

## HUMAN RIGHTS COMMITTEE

### Jalloh v. The Netherlands

Communication No. 794/1998

26 March 2002

CCPR/C/74/D/794/1998

### VIEWS

*Submitted by: Mr. Samba Jalloh (represented by counsel, Mr. Pieter Bouman)*

*State party: The Netherlands*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2002,

Having concluded its consideration of communication No. 794/1998, submitted to the Human Rights Committee by Mr. Samba Jalloh under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Samba Jalloh. He claims to be a victim of a violation by the Netherlands of articles 9 and 24 of the Covenant. The author is represented by counsel.

#### **The facts as presented**

2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice.

From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.<sup>1</sup>

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.<sup>2</sup> His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.<sup>3</sup> On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.<sup>4</sup>

## **The complaint**

3.1 In his initial submission, counsel claimed that the author's detention under the Aliens' Act was in violation of articles 9 and 24 of the Covenant<sup>5</sup>. Counsel argued that the detention was arbitrary, because it is unreasonable to expect that the author would try to escape deportation, having voluntarily reported to the police on 4 September 1996 and because he was a minor. He further claimed that according to the State party's policy, minors who claim refugee status should be given a residence permit if they cannot be returned to their home country within six months.

3.2 In a letter, dated 16 December 1997, counsel informed the Committee that his client had obtained a residence permit, but that he still wishes to maintain the communication before the

Committee in light of the author's unlawful three and half month detention.

### **The State party's observations**

4.1 On the merits and with respect to the law, the State party explains that the detention of illegal immigrants is covered by section 26 of the Aliens Act. The State party underlines that detention of aliens is not a punishment but a measure aimed at facilitating expulsion and is limited to cases where the detention is necessary and effective. The courts can review the detention in the interests of the alien. The State party explains that unaccompanied minor aliens may also be detained in custody under the same section of the Aliens Act. However, the detention of minors is applied with great restraint.

4.2 In respect of the author's claim under article 9, the State party explains that the author was detained for three and half months under section 26 of the Aliens Act, because he had no valid residence permit, no identification documents, nor sufficient means of support, because there were serious grounds for suspicion that he would evade expulsion, and because the authorities had the impression that he was abusing the asylum procedures. Upon review by the Court, the Court held, on 24 September 1996, that the detention was lawful, that the author had evaded expulsion before, that he had not told the truth about his identity, and that there was sufficient prospect of expulsion in view of the preparation made by the State for an identity investigation by an expert.

4.3 The State party is of the opinion that its authorities acted with due care and not arbitrarily in relation to the author's detention. The purpose of the detention was under constant review by the implementing authorities and examined by an independent tribunal. The State party adds that at the time it was not possible to determine whether the author was under age.

4.4 With regard to the author's claim under article 24, the State party acknowledges that it has particular responsibilities in relation to minors. It explains that it has devised a special policy on unaccompanied minor asylum seekers. Unaccompanied minor asylum seekers are eligible for a residence permit subject to the restriction 'admitted as an unaccompanied minor asylum seeker'. Such a permit is granted if the minor has applied for asylum but does not qualify for admission as such. In those cases, a residence permit is issued if it is established within six months of the submission of the asylum application that there is no suitable care provision in the country of origin. In assessing the first asylum application, the State Secretary for Justice considered whether the author qualified for residence status as an unaccompanied minor and concluded that he did not, as it could not be established that he was telling the truth, given the many conflicting statements the author had made and the doubt about his identity. The Court, in reviewing the denial of the author's first asylum request, considered that there were insufficient elements to conclude that the author was under age. In the second proceedings, however, the Court decided that the author should undergo a medical examination, in the light of a new issue of mental underdevelopment raised by him. On the basis of the medical and psychological information then received, the author was granted a residence permit.

### **Counsel's comments**

5.1 In his comments, counsel notes that the author suffers from "serious mental

underdevelopment", and that although the issue of mental underdevelopment was raised by counsel, it was not taken into account by the authorities when the author was detained. Only after intervention by the court in April 1997, were the author's problems finally recognized and he was granted a residence permit. Counsel explains that the complaint focuses on the fact that the authorities failed to recognize the author's lack of mental development and that he functions on the level of a five year old. In the specific circumstances of the author's case, his detention was not justified and constituted intimidation. According to counsel, the fact that the court reviewed the detention does not diminish the State party's responsibility.

5.2 On refusing to grant the author asylum, the court on two occasions failed to recognise that the author was mentally undeveloped and that it was for this reason that he could not explain his reasons for seeking asylum. The courts had interpreted his inability to express himself properly as an issue of credibility rather than incapacity.

### **State party's further submission**

6. As to the inadequate development of the author's mental faculties, the State party submits that, on the two occasions when the Court was requested to determine the lawfulness of the author's detention in September and November of 1996 respectively, it was clear that he had never received any schooling and that his vocabulary and frame of reference were limited. However, the Court then did not consider those facts as sufficient ground for terminating his detention. Subsequently, in April 1997, the same Court decided to reopen proceedings to consider the author's appeal against the refusal to grant him refugee status and allowed the author to undergo a medical examination. It was only after the report of the psychological examination showed the author's mental age as that of a child between four and seven years that the Court was able to detect "mental underdevelopment" of the author. In consequence, the Court declared the author's appeal well-founded.

### **Issues and proceedings before the Committee**

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another international procedure of international investigation or settlement.

7.3 As to the requirement under article 5, paragraph 2 (b) of the Optional Protocol, the Committee notes that the State party has not submitted that the author failed to exhaust domestic remedies. As the State party does not raise any objections to the admissibility of the author's claims, the Committee declares the communication admissible and proceeds to the examination of the merits of the case.

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 With regard to the author's claim that his rights under article 9 have been violated, the Committee notes that his detention was lawful under Dutch law, section 26 of the Aliens Act. The Committee further notes that the author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence<sup>6</sup> the Committee notes that "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness. Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated. In the circumstances, the Committee finds that the author's detention was not arbitrary and thus not in violation of article 9 of the Covenant.

8.3 The author has raised a further claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè

Ahanhango, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

## Notes

<sup>1</sup> On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

<sup>2</sup> It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

<sup>3</sup> No further details have been provided on of the type of detention facility nor on the specific conditions of his detention have been provided.

<sup>4</sup> This information was provided by counsel after the initial submission to the Human Rights Committee.

<sup>5</sup> In his initial submission, the author also raised an allegation of a violation of article 10 but this is not maintained by the author in his submission of 16 December 1997 or in any subsequent submissions and was not responded to by the State party for this reason.

<sup>6</sup> Van Alpen v. The Netherlands, Case no. 305/1988, Views adopted on 23 July 1990, Suárez de Guerrero, Case no. 45/1979, Views adopted on 31 March 1982.