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

SECOND SECTION

DECISION

Application no 25748/15
Kemal HAMESEVIC
against Denmark

The European Court of Human Rights (Second Section), sitting on 16 May 2017 as a Chamber composed of:

Robert Spano, *President,*
Julia Laffranque,
Ledi Bianku,
Işıl Karakaş,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 21 May 2015,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Kemal Hamesevic, is a citizen of Bosnia and Herzegovina and was born in 1971. It appears that he currently lives in Bosnia and Herzegovina. He was represented before the Court by Mr Gunnar Homann, a lawyer practising in Copenhagen.

A. The circumstances of the case

1. First set of proceedings

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant entered Denmark in 1994, when he was 23 years old. He was granted asylum the following year.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

4. In the meantime, on 15 August 1994 he had married a woman originating from Bosnia and Herzegovina, with whom he has three children, born respectively in 1995, 1996 and 1998. The children are Danish nationals.

5. The spouses divorced in 2007.

6. On 23 February 2007 the applicant was convicted of assault and sentenced to 40 days' imprisonment, suspended.

7. On 8 August 2012 the applicant and his girlfriend, A, a Danish national originating from Bosnia and Herzegovina, were arrested and charged with smuggling loaded weapons from Bosnia and Herzegovina into Denmark, in the spring and summer of 2012.

8. On 12 March 2013, a City Court (*retten i Kolding*) convicted the applicant, A, and two co-accused under Article 192 a of the Penal Code of smuggling loaded weapons from Bosnia and Herzegovina to Denmark for the purpose of resale (four AK 47 machine guns and two pistols), and attempt to do so (ten pistols), as well as offences under the Weapons Act (notably possession of ammunition). The applicant was found to be the instigator and was therefore sentenced to two years and six months' imprisonment. A was sentenced to one year in prison.

9. In addition, the applicant was expelled from Denmark with a life-long ban on returning. Before the City Court the Aliens Board (*Udlændingestyrelsen*) gave a statement about the applicant's situation, *inter alia*, that the applicant's father lived in Bosnia and Herzegovina and that his mother had died eleven years before. The applicant's children would not be covered by the applicant's expulsion. The applicant had worked in Denmark, but for the two previous years he had received social welfare benefits and taken medication against depression. During the two previous years, he had been on vacation in Bosnia and Herzegovina around five times and he was in the process of buying a house in the town of Sanski Most. He did not want to move to Bosnia and Herzegovina, however, since he only had his father there, and his children were in Denmark. The City Court stated:

> "The applicant has had a legal stay in Denmark for more than nine years [referring to the wording in section 22 of the Aliens Act]. Since he is convicted of violation of Article 192 a of the Penal Code, the legal authority for expulsion is set out in section 22, no. 8 of the Aliens Act. It transpires from section 26, subsection 2, of that Act that an alien shall be expelled under sections 22-24 and section 25, unless such would be in breach of Denmark's international obligations. Having made an overall assessment of the information contained in the statement by the Aliens Board, including notably the connection to his home country, and the age of the applicant's children in Denmark combined with the sentence and nature of the crime, the City Court does not find that expulsion would be in breach of Denmark's international obligations. Accordingly, the claim to expel the applicant is granted by the City Court. By virtue of section 32, subsection 2, no. 5, the expulsion is permanent due to the length of the sentence".

10. The applicant appealed against the judgment to the High Court of Western Denmark (*Vestre Landsret*) before which he explained, among other things, that his children, who lived with their mother, had visited him in prison twice a week. Before his imprisonment, he had seen them almost every day. The applicant and A had lived together for a couple of years and had married on 31 May 2013. Moreover, the applicant had acknowledged paternity of a child, E, born to A on 26 September 2007, at a time when she was living with R, the father of A's other children, Danish citizens born in 1992, 1995, 1999, and 2001. The applicant owned a piece of land in Serbia, but he could not build on it. He had inherited it from his mother. He and A had to give up their plan to buy a house in Bosnia and Herzegovina since, due to his arrest, they could not pay for it. His father was 74 years old.

11. A explained that she and the applicant had been a couple for six years and had long intended to marry. It had been a difficult period when both she and the applicant had been in pre-trial detention and she could not see her daughter, E. The latter now lived with a foster family and visited A every second weekend. If the applicant were to be expelled, she and the children would have nobody to lean on in Denmark. She was from Bosnia and Herzegovina, but no longer had any family there, and she could not see how she and the children would be able to move to Bosnia and Herzegovina with the applicant.

12. By a judgment of 13 August 2013, the High Court increased the applicant's sentence to three years' imprisonment and upheld the expulsion order. It adhered to the reasons set out by the City Court and added that the fact that the applicant, after the City Court's judgment, had married A, and that the paternity case concerning five-year-old E had been reopened, could not lead to a finding that the applicant's expulsion would be in breach of Denmark's international obligations.

13. Leave to appeal to the Supreme Court *(Højesteret*) was refused on 27 December 2013.

14. In the meantime, on 12 July 2013 a City Court had reopened the paternity case concerning E, who until then had had R registered as her father. On 17 October 2013, the same City Court confirmed that the applicant was E's father.

2. *Second set of proceedings*

15. On 6 March 2014, before having served his sentence, the applicant requested that the expulsion order be revoked under section 50, subsection 1, of the Aliens Act due to material changes in his circumstances, notably because it had been established that he was E's father.

16. The case was submitted to the City Court (*retten i Svendborg*), before which the applicant explained that A and the children would not follow him as they would not be able to cope in Bosnia and Herzegovina.

17. A explained, among other things, that she lived in an apartment with the three youngest children, including E. At the relevant time the children were 15, 13 and 7 years old. The two eldest had moved away from home. Her children spoke Danish and Bosnian. She did not have a job. If the applicant were to be expelled, she would have to stay in Denmark, because the children could not live by themselves, and she could not envisage taking E to Bosnia, as E would not be able to understand that she would no longer attend school in Denmark. A's parents lived in the United States of America. She only had the applicant, and her children in Denmark, and she needed a man to support them. Her children with R had contact with him and visited him as they liked. They had stayed with him when she was in pre-trial detention.

18. A statement of 4 September 2014 by the Aliens Board was submitted before the City Court setting out, *inter alia*, that the applicant was able to speak and write in Danish. He had received frequent visits in prison from his sister, brother-in-law, children and stepchildren. The applicant's father had died and the applicant no longer had any close family in Bosnia. He had been offered a job as a driver, to begin when he had served his sentence.

19. On 18 November 2014 the City Court refused to revoke the expulsion order, finding that no material changes had occurred in the applicant's circumstances.

20. On appeal to the High Court, the applicant and A were heard anew. The latter now stated that her children did not speak much Bosnian. She could not follow the applicant to Bosnia. They had nothing in Bosnia. It would be very difficult for them to settle there.

21. On 20 January 2015, having made an overall assessment, which notably took into account on the one hand the applicant's connection to Denmark and on the other hand, the seriousness of the crime committed and the sentence imposed, the High Court confirmed the decision to refuse to revoke the expulsion order. In the High Court's view, the expulsion order would not be disproportionate or in violation of Article 8 of the Convention. The High Court gave weight to the fact that both the applicant and A were from Bosnia and Herzegovina, and accordingly spoke Bosnian. Moreover, A had stated that her three youngest children, who lived with her, spoke Danish and Bosnian. Therefore, the High Court found it established that it would be possible for them to continue family life with the applicant in Bosnia. Finally it noted that the applicant's children with his ex-wife, who were aged 16, 18 and 19, lived with their mother.

22. Leave to appeal to the Supreme Court was refused on 13 April 2015.

23. Finally, the Aliens Board, by a decision of 4 March 2015, upheld on appeal by the Refugee Appeals Board (*Flygtningenævnet*) on 26 May 2015, found that there were no impediments to deporting the applicant to Bosnia and Herzegovina.

24. The applicant was deported shortly thereafter.

B. Relevant domestic law

25. The relevant provisions of the Aliens Act (*udlændingeloven*) relating to expulsion were recently set out in detail in *Salem v. Denmark*, no. 77036/11, §§ 49-52, 1 December 2016.

COMPLAINT

26. The applicant complained that his expulsion from Denmark was in breach of Article 8 of the Convention as he was thus separated from his wife and children.

THE LAW

27. The applicant relied on Article 8, which provides:

> "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."

28. The Court reiterates that in accordance with Article 35 of the Convention, "[it] may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken". It notes that the first set of proceedings in the case ended on 27 December 2013, when leave to appeal to the Supreme Court was refused, and that the application was lodged on 21 May 2015. Accordingly, in so far as the application relates to the original expulsion order set out in the judgments in the first set of proceedings, it has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

29. In the second set of proceedings the applicant requested that the expulsion order be revoked under section 50, subsection 1, of the Aliens Act due to material changes in his circumstances. Those proceedings ended on 13 April 2015 when leave to appeal to the Supreme Court was refused. The Court has recently examined the proceedings under section 50, subsection 1, of the Aliens Act and noted (see *Salem v. Denmark*, no. 77036/11, § 56, 1 December 2016) that this remedy empowers the domestic courts to rescind the expulsion decision included in the original judgment. It therefore

found that this is a remedy which is both adequate and effective for the purpose of Article 35 of the Convention. For the reasons set out below, however, in the circumstances of the present case, it finds that this part of the application is manifestly ill-founded within the meaning of Article 35 of the Convention.

30. From the outset it reaffirms that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, an interference with a person's private or family life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that Article as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned. The relevant criteria to be applied in determining whether an interference is necessary in a democratic society were set out, *inter alia*, in *Üner v. the Netherlands* ([GC], no. 46410/99, §§ 54-55 and 57-58, ECHR 2006-XII), *Maslov v. Austria* ([GC], no. 1638/03, §§ 72-73, ECHR 2008), *Balogun v. the United Kingdom* (no. 60286/09, § 46, 10 April 2012) and *Samsonnikov v. Estonia*, (no. 52178/10, § 86, 3 July 2012). They are the following:

> "- the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the nationalities of the various persons concerned;
>
> - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> - whether there are children of the marriage, and if so, their age; and
>
> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
>
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination."

31. The Court considers it established that there was an interference with the applicant's right to respect for his private and family life within the meaning of Article 8, that the expulsion order was "in accordance with the law", and that it pursued the legitimate aim of preventing disorder and crime (see also, for example, *Salem v. Denmark*, cited above, § 61).

32. In the first set of proceedings, the applicant was convicted of smuggling loaded weapons from Bosnia and Herzegovina to Denmark for the purpose of resale in respect of four AK 47 machine guns and two pistols, and attempting to do so in respect of ten pistols. He was also convicted of offences under the Weapons Act, notably possession of ammunition. The applicant was found to be the instigator and was sentenced on appeal to three years' imprisonment. In its judgment of 20 January 2015 the High Court took into account the seriousness of the crime committed and the sentence imposed. The Court notes in addition that the crimes were of such a nature that they could have had serious consequences for the lives of others.

33. The applicant was 23 years old when he entered Denmark in 1994 and he had stayed in Denmark legally for approximately twenty-one years when the judgment refusing to revoke the expulsion order became final on 13 April 2015. The applicant had had work in Denmark, but for the two previous years before his imprisonment he had received social welfare benefits. He had been in Denmark for approximately eighteen years when he committed the crimes in question. Before that he had been convicted once, in 2007 (see paragraph 6 above).

34. The applicant had three children from his first marriage. They are all Danish nationals. The High Court noted, in its judgment of 20 January 2015, that they were approximately 19, 18 and 16 years old and lived with their mother. In respect of the two eldest, who were of age, the Court reiterates that relations between parents and adult children do not constitute family life for the purpose of Article 8 unless the applicant can demonstrate additional elements of dependence (see, for example, *A.S. v. Switzerland*, no. 39350/13, § 49, 30 June 2015 and *F.N. v. the United Kingdom* (dec.), no. 3202/09, § 36, 17 September 2013). The applicant did not point to such dependence. Nor did he point to any obstacle to his maintaining contact with his 16-year-old child remaining with his ex-wife in Denmark, via the telephone or the internet, or by visits to Bosnia and Herzegovina, the country of origin of both the applicant and the child's mother.

35. The applicant's wife, A, is a Danish national. She originated from Bosnia and Herzegovina. They married on 31 May 2013 after having lived together for some years. When they commenced their relationship she could not have known about the offences which would be committed in 2012. It is noteworthy, though, that she and the applicant committed the offences together and that A was sentenced to one year's imprisonment.

36. On 17 October 2013 it was established that the applicant was also father of E, born in 2007, who is also a Danish national. The Court notes, however, that R had been registered as E's father until 12 July 2013 (see paragraph 14 above) and that the applicant was detained from August 2012 until his deportation around June 2015.

37. A has four other children, who had close contact with their father, R, who lived in Denmark. Two of them were of age and had moved away from home. At the time of the applicant's deportation, A lived in an apartment with her three youngest children, including E, who were then 16, 14 and 8 years old. The children spoke Danish and Bosnian. A did not have a job.

38. The Court will examine together the questions of the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant was expelled, and the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant was expelled.

39. It points out that in its judgment *Jeunesse v. the Netherlands* [GC], (no. 12738/10, § 109, 3 October 2014), which concerned family reunion, the Court reiterated "that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance ... Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it."

40. Whilst this principle applies to all decisions concerning children, the Court notes that in the context of the removal of a non-national parent as a consequence of a criminal conviction, the decision first and foremost concerns the offender. Furthermore, as case-law has shown, in such cases the nature and seriousness of the offence committed or the offending history may weigh heavy in the overall assessment (see, for example, *Üner v. the Netherlands* [GC], cited above, §§ 62-64 and *Cömert v. Denmark* (dec.), 14474/03, 10 April 2006).

41. The applicant and A maintained that she and the children would have to stay in Denmark. Their main reasoning in this respect was that "they would not be able to cope in Bosnia and Herzegovina", that "they had nothing in Bosnia and Herzegovina", that "it would be very difficult for them to settle there", that "E and A's children with R could not live by themselves in Denmark", "that A could not envisage taking them to Bosnia and Herzegovina" and "that E would not be able to understand that she would no longer attend school in Denmark" (see paragraphs 16, 17 and 20 above).

42. In its judgment of 20 January 2015 the High Court gave weight to the fact that both the applicant and A were from Bosnia and Herzegovina and accordingly spoke Bosnian. Moreover, it noted that A had stated that her three youngest children, who lived with her, including E, spoke Danish and Bosnian. Therefore, the High Court found it established that it was possible for them to continue family life with the applicant in Bosnia and Herzegovina.

43. The Court finds no grounds for concluding that such a finding was arbitrary or manifestly unreasonable. In addition, it notes, as appeared from the first set of proceedings, that the applicant and A had actually planned to buy a house in Bosnia and Herzegovina (see paragraphs 9 and 10 above).

44. Moreover, if A were to choose to remain in Denmark with her youngest children, including E, the applicant has not pointed to any obstacles for them to visit him in Bosnia and Herzegovina or for the family to maintain contact via the telephone or the internet.

45. Finally, the Court observes that the applicant had strong ties with his country of origin. He only left Bosnia and Herzegovina when he was 23 years old. At that time his parents were still alive. During the two years before his arrest in 2012, he had been on vacation there about five times, and he had planned to buy there. The nature of the crimes committed also suggests that he had maintained such ties.

46. Having regard to the above, the Court is satisfied that the interference with the applicant's private life – the refusal to revoke his deportation order – was supported by relevant and sufficient reasons and that it was not disproportionate given all the circumstances of the case.

47. It follows that the application is manifestly ill-founded and must be rejected 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 8 June 2017.

Stanley Naismith Registrar	Robert Spano President