



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

COURT (CHAMBER)

CASE OF AHMED v. AUSTRIA

(Application no. 25964/94)

JUDGMENT

STRASBOURG

17 December 1996

In the case of Ahmed v. Austria¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

MM. R. BERNHARDT, *président*,

T. VILHJALMSSON,

F. MATSCHER,

C. RUSSO,

A. SPIELMANN,

L. WILDHABER,

D. GOTCHEV,

K. JUNGWIERT,

P. KURIS,

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

Having deliberated in private on 24 April, 28 June and 27 November 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 September 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 25964/94) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by a Somali national, Mr Sharif Hussein Ahmed, on 13 December 1994.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether, in the event of the applicant being

¹ The case is numbered 71/1995/577/663. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

deported to Somalia, the facts of the case would disclose a breach by the respondent State of its obligations under Article 3 of the Convention (art. 3).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31). On 23 May 1996 the President of the Chamber gave the lawyer leave to use the German language in both the written and the oral proceedings (Rule 28 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr A. Spielmann, Mr F. Bigi, Mr L. Wildhaber, Mr D. Gotchev, Mr K. Jungwiert and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr C. Russo, substitute judge, replaced Mr Bigi, who had died (Rule 22 paras. 1 and 2 and Rule 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 23 and 26 April 1996 respectively. On 10 June 1996 the Commission supplied the Registrar with various documents that he had requested on the President's instructions.

5. On 15 December 1994 the President of the Commission had indicated to the Austrian Government, under Rule 36 of the Commission's Rules of Procedure, that it was desirable, in the interests of the parties and the proper conduct of the proceedings, not to deport the applicant before the end of the Commission's next session. The Commission extended the application of Rule 36 several times. On 2 October 1996 the Deputy Registrar of the Court informed the Government that the above measure remained recommended under Rule 38 para. 2 of Rules of Court B.

6. On 28 February 1996 the Government had asked the Court to strike the case out of its list, on the ground that on 22 November 1995, when the applicant obtained a stay of his expulsion for a renewable period of one year (see paragraph 23 below), he had lost the status of victim within the meaning of Article 25 para. 1 of the Convention (art. 25-1). In letters received at the registry on 22 and 25 March 1996 respectively the applicant and the Delegate of the Commission, who had been consulted in accordance with Rule 51 para. 2, asked the Court not to allow this application. The Delegate of the Commission expressed himself as follows:

"... It emerges [from the] observations [of the Austrian Government] that the applicant has not indicated that he wishes to withdraw and that no information about a friendly settlement of the case has been communicated to the Court. Accordingly, the only possible ground for striking out is that provided for in Rule 51 para. 2, second sub-paragraph, of Rules of Court B, namely that 'for any other reason, further examination of the case is not justified'.

In the light of the *Vijayanathan and Pusparajah v. France* judgment of 27 August 1992 (Series A no. 241-B), it appears that the lack of victim status does not lead the Court to strike a case out but to rule at the end of the normal procedure that it cannot look into the merits. I fail to see in what way the alleged loss of victim status could justify any other form of procedure, given that in the two cases mentioned the respondent Government submitted a preliminary objection. I cannot therefore agree with the course advocated by the Austrian Government ..."

On 24 April 1996 the Court rejected the application for the case to be struck out, considering that in the absence of any friendly settlement or arrangement between the parties the conditions laid down in Rule 51 para. 2 had not been satisfied.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 June 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr F. CEDE, Ambassador, Legal Adviser, Federal Ministry of Foreign Affairs,	<i>Agent,</i>
Mr J. ROHRBÖCK, Federal Ministry of the Interior,	
Mrs I. SIEß, Constitutional Department, Federal Chancellery,	
Mrs E. BERTAGNOLI, International Law Department, Federal Ministry of Foreign Affairs,	<i>Advisers;</i>

- for the Commission

Mr J.-C. GEUS,	<i>Delegate;</i>
----------------	------------------

- for the applicant

Mr W. VACARESCU, Rechtsanwalt (lawyer) of the Graz Bar,	<i>Counsel.</i>
--	-----------------

The Court heard addresses by Mr Geus, Mr Vacarescu and Mr Cede.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. Recognition and forfeiture of refugee status

8. Mr Ahmed, a Somali citizen born in 1963, currently lives in Graz (Styria).

9. On 10 October 1990 he left Somalia. He reached Vienna Airport on 30 October via Syria and the Netherlands.

10. He requested refugee status on 4 November 1990 and was interviewed on 27 November 1990 by the Lower Austria Public Security Authority (Sicherheitsdirektion). On that occasion he stated that his uncle had been an active member of the United Somali Congress ("the USC") and that his father and his brother, though not members of the USC, had assisted his uncle and been executed on that account in May 1990. Since then he and his family had been suspected of belonging to the USC and taking part in acts of rebellion. His car had been confiscated and he had been assaulted, as was evidenced by a still-visible scar on his left forearm. He had left Somalia through fear of being arrested and executed.

11. On 19 April 1991 the Styria Public Security Authority rejected the application, but on appeal by the applicant the Minister of the Interior reversed this decision on 15 May 1992 and granted refugee status within the meaning of the Geneva Convention (see paragraph 24 below). He considered that Mr Ahmed could not be required to return to his homeland, regard being had to his activities in an opposition group and the general situation in the country concerned. His statements, which appeared credible, gave grounds to fear that, in the event of his return to Somalia, he would suffer persecution there within the meaning of the Geneva Convention.

12. On 15 July 1994 the Federal Refugee Office (Bundesasylamt) in Graz, acting pursuant to section 5 (1) (3) of the Right to Asylum Act (see paragraph 25 below), ordered the forfeiture of the applicant's refugee status. This decision followed a judgment of 25 August 1993 in which the Graz Regional Court (Landesgericht) sentenced the applicant to two and a half years' imprisonment for attempted robbery (versuchter Raub): together with an accomplice, Mr Ahmed had struck a passer-by in the face and attempted to steal his wallet.

13. On 12 September 1994 the Minister of the Interior dismissed an appeal by the applicant. He pointed out that under section 5 (1) (3) of the Right to Asylum Act a refugee lost refugee status if he committed a "particularly serious crime" within the meaning of Article 33 para. 2 of the Geneva Convention. Section 37 (4) of the Aliens Act (see paragraph 28

below) showed that the legislature considered that expression to mean any offence punishable by a term of imprisonment exceeding five years. Since attempted robbery was punishable by up to ten years' imprisonment, the applicant had forfeited his refugee status and any other consideration relating to the correctness of his conviction or the situation in Somalia was superfluous.

14. Mr Ahmed contested this decision in the Administrative Court (Verwaltungsgerichtshof), which set it aside on 2 February 1995. The Administrative Court held that the applicant's conviction for a particularly serious crime had only evidential relevance; it could not be deduced therefrom that, ipso facto, the applicant constituted a danger to Austrian society within the meaning of Article 33 para. 2 of the Geneva Convention. Such a conclusion, which suspended the protection (Schutzzweck) afforded by that Convention in spite of the continuing risk of persecution, could only be reached after the interests of the refugee and those of the host State had first been weighed against each other, the result being unfavourable to the former. The measure involved such a restriction of the refugee's personal rights (persönliche Rechtssphäre) that it had to be really necessary for one of the reasons set out in the provision concerned. In order to determine whether that was so, it was necessary to assess the future conduct of the person concerned, but in the present case the Minister had neglected to do so.

15. On 10 April 1995 the Minister of the Interior again ordered the forfeiture of Mr Ahmed's refugee status. Referring to the Administrative Court's decision (see paragraph 14 above), he first noted that the applicant had been found guilty of attempted robbery, a particularly serious crime within the meaning of Article 33 para. 2 of the Geneva Convention. He went on to mention other measures taken against the applicant, namely a suspended sentence of three months' imprisonment and a fine of 500 Austrian schillings (ATS) for criminal damage (Sachbeschädigung) in 1991, a fine of ATS 1,000 for threatening behaviour (ungestümes Benehmen) in a police station in 1992 and a complaint by the police to the Graz public prosecutor alleging criminal damage in the same year. Although, taken separately, these offences did not represent any danger to society, taken together they nevertheless revealed a clear tendency to aggression. It could not therefore be excluded that the applicant might commit further offences in future, which made him a danger to society.

16. On 9 November 1995 the Administrative Court upheld the above decision, holding in particular that in carrying out an assessment of the applicant's dangerousness (Gefährlichkeitsprognose) the Minister had validly relied on events prior to his imprisonment.

B. The expulsion proceedings

17. In the meantime, on 14 November 1994, the Graz Federal Police Authority (Bundespolizeidirektion) had issued an indefinite exclusion order (unbefristetes Aufenthaltsverbot) against the applicant under section 18 (1) and (2) of the Aliens Act (see paragraph 26 below) and ordered that after serving his sentence he was to be detained with a view to his expulsion (Schubhaft). It noted that in view of the applicant's convictions and the seriousness of one of the offences, namely attempted robbery, it could not be excluded that he would continue to offend. Therefore, in order to preserve public peace, order and security, and to prevent Mr Ahmed from committing crimes within the meaning of Article 8 para. 2 (art. 8-2) of the European Convention on Human Rights, it appeared to be essential to deport him, even though that measure incontestably constituted an interference (Eingriff) in his private life.

18. The applicant appealed against the above decision on 30 November 1994, asking the authorities to find, under section 54 of the Aliens Act, that his expulsion would contravene section 37 of the same Act (see paragraphs 29 and 28 below). On 10 December 1994 the Graz Public Security Authority dismissed the appeal, but reduced the period specified in the exclusion order against him to ten years. It considered that the Federal Police Authority had correctly weighed the conflicting interests and had had valid reasons to form the view that revoking the expulsion would have much more serious detrimental effects on the community than on Mr Ahmed. It further noted that the applicant could not yet be regarded as integrated into Austrian society, as he had lived there for only four years and had been in prison since March 1993. Nor did he have family or other links with the country. As for his occupational activities, these did not require any particular qualification and could therefore also be carried on abroad. Moreover, the applicant had been unemployed at the time of his arrest.

19. After being released on parole (bedingte Entlassung), the applicant was taken into custody at the Graz police headquarters on 14 December 1994 with a view to his expulsion.

20. On 23 January 1995 the Styria Independent Administrative Tribunal (Unabhängiger Verwaltungssenat) upheld an appeal by Mr Ahmed against the above measure (Schubhaftbeschwerde) on the ground that, as the European Commission of Human Rights had extended the provisional measure indicated under Rule 36 of its Rules of Procedure (see paragraph 5 above), deportation of the applicant before expiry of the two-month maximum period for detention of that type (section 48 of the Aliens Act) seemed to be out of the question. The applicant was therefore released.

21. On 26 April 1995 Mr Ahmed appeared before the Federal Refugee Office with a view to the possible application of section 37 of the Aliens Act (see paragraph 28 below). He asserted that the situation in Somalia had

deteriorated since his departure in 1990. He was a member of the Hawiye clan, which at that time was being persecuted, especially by the generals in power. His clan, who lived 900 kilometres to the north of Mogadishu, had supported General Aïdid, but had later withdrawn that support and since then had been on the run from him as well. He could therefore not return to the country without risking his life.

On 27 April 1995 the Federal Refugee Office declared the proposed expulsion of the applicant lawful (zulässig). It took the view that, taken together, the offences he had committed revealed a tendency towards aggressive behaviour and even increasing aggressiveness (steigendes Aggressionspotential), which did not stop short of violence against the person. It could therefore not be excluded that Mr Ahmed might commit other offences in future, so that he constituted a danger to the community within the meaning of section 37 (4) of the Aliens Act. That being the case, even the fact that he risked persecution in the event of his return to Somalia could not make his deportation to that country unlawful.

22. On 4 May 1995 the Graz Federal Police Authority dismissed the applicant's appeal of 30 November 1994 (see paragraph 18 above) on the ground that there were no solid reasons to believe that on his return to Somalia he might suffer treatment prohibited by section 37 (1) and (2) of the Aliens Act. According to the established case-law of the Administrative Court, section 37 (1) contemplated only dangers and threats emanating from a State. Since the overthrow of President Siyad Barre a civil war had been raging in Somalia and all State authority (staatliche Gewalt) had disappeared. Moreover, there was nothing to suggest that the applicant might be persecuted in Somalia for one of the reasons set out in section 37 (2). Lastly, there would not be any breach of Article 2 para. 1 (art. 2-1) of the European Convention on Human Rights either, since under section 37 the mere fact that on returning to his home country an alien might be risking his life was not a sufficient bar to expulsion.

23. On appeal by the applicant, the Styria Public Security Authority set aside the above decision on 22 May 1995. Thereupon the Graz Federal Police Authority found on 31 October 1995 that in Somalia Mr Ahmed would be at risk of persecution for one of the reasons set out in section 37 of the Aliens Act. On 22 November 1995 it accordingly stayed his expulsion for a renewable period of one year.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. The Geneva Convention of 28 July 1951 relating to the Status of Refugees

24. Under Article 1 of the Geneva Convention of 28 July 1951, as amended by the Protocol of 31 January 1967, a "refugee" is defined as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

Article 33 of the above Convention provides:

"1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

B. Domestic law

1. The Right to Asylum Act

25. Under section 5 (1) (3) of the 1991 Right to Asylum Act (Asylgesetz), a refugee loses refugee status if the competent authority finds that the conditions set out in Article 33 para. 2 of the Geneva Convention relating to the Status of Refugees (see paragraph 24 above) are satisfied.

2. The Aliens Act

26. Section 18 of the 1992 Aliens Act (Fremdengesetz) governs exclusion orders (Aufenthaltsverbot). The first paragraph provides that an alien's exclusion must be ordered if certain facts give reason to believe that his presence in the country constitutes a danger to public peace, order and security or is incompatible with other public interests referred to in Article 8 para. 2 (art. 8-2) of the European Convention on Human Rights. Among the facts which are relevant for the purposes of section 18, subsection 2 mentions a final decision by an Austrian court imposing on the refugee concerned a custodial sentence of more than three months.

27. The first sentence of section 36 (2) provides for expulsion to be stayed for a renewable period of up to one year at the request of the person concerned, or by the authorities of their own motion, where expulsion is prohibited under section 37 or appears to be impossible in practice.

28. Section 37 forbids the expulsion of an alien to a State where there are solid reasons (*stichhaltige Gründe*) to believe:

- that he will be exposed to the risk of inhuman treatment or punishment or the death penalty (subsection 1); or
- that his life or liberty will be at risk on account of his race, religion, nationality, membership of a particular social group or political opinion (subsection 2, which refers to Article 33 para. 1 of the Geneva Convention).

The expulsion of an alien to a State where he would be at risk within the meaning of subsection 2 is permitted only if, for weighty reasons, the person concerned constitutes a danger to the security of the Republic of Austria or, having been convicted by a final judgment of a crime punishable by more than five years' imprisonment, a danger to society (subsection 4, which refers to Article 33 para. 2 of the Geneva Convention).

No alien may be deported while a provisional measure requested by the European Commission or Court of Human Rights is in force (subsection 6).

29. Under section 54 the competent authority has to determine (*Bescheid*), at the alien's request (*Antrag*), whether there are solid reasons to believe that he would be at risk, within the meaning of section 37 (1) or (2), in a particular State named by him (subsection 1).

Pending the final decision on the alien's request he may not be deported to the State in question. If he has been deported to another State the proceedings are discontinued for lack of object (subsection 4).

PROCEEDINGS BEFORE THE COMMISSION

30. In his application to the Commission (no. 25964/94) of 13 December 1994 Mr Ahmed alleged that his expulsion to Somalia would expose him to a serious risk of being subjected to treatment contrary to Article 3 of the Convention (art. 3) there.

31. The Commission declared the application admissible on 2 March 1995. In its report of 5 July 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there would be a violation of Article 3 (art. 3) if the applicant were to be deported to Somalia. The full text of the Commission's opinion is reproduced as an annex to this judgment³.

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-VI), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. In their memorial the Government asked the Court to hold that there had been no breach of Article 3 (art. 3).

AS TO THE LAW

I. SCOPE OF THE CASE

33. In his memorial Mr Ahmed requested the Court to consider the facts of the case not only under Article 3 of the Convention (art. 3) but also under Articles 5 and 13 (art. 5, art. 13).

34. The Court notes that no complaint under Articles 5 and 13 (art. 5, art. 13) was submitted in the application to the Commission. As the compass of the case before it is delimited by the Commission's decision on admissibility (see, among many other authorities, the *Masson and Van Zon v. the Netherlands* judgment of 28 September 1995, Series A no. 327-A, p. 16, para. 40), it cannot entertain such complaints.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

35. The applicant alleged that, if he were to be deported to Somalia, he would certainly be subjected there to treatment prohibited by Article 3 of the Convention (art. 3), which provides:

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

By granting him refugee status on 15 May 1992 the Austrian authorities had, he submitted, recognised the existence of that risk. According to the latest news, the situation in Somalia had not fundamentally changed since then. The country was still the theatre of a fratricidal war between rival clans. He himself was still suspected of belonging to one of these, the USC, and on that account was still at risk of persecution in Somalia. Only his criminal conviction had made him lose his refugee status; however, the alleged seriousness of the offence a person had committed was not sufficient to justify placing his life in danger.

36. The Commission accepted the above argument in substance. It noted in particular that in support of their decision to strip the applicant of

his refugee status the national authorities had not mentioned any new factor tending to show that the risk he would run in Somalia had disappeared.

37. The Government too considered that Mr Ahmed was at risk of being subjected in Somalia to treatment incompatible with Article 3 (art. 3). However, they submitted that they had complied with the requirements of that provision (art. 3) to the extent that Austrian legislation permitted. As the deportation order had become final, it could no longer be deferred. That meant that, as Austrian law stood, the stay of execution of the measure against the applicant was the only means whereby he could lawfully remain in Austrian territory. Moreover, by submitting an application under section 36 (2) of the Aliens Act (see paragraph 27 above), Mr Ahmed would be entitled to have the stay extended for as long as the danger in Somalia persisted. If that application were rejected, he could still apply to the Constitutional Court and the Administrative Court.

38. The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes that the right to political asylum is not contained in either the Convention or its Protocols (see the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, para. 102).

39. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70; the above-mentioned *Vilvarajah and Others* judgment, p. 34, para. 103; and the *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras. 73-74).

40. The Court further reiterates that Article 3 (art. 3), which enshrines one of the fundamental values of democratic societies (see the above-mentioned *Soering* judgment, p. 34, para. 88), prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65, para. 163; the *Tomasi v. France* judgment of

27 August 1992, Series A no. 241-A, p. 42, para. 115; and the above-mentioned Chahal judgment, p. 1855, para. 79).

41. The above principle is equally valid when issues under Article 3 (art. 3) arise in expulsion cases. Accordingly, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees (see paragraph 24 above and the above-mentioned Chahal judgment, p. 1855, para. 80).

42. Like the Commission, the Court attaches particular weight to the fact that on 15 May 1992 the Austrian Minister of the Interior granted the applicant refugee status within the meaning of the Geneva Convention (see paragraphs 11 and 24 above), finding credible his allegations that his activities in an opposition group and the general situation in Somalia gave grounds to fear that, if he returned there, he would be subjected to persecution (see paragraph 11 above). Although the applicant lost his refugee status two years later, this was solely due to his criminal conviction; the consequences of expulsion for the applicant were not taken into account (see paragraph 12 above).

43. However, in order to assess the risks in the case of an expulsion that has not yet taken place, the material point in time must be that of the Court's consideration of the case. Although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive (see the above-mentioned Chahal judgment, p. 1856, para. 86).

44. With regard to the present situation in Somalia, the Court bases its assessment on the findings of the Commission, to which, under the Convention, the tasks of establishing and verifying the facts are primarily assigned (see, *inter alia*, the above-mentioned Cruz Varas and Others judgment, p. 29, para. 74). In its report of 5 July 1995 the Commission noted that the situation in Somalia had changed hardly at all since 1992. The country was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.

45. Before the Court the Government did not contest the applicant's submission that there was no observable improvement of the situation in his country. On the contrary, they explained that the Austrian authorities had decided to stay execution of the expulsion in issue because they too considered that, as matters stood, Mr Ahmed could not return to Somalia without being exposed to the risk of treatment contrary to Article 3 (art. 3).

46. That being the case, the Court reaches the same conclusion, which moreover is not contradicted by any material in the file or the information

supplied by those who appeared at the hearing; nor, in view of the absolute nature of Article 3 (art. 3), is that conclusion invalidated by the applicant's criminal conviction or the current lack of State authority in Somalia.

47. It follows that the applicant's deportation to Somalia would breach Article 3 of the Convention (art. 3) for as long as he faces a serious risk of being subjected there to torture or inhuman or degrading treatment.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

48. Article 50 of the Convention (art. 50) provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under that provision (art. 50) the applicant claimed compensation for damage and the reimbursement of his costs.

49. No breach of Article 3 (art. 3) has as yet occurred. Nevertheless, the Court having found that the decision to deport Mr Ahmed would, if implemented, give rise to such a breach, Article 50 (art. 50) must be taken as applying to the facts of the present case (see, *mutatis mutandis*, the *Beldjoudi v. France* judgment of 26 March 1992, Series A no. 234-A, p. 29, para. 84).

A. Damage

50. Mr Ahmed claimed 16,250 Austrian schillings (ATS) as compensation for loss of earnings between 14 December 1994 and 23 March 1995, during which period, he submitted, his imprisonment had been unlawful.

The Delegate of the Commission made no observation.

Like the Government, the Court can discern no causal connection between the alleged pecuniary damage and the conclusion with regard to Article 3 (art. 3) (see paragraph 47 above). This claim must therefore be rejected.

51. The applicant further claimed compensation for non-pecuniary damage in a sum which he asked the Court to determine.

The Government left this matter to the discretion of the Court; the Delegate of the Commission made no observation.

The Court considers that the applicant must have suffered non-pecuniary damage but that the present judgment affords him sufficient compensation in that respect.

B. Costs and expenses

52. In respect of costs and expenses incurred for the proceedings brought in the Austrian courts and later before the Convention institutions, Mr Ahmed claimed ATS 240,000, including ATS 100,000 for his legal fees incurred in Strasbourg.

The Government submitted that they were not in a position to comment on these figures, not having sufficient information on how they had been arrived at. If, however, the Court were to find a violation, they were prepared to pay ATS 100,000. The Delegate of the Commission made no observation.

53. Making an assessment on an equitable basis, the Court awards the applicant ATS 150,000 under this head.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it does not have jurisdiction to consider the applicant's complaints under Articles 5 and 13 of the Convention (art. 5, art. 13);
2. Holds that for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention (art. 3) there would be a breach of that provision (art. 3) in the event of the decision to deport him there being implemented;
3. Holds that as regards the non-pecuniary damage suffered by the applicant this judgment in itself constitutes sufficient just satisfaction for the purposes of Article 50 of the Convention (art. 50);
4. Holds that the respondent State is to pay the applicant, within three months, 150,000 (one hundred and fifty thousand) Austrian schillings in respect of costs and expenses and that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses the remainder of the applicant's claims.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 December 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar