BGE 20140121_23604_11 vom 21. Januar 2014

Bundesgericht (BGE), 2014-01-21, DE

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IT: BGE 20140121_23604_11 del 21 gennaio 2014

Regeste

Inhaltsangabe des BJ (1. Quartalsbericht 2014) Streichung aus dem Register (Art. 37 Abs. 1 lit. c) EMRK); weitere Prüfung der Beschwerde nicht mehr gerechtfertigt. Der Beschwerdeführer beschwerte sich vor dem Gerichtshof darüber, dass ihn seine Ausweisung nach Mogadischu der Gefahr einer Behandlung, welche Art. 3 EMRK (Verbot der Folter und der unmenschlichen und erniedrigenden Behandlung) und Art. 8 EMRK (Recht auf Achtung des Privat- und Familienlebens) zuwiderlaufe, aussetzen würde. Gestützt auf die Praxis der im Asylbereich zuständigen Schweizer Behörden, wonach die Schweiz zur Zeit keine Zwangsrückschaffungen abgewiesener Asylbewerber nach Somalia vornehmen könne, stellte der Gerichtshof fest, dass der Beschwerdeführer nicht Gefahr laufe, nach Somalia zurückgeschickt und einer Art. 3 oder 8 EMRK zuwiderlaufenden Behandlung ausgesetzt zu werden. Er war deshalb der Ansicht, dass die weitere Prüfung der vorliegenden Beschwerde nicht mehr gerechtfertigt sei. Streichung aus dem Register (einstimmig). Synthèse de l'OFJ (1er rapport trimestriel 2014) Radiation du rôle (art. 37 § 1 c) CEDH); poursuite de l'examen de la requête ne se justifie plus. Le requérant s'est plaint devant la Cour que son expulsion vers Mogadiscio l'exposerait au risque d'être soumis à des traitements contraires à l'article 3 CEDH (interdiction de la torture et des peines ou traitements inhumains ou dégradants) et à l'article 8 CEDH (droit au respect de la vie privée et familial). Se basant sur la pratique des autorités suisses compétentes en matière d'asile, selon laquelle la Suisse ne peut pas, pour le moment, expulser de force des demandeurs d'asile déboutés vers la Somalie, la Cour a constaté que le requérant ne court pas de risque d'être renvoyé en Somalie et de subir des traitements contraires à l'article 3 ou 8 CEDH. Elle a donc estimé que la poursuite de l'examen de la présente affaire ne se justifie plus. Radiation du rôle (unanimité). Sintesi dell'UFG (1° rapporto trimestriale 2014) Cancellazione dal ruolo (art. 37 par. 1 lett. c) CEDU); ulteriore esame del ricorso non più giustificato. Il ricorrente ha fatto valere dinanzi alla Corte che la sua espulsione verso Mogadiscio lo esporrebbe a trattamenti contrari all'articolo 3 CEDU (divieto di tortura e di pene e trattamenti inumani o degradanti) e violerebbe l'articolo 8 CEDU (diritto al rispetto della vita privata e familiare). Fondandosi sulla pratica delle autorità svizzere competenti in materia d'asilo, secondo cui la Svizzera non può attualmente espellere con la forza verso la Somalia richiedenti l'asilo la cui domanda è stata respinta, la Corte ha constatato che il ricorrente non corre alcun pericolo di essere rinviato in Somalia e di subirvi trattamenti contrari agli articoli 3 o 8 CEDU. Ha quindi considerato che non vi fosse più motivo di continuare l'esame del ricorso. Cancellazione dal ruolo (unanimità).

Volltext

Bundesgericht (BGE) EGMR 21.01.2014 20140121_23604_11 (Isman Abdirasak c. Suisse) Tribunal fédéral (ATF) CEDH 21.01.2014 20140121_23604_11 (Isman Abdirasak c. Suisse) Tribunale federale (DTF) CEDU 21.01.2014 20140121_23604_11 (Isman

Abdirasak c. Suisse)

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Urteilskopf 23604/11 Isman Abdirasak c. Suisse Décision d'irrecevabilité no. 23604/11, 21 janvier 2014 Inhaltsangabe des BJ (1. Quartalsbericht 2014) Streichung aus dem Register (Art. 37 Abs. 1 lit. c) EMRK); weitere Prüfung der Beschwerde nicht mehr gerechtfertigt. Der Beschwerdeführer beschwerte sich vor dem Gerichtshof darüber, dass ihn seine Ausweisung nach Mogadischu der Gefahr einer Behandlung, welche Art. 3 EMRK (Verbot der Folter und der unmenschlichen und erniedrigenden Behandlung) und Art. 8 EMRK (Recht auf Achtung des Privat- und Familienlebens) zuwiderlaufe, aussetzen würde. Gestützt auf die Praxis der im Asylbereich zuständigen Schweizer Behörden, wonach die Schweiz zur Zeit keine Zwangsrückschaffungen abgewiesener Asylbewerber nach Somalia vornehmen könne, stellte der Gerichtshof fest, dass der Beschwerdeführer nicht Gefahr laufe, nach Somalia zurückgeschickt und einer Art. 3 oder 8 EMRK zuwiderlaufenden Behandlung ausgesetzt zu werden. Er war deshalb der Ansicht, dass die weitere Prüfung der

vorliegenden Beschwerde nicht mehr gerechtfertigt sei. Streichung aus dem Register (einstimmig). Sachverhalt SECOND SECTION DECISION Application no. 23604/11 Abdirasak ISMAN against Switzerland The European Court of Human Rights (Second Section), sitting on 21 January 2014 as a Chamber composed of: Guido Raimondi, président, Peer Lorenzen, Dragoljub Popovi■, Nebojša Vu■ini■, Paulo Pinto de Albuquerque, Helen Keller, Egidijus K■ris, juges, and Stanley Naismith, Section Registrar, Having regard to the above application lodged on 12 April 2011, Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court, Having deliberated, decides as follows: FACTS AND PROCEDURE 1. The applicant, Mr Abdirasak Isman, is a Somali national who was born in 1979 and is currently living in Zürich. He was represented before the Court by Mr H. Tarig, a lawyer practising in Zürich. 2. The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger, of the Federal Office of Justice. A. The circumstances of the case 3. The facts of the case, as submitted by the applicant, may be summarised as follows. 4. On 17 March 2009 the applicant applied for asylum in Switzerland, submitting that he was a member of the Ali Clan, which belongs to the Asharaf minority. He claimed that he had lived in Mogadishu, in the District of Hamar Jadid and Madino, all his life. In 2007 his father had been killed and, at the beginning of 2008, the business he had been working for had closed on account of the erupting civil war. When the civil war reached the district of Mogadishu, where the applicant was living, he had had to flee. On 15 March 2009 he had left Mogadishu with a forged passport. His mother and his two younger brothers had already left Mogadishu in 2007 for Afgoje. 5. On 24 September 2009 the Federal Office for Migration ("the FOM") dismissed the applicant's asylum request, finding that his submissions lacked credibility and that he had failed to demonstrate a well-founded fear of persecution. It suspected that the applicant was not from Mogadishu but from Northern Somalia or another country. Since his identity and origins had not been clarified, the FOM could not properly assess the feasibility of his return. However, in view of the applicant's failure to cooperate with the asylum authorities, the FOM considered it had no duty to look for possible obstacles to expulsion. The applicant's return was therefore possible. 6. On 4 November 2009 the applicant appealed against that decision to the Federal Administrative Court ("the FAC"). As proof of his origin he submitted several documents, such as a birth certificate from the hospital where he was born and school certificates. 7. The FAC dismissed the applicant's appeal by a judgment of 3 June 2010. It ruled that it was doubtful whether the documents were authentic and that there remained numerous inconsistencies in his story. The applicant's identity and origin had therefore not been sufficiently clarified and all the documents had to be confiscated. Moreover, even assuming that all the documents were authentic, they were not evidence that the applicant had lived in Mogadishu before coming to Switzerland. His expulsion to another region in Somalia or another country was therefore feasible. 8. On 9 September 2010 the applicant married a Somali national who was living in Switzerland and had a residence permit. 9. On 3 November 2010 the applicant submitted a reconsideration request (Wiedererwägungsgesuch), claiming that in preparation for his wedding he had been able to obtain a Somali passport, which had been authenticated by the police of the Canton of Zürich. Furthermore, he requested that a linguistic and cultural analysis (a "Lingua analysis") be conducted by the domestic authorities to establish that he had been socialised in Mogadishu. He additionally alleged that his expulsion would violate his rights under Article 8 of the Convention because he had married in the meantime and his wife held a residence permit in Switzerland. 10. The FAC

accepted the application as a request for revision (Revisionsgesuch) of its judgment of 3 June 2010. However, in an interim order dated 22 November 2010 it held that a revision would have little prospect of success and that the applicant therefore had to advance the costs of the proceedings. It reasoned that despite the authentication of the applicant's passport by the cantonal police, the documents issued by the Somali authorities had no value as evidence. Moreover, the signature in the passport differed considerably from that of the applicant in other documents. In addition, he should have requested the Lingua analysis during the ordinary proceedings and not only in the revision proceedings. According to the domestic law, this request was therefore belated. Lastly, the FAC held that the applicant could always apply for family reunification from abroad. Hence, there was no need for a revision. 11. On 6 December 2010 the applicant applied for a revision of the FAC's interim order of 22 November 2010, arguing that he was unable to advance the costs of the proceedings. He explained that the signature in his passport was his mother's since she had obtained the document for him in Mogadishu. 12. On 17 December 2010 the FAC dismissed the applicant's revision request regarding the interim order and declared his request for a revision of the judgment of 3 June 2010 inadmissible since he had not advanced the costs of the proceedings. It also confiscated the passport because it suspected that it was forged. 13. On 21 January 2011 the applicant submitted "a request for a qualified reconsideration" ("qualifiziertes Wiedererwägungsgesuch"), maintaining that his passport was not forged and that his request for a Lingua analysis was justified since all the Somali documents he had submitted had been rejected as evidence. He also attached a letter in which the director of the Somali association in Zürich asserted, on the basis of a private linguistic and cultural examination, that he originated from Mogadishu. He further claimed that his expulsion was disproportionate because his wife was in the process of naturalisation in Switzerland and he had a good chance of obtaining a residence permit on the ground of family reunification. Finally, he claimed that the security situation in Mogadishu and Southern and Central Somalia had escalated in such a way that there existed no possibility of relocation to those regions. Somaliland and Puntland would only accept people who could prove that they originated from there, which he could not. 14. The FAC accepted the application as a request for revision and dismissed it on 15 February 2011. It ruled that the letter from the director of the Somali association in Zürich was not an official document and therefore did not have sufficient value as evidence. His request for a Lingua analysis was, moreover, as established earlier, belated. Regarding the increased security risk in Somalia the FAC held that this was a new fact and as such could not be subject to a revision request. Moreover, there was no point in re-submitting the request to the FOM because the applicant had only described the general security situation and had not substantiated any risk of persecution. His expulsion was also feasible with regard to his family life since it could not be predicted when his wife would be naturalised in Switzerland. Furthermore, he could always submit a request for family reunification from abroad. B. Developments subsequent to the lodging of the application 15. On 15 April 2011, at the request of the applicant, the Acting President of the Section decided to indicate to the Government of Switzerland that the applicant should not be expelled to Somalia for the duration of the proceedings before the Court (Rule 39 of the Rules of Court). The Acting President further decided to give notice to the Government of the applicant's complaints detailed below (Rule 54 § 2 (b)). 16. On 4 April 2012, in reply to questions put to them under Rule 54 § 2 (a) of the Rules of Court on 16 December 2011, the Government stated that, on the basis of various country reports by governmental and non-governmental organisations, the domestic authorities had

established that the expulsion of refused asylum seekers to Central or Southern Somalia was not feasible for the time being. By contrast, Puntland and Somaliland were relatively safe, provided that the person concerned was not particularly vulnerable and had direct contact with one of the local clans there which could provide him or her with effective support. However, since it had not been possible to establish the applicant's identity and nationality, the domestic authorities had not specified the country or region the applicant was to be returned to. Even assuming that the expulsion was executed, the applicant would not be returned to Southern or Central Somalia, but - and only under the above-mentioned conditions - to Puntland or Somaliland. Therefore, the applicant was not at risk of being exposed to treatment contrary to Article 3 of the Convention. 17. With particular regard to the current security situation in Mogadishu and whether recent changes had had an impact on the risks allegedly facing the applicant if he was ultimately returned to Somalia, the President of the Second Section decided on 2 April 2013 to request additional observations from the parties under Rule 54 § 2 (c) of the Rules of Court. In their reply of 14 May 2013, the Government stated that they maintained their earlier stance regarding expulsions to Somalia (see paragraph 16 above). The Government reiterated that the domestic authorities had ordered the expulsion of the applicant from Switzerland without specifying a destination. Owing to the applicant's lack of cooperation, it had been impossible for the domestic authorities to establish his identity and origin, and hence the feasibility of his return. Therefore, the Government could not evaluate whether the recent developments in the security situation in Somalia concerned the applicant at all. The Government also emphasised that no treaty existed between Switzerland and Somalia as to the readmission of rejected asylum seekers to Somalia, and that they had no links with the Somali immigration authorities. They concluded that Switzerland could not therefore forcibly return refused asylum seekers to Somalia. 18. In response to the Government's submissions, the applicant stated on 9 July 2013 that even if he was not returned to Somalia immediately, it was clear that the Swiss authorities considered him to be removable. It appeared to him that as soon as removals to Somalia resumed, the authorities would seek to remove him there, the country he claimed to be from. He alleged that there was thus a real risk that the authorities would, at that point, contact the Somali authorities and request a laissez-passer or some other form of travel document for him on the basis of the various identity documents he had already submitted. He could therefore be removed at any point without further notice and without any removal direction or decision that he could challenge. He therefore had no effective remedy available for challenging his removal in the future, which made it necessary for him to challenge the removal decision of the Swiss authorities now. C. Relevant domestic law 19. Articles 3, 7, 8 and 44 of the Asylum Act, as in force at the relevant time, read as follows: Art. 3 Definition of the term "refugee" « 1 Refugees are persons who in their native country or in their country of last residence are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages for reasons of race, religion, nationality, membership of a particular social group or due to their political opinions. 2 Serious disadvantages include a threat to life, physical integrity or freedom as well as measures that exert intolerable psychological pressure. Motives for seeking asylum specific to women must be taken into account. 3 Persons who are subject to serious disadvantages or have a well-founded fear of being exposed to such disadvantages because they have refused to perform military service or have deserted are not refugees. The provisions of the Convention of 28 July 1951 relating to the Status of Refugees are retained. » Art. 7 Proof of refugee status « 1 Any person who applies for asylum must prove or at least credibly

demonstrate their refugee status. 2 Refugee status is credibly demonstrated if the authority regards it as proven on the balance of probabilities. 3 Cases are not credible in particular if they are unfounded in essential points or are inherently contradictory, do not correspond to the facts or are substantially based on forged or falsified evidence. » Art. 8 Duty to cooperate « 1 Asylum seekers are obliged to cooperate in the establishment of the facts. They must in particular: a. reveal their identity; b. hand over their travel documents and identity papers at the reception centre; c. state at the hearing why they are seeking asylum; d. indicate any evidence in full and submit this without delay or, as far as this seems reasonable, endeavour to acquire such evidence within an appropriate period; e. cooperate in providing biometric data. ... » Art. 44 Removal and temporary admission « 1 If the Federal Office rejects or dismisses the application for asylum, it shall normally order and enforce removal from Switzerland; however, in doing so it shall take account of the principle of family unity. ... » COMPLAINTS 20. The applicant complained under Article 3 of the Convention that his removal to Mogadishu would expose him to a real risk of being subjected to treatment in breach of Article 3 of the Convention. Under Article 8 of the Convention, he alleged that his removal would separate him from his wife, which would constitute a disproportionate interference with his right to respect for family life. Erwägungen THE LAW 21. With regard to the applicant's claim under Article 3 of the Convention, the Court reiterates at the outset 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 (see, for example, Abdulaziz, Cabales and Balkandali v. the United Kingdom , 28 May 1985, § 67, Series A no. 94; Boujlifa v. France , 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI; and Üner v. the Netherlands [GC], no. 46410/99 , § 54, ECHR 2006-XII). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 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 deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to remove the person in question to that country (see, among other authorities, Soering v. the United Kingdom , 7 July 1989, § 91, Series A no. 161, and Saadi v. Italy [GC], no. 37201/06 , §§ 124-125, ECHR 2008). 22. The Court has held that in this type of case it is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. With regard to the material date, the Court has on many occasions stressed that the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, the Court has found that if the applicant has not yet been extradited or deported when it examines the case, the relevant time will be that of the proceedings before the Court (see, for instance, Chahal v. the United Kingdom , 15 November 1996, §§ 85 and 86, Reports 1996-V, and Auad v. Bulgaria , no. 46390/10 , § 99, 11 October 2011). It is furthermore the Court's established case-law that even though 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 in the receiving country which are decisive (see Chahal , cited above, §§ 86 and 97, and H.L.R. v. France , 29 April 1997, § 37, Reports 1997-III). 23. It is to be noted that when the Court examines a complaint under Article 3 relating to the removal of an alien who is, at the time of that examination, still on the territory of the Contracting State against which the complaint is directed, the underlying assumption is that the removal of

that alien is imminent or, at the very least, possible, even if no exact date for the removal has been set yet. It is precisely to prevent irreparable damage being done to the asserted Convention right that the Court may see fit to apply Rule 39 of the Rules of Court and indicate to the Contracting State not to proceed with the removal pending the Court's examination of the case (see Abdi Mohammed v. The Netherlands (déc.), no. 2738/11, 4 December 2012). 24. However, in the present case it is clear from the information submitted by the Government that the applicant cannot be forcibly removed to Somalia at the present time (see paragraphs 16 and 17 above); he is therefore currently not at risk of being subjected to the treatment he alleges to be in violation of Article 3 of the Convention or of the other Convention provisions invoked by him. Under these circumstances the Court considers that it would be less than efficient to proceed to an assessment of the present conditions in the receiving country, the more so when it can by no means be excluded that those conditions will have undergone a considerable change by the time the Government decide that removal can take place. For this reason, the Court finds that at the present time it is no longer justified to continue the examination of the application (see mutatis mutandis Atmaca v. Germany (dec.), no. 45293/06 , 6 March 2012) and that it should be struck out of its list of cases in accordance with Article 37 § 1 (c) of the Convention. Moreover, in accordance with Article 37 § 1 in fine, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case. 25. The Court would additionally emphasise that if domestic law does not enable the applicant to challenge a future removal from Switzerland, it will be open to the applicant to lodge a new application, taking into account that by the time in question the conditions in Somalia, as well as the applicant's personal situation, may have undergone certain changes and thus constitute new facts. 26. In view of the above, it is appropriate to lift the interim measure indicated under Rule 39 of the Rules of Court and to strike the case out of the list. Entscheid For these reasons, the Court unanimously Decides to strike the application out of its list of cases. Stanley Naismith Registrar Guido Raimondi President