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

THIRD SECTION

DECISION

Application no. 23270/16
Said Mohamed ABOKAR
against Sweden

The European Court of Human Rights (Third Section), sitting on 14 May 2019 as a Committee composed of:
Georgios A. Serghides, *President,*
Branko Lubarda,
Erik Wennerström, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*
Having regard to the above application lodged on 20 April 2016,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Said Mohamed Abokar, is a Somali national who was born in 1986 and lives in Italy. He was represented before the Court by Ms V. Nyström, a lawyer practising in Norrköping.
2. The Swedish Government ("the Government") were represented by their Agent, Ms C. Hellner Kirstein, of the Ministry for Foreign Affairs.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.
4. The applicant is married to A, a Somali national who has held a permanent residence permit in Sweden since 2009. The applicant married A in a religious ceremony on 15 May 2011 and a civil ceremony on 6 April 2013. The couple started their relationship in Sweden and have never lived

together in Somalia. The applicant and A have two children together: B, born in 2012 and C, born in 2014. The applicant and A are both registered as the legal guardians of B and C. In 2013 the applicant was granted a residence permit and refugee status in Italy.

1. First set of asylum proceedings

5. On 28 June 2010 the applicant applied for asylum in Sweden under the identity of Abdirahman Mohamed Abukar, born on 22 February 1990.

6. On 23 August 2010 the Migration Agency (*Migrationsverket* – hereafter "the Agency") dismissed his application and decided to transfer him, in accordance with the Dublin Regulation, to Italy where he had previously applied for asylum and, according to his own statement, had been granted a temporary residence permit. The Agency noted that the applicant had applied for asylum in Finland on 18 January 2010 under the identity of Said Mohamed Abokar, born in 1986, and that he had spent time in Sweden during 2009 without registering. His transfer case was handed over to the police on 14 September 2010 after he had absconded. His transfer to Italy was enforced on 18 January 2012.

2. Second set of asylum proceedings

7. On 4 December 2012 the applicant again applied for asylum in Sweden under the identity of Abdirahman Mohamed Abukar, born on 22 February 1990. The applicant requested that his asylum case be examined in Sweden where his wife, who is disabled, and their child were resident.

8. On 2 February 2013 the Agency dismissed his application and transferred him to Italy, after confirmation from the Italian authorities that he had been granted a residence permit under the identity of Said Mohamed Abokar, born in 1986. The Agency noted that the applicant's family life had not been established in his country of origin and that A's disability (her arm had been amputated) was not severe enough to find that she was dependent on him. The transfer to Italy was enforced on 4 March 2013.

3. First set of proceedings for a residence permit

9. On 23 April 2013 the applicant applied for a residence permit based on his family ties to A and B, stating that he had been living with A for a couple of months. The applicant admitted to having previously used a false identity. He also stated that he had been married in Somalia between 2002 and 2010. When questioned about the applicant, A was not able to say where the applicant was born, where he lived in Italy, or give any information regarding his parents. A did not know that the applicant had previously been married. Although the applicant handed in his application while in Sweden, he left for Italy on 23 August 2013.

10. On 26 August 2013 the Agency rejected his application. It noted that the applicant could only be granted a residence permit if his identity was confirmed. Since the applicant was from Somalia, where a functioning and reliable national registration system had been lacking since 1991, he was unable to submit any document that could prove his identity. According to national case-law, it was possible to grant a residence permit for family reunion if the applicant could make his identity probable. However, the Agency noted that this exception did not apply to the applicant as he had not been living together with A prior to her moving to Sweden. It concluded that its decision could not be considered to violate Article 8 of the Convention.

11. On 10 January 2014 the Migration Court (*Migrationsdomstolen*) rejected the applicant's appeal, agreeing with the findings of the Agency.

12. On 21 February 2014 the Migration Court of Appeal (*Migrationsöverdomstolen*) decided to refuse the applicant leave to appeal.

4. Second set of proceedings for a residence permit

13. On an unspecified date the applicant applied for the second time for a residence permit based on his ties to A, B and, this time, also to C. In contrast to his previous statement, he claimed that he had not been married before.

14. On 9 February 2015 the Agency rejected his application. As in the previous decision, it found that the applicant had not proved his identity. The Agency further considered that the applicant had not even made his identity probable since he had used different identities in Sweden. The fact that DNA analyses showed that the applicant and A, with a likelihood of 99.999 %, were the parents of B and C led to no other assessment by the Agency. Since the applicant had not met the requirement of proved identity, the Agency did not go further in its examination of the application.

15. On 22 September 2015 the Migration Court rejected the applicant's appeal. The court agreed with the findings of the Agency and considered that a lower standard of proof regarding an applicant's identity could be applied, in accordance with the domestic case-law (see MIG 2012:1 and MIG 2014:16 below) if the parents had lived together outside Sweden prior to their separation. In the present case this exception was not applicable since the applicant had not cohabited with A in Somalia before she came to Sweden. The court concluded that it had weighed the individual interests against the general ones and that it was reasonable and proportionate to uphold the general rule that applicants needed to prove their identity.

16. On 9 November 2015 the Migration Court of Appeal refused the applicant leave to appeal.

B. Relevant domestic law and practice

1. Domestic law on family reunion

17. The basic provisions concerning the right of aliens to enter and to remain in Sweden are laid down in the 2005 Aliens Act (*Utlänningslagen*, Act no. 2005:716). The provisions on family reunion relating to the spouse of a person who is resident in Sweden are set out in Chapter 5, section 3, of the Aliens Act and were given their present wording on 30 April 2006 when the EC Directive on the right to family reunion (Directive 2003/86/EC of 22 September 2003) was implemented.

18. Under Chapter 5, section 3, subsection 1, of the Aliens Act, unless otherwise provided in sections 17–17b of the same Chapter, a residence permit shall be granted to an alien who is the spouse of a Swedish resident. The provision provides for a right to obtain a residence permit unless there are special grounds for rejecting it, such as the spouses having no intention of living together, the alien being married to someone else, or the alien being considered a threat to public order and security.

19. According to Chapter 1, section 10, of the Aliens Act, in cases concerning a child particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general.

2. Requirement of established identity

20. There is no explicit provision in the Swedish Aliens Act stating that an applicant's identity must be confirmed in order for him or her to be granted a residence permit based on family ties. However, according to preparatory works and case-law, this is the principal rule (see Government Bill 2005/06:72 p. 68-69, Government Bill 2009/10:137 p. 17 and MIG 2011:11).

21. In the case MIG 2012:1, the Migration Court of Appeal found that, in family reunion matters, there may be circumstances that may justify applying a lower standard of proof regarding an applicant's identity. This is, for example, the case if an applicant comes from a country where it is difficult to obtain acceptable identity documents. It may thus suffice that the applicant's identity is made probable by confirming parenthood of a common child together with the resident in Sweden. This practice was confirmed by a later judgment where the Migration Court of Appeal reiterated that the exception only concerned parents who had lived together outside Sweden prior to their separation (MIG 2014:16).

C. Relevant international materials

22. In August 2014 the European Asylum Support Office (EASO) published a country of origin information report entitled "South and Central Somalia Country overview". This report provides, *inter alia*, a general description of the lack of a centrally organised administration in Somalia as well as a description of the possibility to obtain reliable identity documents.

23. The report states in its relevant parts the following:

> "Since the start of the civil war in 1991, Somalia lacks a centrally organised and functioning administration. Most records have been discontinued and destroyed. The few records not destroyed are in the hands of private individuals or otherwise not retrievable. Consequently, most persons born after 1991 in Somalia have never been registered officially. In December 2013, the FGS launched a new centre for issuing passports and identity cards, which is also recording biometrical data electronically. However, the system has very limited capacities and is so far only available in Mogadishu ...
>
> Thus, until recently, there existed neither authorities entitled to issue identity documents, nor records on which these could be based. Somali society is largely paperless. Somalis identify themselves usually by dialect and genealogy. Identity papers are mainly needed when travelling (or seeking asylum) abroad. For many years, they have been issued only by forgers on markets. In 2006, the (transitional) government started also issuing papers, which are largely based on oral declarations and not on information from kept records. These documents therefore lack reliability and value of proof ...
>
> While the newer generation identity documents include elaborate security features which are difficult to counterfeit, information contained in the documents still lacks substance due to the absence of reliable records. Until the introduction of a comprehensive record system, identity documents will be largely based on information given orally by the applicants. Fraud is very common. Through bribery, networks or connections, it is easy to fraudulently obtain genuine Somali identity documents, be it in Somalia or abroad. These documents can be issued to persons who are not entitled (e.g. foreign citizens) or may contain false identity information. For these reasons, most countries do not currently recognise the Somali passport."

COMPLAINT

24. The applicant complained under Article 8 of the Convention that the failure to grant him a residence permit on the grounds that he could not prove his identity amounted to a violation of his right to respect for his family life.

THE LAW

25. The applicant complained that the decision not to grant him a residence permit in Sweden was in violation of his right to respect for family life as provided in Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions by the parties

1. The Government

26. The Government argued that a fair balance had been struck between the applicant's personal interest in establishing a family life in Sweden and the general interest of controlling the identity of immigrants and maintaining security, public order and controlled immigration. The Government stressed that the applicant and his wife had been well aware that he was under the obligation to leave Sweden at the time of the establishment of their family life. It transpired from the Court's case-law that, when family life had been created at a time when there could be no reasonable or legitimate expectations as to the possibilities for establishing family life in the Contracting State, it was likely only to be in exceptional circumstances that the removal of the non-national family member would constitute a violation of Article 8 (see *Darren Omoregie and Others v. Norway*, no. 265/07, § 57, 31 July 2008, and *J.M. v. Sweden* (dec), no. 47509/13, § 42, 8 April 2014). In the Government's view the applicant had failed to establish a presence of such exceptional circumstances.

27. The Government noted that the applicant had provided the Swedish authorities with incorrect information concerning his identity and thus rendered more difficult the efforts to control the entry of aliens into the country. Furthermore, the applicant had refused to leave the country after his first application for a residence permit had been rejected. The applicant's presence in the country had never been tolerated by the Swedish authorities but he had remained in the country unlawfully. Moreover, the applicant did not have any ties to Sweden apart from his family, whom he had visited only for short periods of time.

28. The Government acknowledged that the applicant had had only a minor role in the upbringing of his children, which lessened the consequences of their living apart from him. The applicant and his wife had

each been granted residence permits in a member State of the European Union, meaning that the family could easily travel to each country and stay for longer periods. Moreover, the family members were able to stay in touch with each other daily via telephone, the internet and Skype. It was not uncommon for families with children to reside in different countries as a result of one family member staying abroad for shorter or longer periods of time. Given the above considerations, the possible difficulties for the children resulting from their father living in Italy were neither unacceptable nor unreasonable in the present case.

2. The applicant

29. The applicant maintained that the domestic authorities had failed to strike a fair balance between his interest in family reunion and the public interest to control immigration. He argued that the requirement for him to prove his identity in order to be granted a residence permit effectively ruptured the ties between him and his family, since it rendered the family incapable of establishing any regular contact.

30. The applicant stressed that his inconsistent statements regarding his identity could in part be attributed to the characteristics of the Somali alphabet which differed phonetically from European languages. The arguments brought forth by the Government regarding this issue should be seen against the background of a risk of misunderstandings when his asylum applications were registered.

31. The applicant further argued that the domestic authorities had failed to pay particular attention to the circumstances of the minor children concerned, especially to their age, the extent to which they were dependent on their parents, and the fact that the applicant's wife, who was currently living with the children, had difficulties providing sufficient care for them due to her physical handicap. The consequence of the authorities' decision was that the family lived apart from each other and that the children had reduced contact with one of their parents. In the applicant's view, it was unreasonable to allow the best interests of the children to suffer due to the choices made by their parents.

B. The Court's assessment

32. The Court reiterates that the Convention does not guarantee, as such, for aliens any right to enter or to reside in a particular country. The Contracting States have the right, as a matter of well-established rules of international law, including treaty obligations, in particular the Convention, to control the entry, residence or expulsion of aliens (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 100, 3 October 2014).

33. Furthermore, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to

authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports of Judgments and Decisions* 1996-I, and *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see, among others, *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000; *Rodrigues da Silva and Hoogkamer*, cited above, *ibid.*; and *Bolek and Others v. Sweden* (dec.), no. 48205/13, 28 January 2014).

34. Turning to the present case, the Court notes at the outset that the applicant's situation amounted to family life within the meaning of Article 8 § 1 of the Convention. It further finds that the impugned decision not to grant him a residence permit in Sweden interfered with his right to respect for family life.

35. As to the further question of whether the interference was justified under Article 8 § 2, the Court is satisfied that the decision not to grant the applicant a residence permit was in accordance with Swedish law and pursued a legitimate aim, notably the economic well-being of the country and the effective implementation of immigration control. It remains for the Court to examine whether the refusal of a residence permit was necessary in a democratic society and proportionate within the meaning of Article 8 § 2 of the Convention.

36. In this assessment, the Court first refers to the decision of 22 September 2015 in which the Migration Court considered that a lower standard of proof regarding an applicant's identity could be applied, in accordance with the domestic case-law, if the family had lived together outside Sweden prior to their separation. In the present case, this exception was not applicable since the applicant had not cohabited with his wife, A, in Somalia before she came to Sweden. The court concluded that it had weighed the individual interests against the general ones and that it was reasonable and proportionate to uphold the general rule that applicants needed to prove their identity. Consequently, the applicant's application for a residence permit in Sweden was refused.

37. The Court reiterates that an important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where

this is the case, the removal of the non-national family member would be incompatible with Article 8 only in exceptional cases (see *Jeunesse*, cited above, § 108; *Nunez v. Norway*, no. 55597/09, § 70, 28 June 2011; and *Bolek and Others*, cited above, §§ 35-36).

38. In this respect, the Court notes that the applicant has at no time been granted lawful residence in Sweden. Moreover, the family life between the applicant and his wife and children was created during his asylum proceedings. The religious marriage of the applicant and his wife took place after the applicant's first asylum request had been finally rejected by the Swedish migration authorities and there was an enforceable expulsion order against him, and their civil marriage took place after the applicant's second asylum request was refused. Thus, the applicant and his wife knew already when they started leading family life that they would most probably not be able to establish and maintain their family life in Sweden.

39. Furthermore, had the applicant and his wife lived together in Somalia before she came to Sweden, a lower standard of proof regarding the applicant's identity could have been applied by the domestic authorities in order to overcome his difficulties in obtaining acceptable identity documents from Somalia. Such a lower standard has already been applied in other similar cases where the parents concerned had lived together outside Sweden prior to their separation (see the paragraph 21 above). It was thus not so much the impossibility for the applicant to prove his identity but the lack of prior family life outside Sweden which was the reason for the refusal of his residence permit.

40. It is also of relevance that the applicant had initially provided the Swedish authorities with incorrect information concerning his identity and had thus himself contributed to his problems in proving his real identity. He had also breached immigration laws by refusing to leave the country after his first asylum application was rejected. Moreover, the applicant did not have any ties to Sweden, apart from his family whom he had visited only for short periods of time.

41. The Court further notes that the applicant was granted a residence permit and refugee status in Italy in 2013 and that he is currently residing there. Since both the applicant and his wife have been granted residence permits in member States of the European Union, the family can easily travel between Italy and Sweden and stay for longer periods in either of those countries. Moreover, it has not emerged that the applicant would lack the possibility to be in contact with the other family members via, *inter alia*, telephone, the internet or Skype.

42. In these circumstances, the Court finds that the Swedish authorities have not failed to strike a fair balance between the applicant's interests, on the one hand, and the State's interest in effective implementation of immigration control, on the other, or that the assessment made by them was

disproportionate *vis-à-vis* the legitimate aims sought under Article 8 of the Convention.

43. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 June 2019.

Fatoş Aracı Deputy Registrar	Georgios A. Serghides President