

**OPINION No. 45/2006 (UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND)**

Communication: addressed to the Government on 9 February 2006.

Concerning: Mr. Mustafa Abdi.

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006.)
2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information.
3. (Same text as paragraph 3 of Opinion No. 32/2006.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.
5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made, the response of the Government thereto and the observations by the source.
6. The case summarized below was reported to the Working Group as follows: Mustafa Abdi is a citizen of Somalia born on 8 December 1975. He arrived in the United Kingdom of Great Britain and Northern Ireland on 7 May 1995 with a false Kenyan passport. On 24 May 1995 he applied for asylum. On 14 February 1996 the Home Office refused the asylum claim but granted him exceptional leave to remain in the United Kingdom for a year. On 21 January 1997, Mr. Abdi was granted further exceptional leave to remain until 14 February 2000.
7. On 9 March 1998 Mr. Abdi was arrested in London. On 23 July 1998 he was convicted at Southwark Crown Court of rape and indecency on a child and sentenced to eight years and two years imprisonment to run concurrently. On 28 May 2002 Mr. Abdi completed his custodial sentence.
8. Already on 21 May 2002, Mr. Abdi had been served with a Notice of decision to make a deportation order and reasons for deportation letter. Accordingly, when his custodial sentence came to an end on 28 May 2002 his detention was continued under immigration powers.¹¹

¹¹ He is detained under Schedule 3 of the Immigration Act 1971. Paragraph 2 (2) of Schedule 3 provides that the Secretary of State may detain a non-British national pending the making of a deportation order against him. Paragraph 2 (3) of the same Schedule authorizes the Secretary of State to detain a person against whom a deportation order has been made pending his removal or departure from the United Kingdom.

9. On 2 July 2002, Mr. Abdi filed an appeal against the decision to make a deportation order and sought asylum again. An asylum interview was conducted on 12 September 2002, but the asylum claim was refused on 26 June 2003. On 28 July 2003, Mr. Abdi appealed against the refusal of the asylum claim. On 25 November 2003, both the appeal against the refusal of the asylum claim and the appeal against the deportation were dismissed.

10. On 19 April 2004, a deportation order was served on Mr. Abdi. Proceedings since then have mainly concerned the authorities' attempts to issue Mr. Abdi an emergency travel document (ETD) and to obtain a "disclaimer" from him. In order to be returned to Somalia Mr. Abdi requires an ETD as he does not have a valid Somali passport (apparently, obtaining a new Somali passport is not an option). However, Mr. Abdi has refused to cooperate with the authorities in this matter. Furthermore, the authorities are insisting that Mr. Abdi signs a "disclaimer", a document that would serve as evidence that Mr. Abdi left the United Kingdom voluntarily and would thus allow the Secretary of State for the Home Department (SSHD) to order Mr. Abdi's deportation despite the human rights situation in Somalia. Mr. Abdi refuses to sign such a disclaimer.

11. Bail was refused on 20 December 2004 and again on 11 October 2005. On the latter occasion, the immigration judge accepted that the Home Office had resumed enforced removal action of failed Somali asylum-seekers to Somalia. The judge therefore considered detention necessary as removal was imminent. However, Mr. Abdi remains in immigration detention, currently at Her Majesty's Prison (HMP) Bedford (after stays at HMP Wandsworth and HMP Hull).

12. The source alleges that the continued detention of Mr. Abdi is arbitrary. He completed his criminal sentence on 28 May 2002, more than four years ago. Since then he has been deprived of liberty under immigration powers pending removal. But as there is no clear timetable for removal, the human rights situation in Somalia remaining very preoccupying, his continued detention amounts to a violation of his basic human rights. Moreover, it also violates the SSHD's own Operational Guidance Manual on length of detention.

13. In its reply the Government to a great extent confirmed the allegations ascertained by the source and added that Mr. Abdi's appeal against both the refusal of his asylum claim and the decision to make a deportation order against him were dismissed on 25 November 2003 and that, as he did not seek to appeal further, he had exhausted all his available avenues of appeal on 4 December 2003. Therefore, on 19 April 2004 a Deportation Order was served on him and since 21 May 2004, several arrangements were made so that a travel document could be produced for Mr. Abdi, but he refused to cooperate.

14. The Government also states that Mr. Abdi is to be removed to Somalia on a European Union Letter, which requires that removals to Somalia can only take place if the person concerned has signed a disclaimer indicating his voluntary return. According to the Government this is a requirement of the airlines used to carry the returnees. Mr. Abdi refuses to sign a disclaimer. Otherwise he would be immediately deported to Somalia after having been served with the deportation order on 19 April 2004. The Government also ascertains that

Mr. Abdi could, at any time, apply to the administrative court for a statutory review, or he could seek a writ of habeas corpus, as a means to challenge the lawfulness of his detention. Neither he nor his lawyers have made any application to the court to challenge his detention. The Government concludes that Mr. Abdi's continued detention is justified. He is to be deported as a result of his having committed a very serious sexual assault on a child and he has been assessed as being at high risk to reoffending. His deportation remains an imminent and realistic prospect and his detention has been maintained in view of this. According to the Government, Mr. Abdi has, himself, prolonged his detention by refusing to sign the disclaimer.

15. The reply of the Government was forwarded to the source. In its comments the source, at the outset, states that, contrary to the assertion of the Government, there are court proceedings afoot seeking to challenge the legality of Mr. Abdi's detention. His lawyers have lodged an application for judicial review at the beginning of July 2006. Following a permission hearing on 25 September 2006 the High Court granted permission to apply for judicial review and the matter is to be heard before the High Court on 6 and 7 December 2006. However, the source confirms the assertion of the Government that Mr. Abdi's asylum claim was refused and that there are presently no outstanding representations before the Government to challenge his removal.

16. Further, an issue has arisen during the proceedings in the High Court as to the exact period of time for which Mr. Abdi has in fact been detained under immigration powers. Even though it has always been the understanding of both the Government and the source that immigration detention commenced on 28 May 2002 it is possible that it is not as long as believed. The source notes that this date is based on the assumption that Mr. Abdi would have been granted parole on 28 May 2002, however, it may be that it was not. On any view, Mr. Abdi has been detained under administrative powers for at least three years.

17. Furthermore, the source submits that there is a fundamental contradiction in the submissions of the Government which attempts to blur the distinction between voluntary departure to Somalia and forcible removal. According to the source "removal" and "voluntary return" are fundamentally different concepts and in seeking to meld the two into the contradictory concept of "voluntary removal" the Government seeks to obscure the true issue in the present case.

18. The source suggests that involuntary removal to Somalia was an impossibility at all material times because the State has entirely disintegrated. This is clear from parliamentary debates in the House of Commons on 3 May 2006 and from the practise of the Government. Although the Government hopes to recommence removals to Somalia soon such removals were not taking place as of 25 September 2006, the date of the permission hearing in the High Court. It was referred to in open court that it became possible to remove a "small number" of Somalis only between March and May 2004 to South-Central Somalia, but no returns to Somaliland. It is because of logistical difficulties and security concerns that the source remains unconvinced that any alleged failure to cooperate has contributed to the inability of the Government to remove Mr. Abdi to his home country.

19. Even assuming that voluntary return would have been possible, this case, in the opinion of the source, raises in stark terms the question whether or not the State is entitled to detain an individual indefinitely if he refuses to return “voluntarily” to a conflict zone. In any event it is questionable whether a return to Somalia made under threat of indefinite detention could be said to be “voluntarily” in any real sense.

20. Finally, turning to the refusal of Mr. Abdi’s application for bail by the Immigration Judge on 11 October 2005, the source alleges that the judge was materially misled by a representative of the Government as to the likelihood of removal. It was explained to the judge that removal was “imminent” and that this was one of three reasons given by the judge to refuse the application. Imminence of removal is always a highly material factor in immigration bail applications. Since it simply was not true that removal was imminent in the present case, the outcome of that application might have been different.

21. The Working Group notes that it is not a matter of dispute that Mr. Abdi served his criminal sentence in full on 28 May 2002, that the Government bases his detention since that (or around that) date on immigration powers and that there are currently no ongoing legal proceedings with respect to Mr. Abdi’s refused asylum claim and concerning his removal. The Working Group, however, takes notice of the fact that, contrary to the assertions of the Government, the legality of Mr. Abdi’s current detention is being challenged in High Court and a hearing has been scheduled for 6 and 7 December 2006 accordingly.

22. The Working Group recalls that the Commission on Human Rights, in its resolution 1997/50, extended the mandate of the Group so as to include situations of asylum-seekers and migrants in detention. Of course, the Working Group’s mandate in that respect is to give its opinion as to whether deprivation of liberty is compatible with the Government’s obligations under international human rights law, in particular article 9 of the International Covenant on Civil and Political Rights (ICCPR), and not with regard to the asylum claim or migration status, or the question whether removal is justified.

23. On the basis of the submissions of the Government and of the source, the Working Group considers that Mr. Abdi’s detention does indeed have a basis in the United Kingdom migration laws. He also enjoys the right to judicial review of his continued detention, as required by article 9, paragraph 4, of ICCPR, although some reservations can be expressed as to the frequency of and delays in the judicial review process.

24. This does not, however, settle the question whether or not Mr. Abdi is arbitrarily detained. The Working Group has two sets of concerns in this respect, the first relating to the duration of Mr. Abdi’s detention, the second to the actual purpose pursued by the use of immigration detention in this case.

25. With regard to duration, the Working Group notes that Mr. Abdi has been detained for four-and-a-half years as of today. The Working Group finds it difficult to think of circumstances under which this duration would not be excessive. It certainly is in the present case, where the prospects of Mr. Abdi’s removal actually taking place were dim from the beginning and have

been deteriorating since then, particularly since 2004.¹² Where the chances of removal within a reasonable delay are remote, the Government's obligation to seek for alternatives to detention becomes all the more pressing. Looking forward, the possibility of Mr. Abdi's removal would appear to be currently as remote as it was ever before. His continued detention therefore has assumed an indefinite character.

26. The circumstance that the asserted purpose of detention, i.e. removal, cannot in fact justify the detention because it is entirely unrealistic points to a second issue in this case. The history of Mr. Abdi's case and the Government's arguments strongly suggest that the Government's concern that - if released in the United Kingdom - he might reoffend is not only the reason the Government is formally pursuing his removal, but also the reason why he is kept in detention notwithstanding the practical impossibility of removal. In other words, Mr. Abdi is in fact detained as a security measure to protect the public in the United Kingdom.

27. This situation renders his detention arbitrary for two reasons. Firstly, the Government is thereby circumventing the procedures available under domestic law to impose security measures against dangerous offenders who the court believes are likely to reoffend in the same way. For this purpose, public protection sentences were introduced by the Criminal Justice Act 2003. They are issued by the sentencing court and continued dangerousness is reviewed by the parole board. This procedure (which is not applicable to Mr. Abdi, because he was sentenced before the entry into force of the 2003 Act) would require the Government to show that there is indeed such a high and continued risk in Mr. Abdi's specific case and would involve considerable procedural safeguards. In the immigration proceedings, the Government appears to be able to maintain

¹² In view of the appalling situation in Somalia the Office of the United Nations High Commissioner for Refugees (UNHCR) reconfirmed its first call upon all Governments from January 2004 to refrain from forced removals of Somali nationals to the country. In its Advisory from November 2005 the UNHCR referred to breakouts of fighting on a regular basis and inter-clan conflicts in central and southern Somalia as well as a high level of violent crime, particularly in the city of Mogadishu. The situation was further aggravated by food insecurity, lack of access to basic services and livelihood opportunities for the Somali population due to a high level of insecurity for aid operations in the area. Frequent violations of the United Nations arms embargo resulted in the continuation of explosives and heavy weapons entering the country on a large scale. While returns to northern Somalia were possible under certain conditions, especially if the persons concerned had clan links and could expect effective clan protection, the UNHCR recommended avoiding large-scale involuntary returns or forced removals of persons not originating from the region. Similarly, the United Nations independent expert on the situation of human rights in Somalia stated in his recent report to the Human Rights Council of 13 September 2006 that "[a]fter 15 years, the lack of security in Somalia continues to have dire consequences on the human rights of Somalis. The right to life is violated throughout Somalia and most of the country is marked by insecurity and violence, with the south and central areas being the most insecure. In the past year, fighting in the capital city of Mogadishu among rival militia was especially fierce and the dead, wounded and displaced were mostly civilians. It is estimated that hundreds of civilians were killed and thousands injured in the fighting, in contravention of international humanitarian and human rights law". (A/HRC/2/CRP.2 (GE.06-13949), para. 13).

Mr. Abdi in detention simply by pointing to the offence that gave rise to his conviction. Mr. Abdi is thereby deprived of the procedural safeguards which, because of the presumption of innocence, necessarily accompany such a highly sensitive measure as imposing detention as a preventive security measure against offenders who have served their sentence or are entitled to probation.

28. Secondly, the need to protect society against the threat emanating from persons convicted for sexual offences who have served their sentence and are entitled to release is the same with regard to United Kingdom citizens and foreigners. But by having recourse to immigration powers to impose security measures against Mr. Abdi, the Government is making use of the - in this respect entirely fortuitous - circumstance that he is a foreigner to deprive him of procedural safeguards against deprivation of liberty. Mr. Abdi is therefore deprived of the equal protection of the law on grounds of citizenship.

29. To sum up, Mr. Abdi is in his fifth year of detention since he completed serving his sentence and, due to the lack of prospect for the removal to Somalia, his detention has assumed the character of indefinite detention. Such indefinite detention can only be qualified as “arbitrary” within the meaning of article 9, paragraph 1 of ICCPR.¹³ Moreover, insofar as immigration powers are used against him in order to continue limiting his freedom in order to protect society, the detention violates the right to equality before the law and equal protection of the law without discrimination enshrined in article 26 of ICCPR, which adds to the arbitrary character of his detention.

30. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Abdi Mustafa is arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and articles 9 and 26 of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party.

31. The Working Group notes that the deprivation of liberty in Mr. Abdi’s case does not squarely fall within any of the three categories which it generally uses to classify cases of arbitrary detention. The fact that Mr. Abdi continues to be detained although he has served his criminal sentence approaches his case to category I, but it cannot be said that the deprivation of

¹³ The Human Rights Committee has considered, in the framework of a temporary or pretrial detention of a judicial nature, that: “The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.” See: Decision of 23 July 1990, communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, paragraph 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also decisions of 5 November 1999, communication No. 631/1995, *Aage v. Norway*, paragraph 6.3 (CCPR/C/67/D/631/1995) of 21 July 1994; communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, paragraph 9 (8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.2.

liberty is devoid of a legal basis. Its discriminatory character approaches the detention to category II. The circumstance that he is deprived of his freedom not on the basis of actually having committed crimes but on the basis of a perceived risk of reoffending raises questions with regard to the presumption of innocence and thus category III. The Working Group considers, however, that in the light of the clear mandate of the then Commission on Human Rights to consider also cases of immigration detention, which generally would not fall within any of the three categories, it is acting fully within the bounds of its mandate in declaring that Mr. Abdi's detention is arbitrary.

32. Having found the detention of Mr. Abdi to be arbitrary, the Working Group requests the Government of the United Kingdom to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2006.