individual petition of applicants and their representatives" (§ 65, references omitted). The judgment further notes that the fact that an individual has managed to pursue his application does not prevent an issue arising under Article 34. Should a Government's actions make it "more difficult" for an individual to exercise his right of application, this amounts to "hindering" his rights under Article 34. The intentions or reasons underlying the acts or omissions of State organs are of "little relevance" for the assessment of compliance with Article 34. What matters is the actual situation created for the individual. Furthermore, the Court must assess the complainant's vulnerability. An applicant's position "might be particularly vulnerable when he is held in custody with limited contact with his family or the outside world" (see § 66 of the judgment).

4. I fully subscribe to all the above statements, which are, in my view, consonant with the object and purpose of Article 34. However, I consider the application of those principles to the present case as rather problematic. It is true that the facts are disputed between the Government and the applicant. In such a situation, the majority (quite rightly) relied upon the facts as established by the domestic judicial authorities, i.e. the Court of Appeal. According to that court, the applicant was presented with written copies of the detention reviews which included statements that his detention would be reduced if he were to withdraw his application and accept voluntary return. Furthermore, the immigration officers also indicated to the applicant orally that voluntary return would reduce the length of detention (see § 68 of the judgment).

5. In other words, what was suggested to the applicant in order to reduce the length of his detention was to withdraw the application to the Court and to accept to return to Somalia. In my view, such an attitude amounts, if not to a direct pressure, at least to an "improper indirect act or communication designed to dissuade or discourage" the applicant "from pursuing a Convention complaint, or having a "chilling effect" on the exercise of the right of individual petition". This seems to be all the more so in that the applicant was an immigrant "held in custody with limited contact with his family or the outside world" and thus "particularly vulnerable" according to the above-mentioned standards set out in the case-law of the Court.