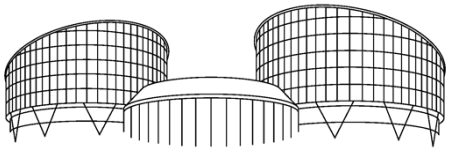

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF AL-MASUDI v. DENMARK

(Application no. 35740/21)

JUDGMENT

Art 8 • Expulsion • Private and family life • Expulsion order with a permanent re-entry ban following convictions for serious offences • Existence of very serious reasons for expelling settled migrant who had spent most of his childhood and youth in the host country • Prior convictions • Prior suspended expulsion order issued against the applicant and warning of expulsion • Proportionality duly assessed by domestic courts in light of Court's case-law

STRASBOURG

5 September 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Al-Masudi v. Denmark,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Anne Louise Bormann*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 35740/21) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Mohamad Mustafa Hamid Al-Masudi ("the applicant"), on 15 July 2021;

the decision to give notice to the Danish Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 27 June 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns an order for the expulsion of a settled migrant, issued in criminal proceedings. The applicant invokes Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1994 and lives in Nyborg. He was represented by Mr Eddie Omar Rosenberg Khawaja, a lawyer practising in Copenhagen.

3. The Government were represented by their Agent, Ms Vibeke Pasternak Jørgensen, from the Ministry of Foreign Affairs, and their Co-Agent, Ms Nina Holst-Christensen, from the Ministry of Justice.

4. The facts of the case may be summarised as follows.

5. The applicant was born in 1994. In 1998, when he was 3 years old, he entered Denmark on the basis of family reunion. He was granted a permanent residence permit in February 2002.

6. The applicant has had a criminal record since 2010.

7. When he was a minor (between 15 and 18 years old), he was convicted of the following offences:

(a) by a judgment of 2 March 2010, he was convicted of theft and a violation of the Weapons and Explosives Act, and sentenced to imprisonment for thirty days, suspended;

(b) by a judgment of 17 November 2010, he was convicted of robbery and ordered to undergo structured, controlled socio-educational treatment subject to defined conditions; and

(c) by an order of 27 August 2012, he was fined for a violation of the Controlled Substances Act.

8. As an adult, he was convicted of the following offences:

(a) by a judgment of 6 February 2013, he was convicted of violence and a violation of the Controlled Substances Act, for which he was sentenced to three months' imprisonment;

(b) by a judgment of 13 January 2017, he was convicted of aggravated violence and sentenced to six months' imprisonment, and issued with a suspended expulsion order with a probation period of two years;

(c) by a judgment of 29 August 2018, he was convicted of violence and a violation of the Controlled Substances Act, for which he was sentenced to six months' imprisonment and cautioned about the risk of expulsion; and

(d) by eight judgments between October 2013 and January 2020, he was fined for violations of the Act on Controlled Substances.

9. By a District Court (*Retten i Nykøbing Falster*) judgment of 9 March 2020 the applicant was convicted of a violation of Article 191 of the Penal Code (carrying a sentence of imprisonment of up to ten years) for being in possession of 57.1 grams of MDMA (also referred to as ecstasy) and 12.1 grams of amphetamine for the purpose of distribution. He was also convicted of a violation of Article 192a of the Penal Code (carrying a sentence of imprisonment of up to eight years) for keeping a sawn-off shotgun and spare cartridges in an unlocked cabinet in his living room at home, with particularly aggravating circumstances. He was sentenced to two years and nine months' imprisonment, and expelled from Denmark with a lifelong ban on returning.

10. The District Court's reasoning regarding the expulsion order was as follows:

> "... Concerning the issue of expulsion, it is observed that [the applicant] has been lawfully resident in Denmark for more than nine years, and the issue of expulsion must therefore be determined under section 22 of the Aliens Act. Owing to the nature of the offences adjudicated, the conditions for expulsion of the defendant pursuant to section 22(1)(iv) and (viii) of the Aliens Act are found to be present.
>
> It follows from section 26(2) of the Aliens Act that an alien must be expelled under, *inter alia*, section 22 unless it would for certain (*med sikkerhed*) be contrary to Denmark's international obligations, including Article 8 of the Convention (ECHR).
>
> Under Article 8 § 2 of the ECHR, it is decisive whether expulsion is deemed necessary for the prevention of crime, which is determined by a proportionality test. The criteria to be taken into account in the test from the European Court of Human Rights are listed in, *inter alia*, the judgment of 23 June 2008 of the European Court of Human Rights in *Maslov v. Austria* (application no. 1638/03). The test includes society's need for the

alien's expulsion, in particular considering the nature of the offences that the person in question has committed now and previously, as well as the length of his stay in Denmark and in his country of origin and the strength of his family, social and cultural ties with Denmark and the country to which he is to be expelled.

[The applicant] is 25 years old, is an Iraqi national and entered Denmark in November 1998 after he had been granted residence in October 1998. During his residence in Denmark, he has served prison sentences of a total of seven months and twenty-six days, and in connection with these proceedings, he has been in pre-trial detention for a little less than four months. He was 3 years old when he entered Denmark from Iraq. According to the information received, he has been to Iraq once together with his family since his departure from Iraq, which was when he was 10 years old. According to the information received, he has no close family members in Iraq, and he does not have contact with any distant family members in Iraq. According to the information received, he speaks broken Arabic, and he does not find himself capable of holding a conversation in Arabic. He grew up in Denmark together with his parents and four siblings, and on that basis, he must be presumed to know about Iraqi culture and customs. He has no education or training and no permanent ties with the labour market. He receives cash benefits and financial support from his parents. He is unmarried, has no children, but has a fiancée, who is a Danish national, and with whom he became a couple a few days before he was remanded in custody.

The defendant has had several previous convictions over the past ten years, including for robbery and for repeated violence and several times for less serious offences in violation of the Controlled Substances Act. By a judgment of 13 January 2017, he was convicted of a violation of Article 245 § 1, read with Article 247 § 1, of the Penal Code, and sentenced to imprisonment for a term of six months and issued with a suspended expulsion order with a probation period of two years. By a judgment of 29 August 2018, he was convicted of a violation of Article 244, read with Article 247 § 1, of the Penal Code and of a violation of the Controlled Substances Act and was given a concurrent sentence of imprisonment for a term of six months and cautioned under section 24b of the Aliens Act.

On the basis of an overall assessment, the Court finds that expulsion of the defendant would not for certain be contrary to Denmark's international obligations, and the conditions for expelling the defendant have therefore been met. ..."

11. On appeal, on 7 September 2020 the High Court of Eastern Denmark (*Østre Landsret*) upheld the judgment. In respect of the expulsion order it stated as follows:

"... For the reasons given by the District Court, the High Court upholds the order expelling the defendant from Denmark and banning him permanently from re-entry.

In that connection, the High Court observes that expulsion from Denmark and a permanent re-entry ban cannot be considered disproportionate interference contrary to Article 8 of the European Convention on Human Rights.

The circumstances that the defendant has become engaged during the period of detention and that the defendant's fiancée has become pregnant with the couple's child during the period of detention cannot lead to a different outcome.

The High Court therefore upholds the judgment to the extent that it has been appealed against."

12. In December 2020 the applicant's girlfriend gave birth to a child. A request by the applicant for leave to appeal to the Supreme Court (*Højesteret*) was refused on 22 November 2021 by the Appeals Permission Board (*Procesbevillingsnævnet*).

13. The applicant was deported to Iraq on 18 July 2022.

RELEVANT LEGAL FRAMEWORK

14. The relevant provisions of the Aliens Act (*Udlændingeloven*) relating to expulsion have been set out in detail in, for example, *Munir Johana v. Denmark* (no. 56803/18, §§ 23-26, 12 January 2021) and *Salem v. Denmark* (no. 77036/11, §§ 49-52, 1 December 2016).

15. Section 24b of the Aliens Act on suspended expulsion orders with a probation period of two years was amended by Act no. 469 of 14 May 2018, which came into force on 16 May 2018. The new provision introduced a scheme of cautioning, which did not provide for a requirement to specify a particular probation period.

16. Section 32 of the Aliens Act was amended by Act no. 469 of 14 May 2018 and Act no. 821 of 9 June 2020. Briefly explained, as a result of the amendments, the re-entry ban was to be imposed for six years if the alien was sentenced to imprisonment for between three months and one year (section 32(4)(iv)); twelve years if the alien was sentenced to imprisonment for between one year and one year and six months (section 32(4)(vi)); and permanently, if the alien was sentenced to imprisonment for more than one year and six months (section 32(4)(vii)). However, the courts were given discretion to reduce the length of re-entry bans, whether permanent or limited in time (section 32(5)(i)), if their length would otherwise for certain be considered in breach of Denmark's international obligations, including Article 8 of the Convention.

17. Section 50 of the Aliens Act was amended by Act no. 919 of 21 June 2022. As a result of the amendment, when making a subsequent review of whether an expulsion order should be revoked, the Danish courts are now able to impose a re-entry ban for a shorter period than that previously specified, irrespective of when the criminal offence was committed, if they find, at the time of the review, that a shortening of the period is required to ensure that the expulsion order falls within the scope of Denmark's international obligations.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complained that the High Court's decision of 7 September 2020, to expel him from Denmark with a lifelong ban on

returning, which became final on 22 November 2021 (see paragraphs 11 and 12 above), was in breach of Article 8 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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. Admissibility

19. The Government submitted that the complaint should be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

20. The applicant disagreed.

21. In the Court's view the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

22. The applicant submitted that the Danish courts had failed to take the relevant circumstances into account in the balancing test, notably that his sentence was rather moderate, that his previous convictions had resulted in sentences not exceeding six months' imprisonment, that he had strong ties to Denmark, including a partner and a child, and that he had no ties to Iraq. In his view, it had not been established that there were "very compelling reasons" to expel him with an entry ban for life.

23. The Government submitted that the Danish courts had thoroughly carried out the proportionality test, balancing the opposing interests and taking all the applicant's personal circumstances into account. They emphasised that the applicant had entered into a relationship with his girlfriend only a few days before he had been detained (on 14 November 2019), and that his child had been conceived during the period of his detention. Furthermore, the applicant had committed serious crimes, the nature of which could have had serious consequences for the lives of others, and he had a criminal past, which included repeated violence and robbery. He had been issued with a suspended expulsion order in 2017 (see paragraph 8 (b) above), and the offence in question had been committed while the probation order had been in force. He had also been cautioned about the risk of expulsion when convicted in 2018 (see paragraph 8 (c) above). The applicant posed a serious threat to public order. He had been convicted many

times during the past ten years. Lastly, since the domestic courts had considered the case specifically in the light of Article 8 of the Convention and the Court's pertinent case-law, having regard to the subsidiarity principle, the Court should be reluctant to disregard the outcome of the assessment made by the national courts.

2. The Court's assessment

(a) General principles

24. The relevant criteria to be applied have been set out in, among other authorities, *Üner v. the Netherlands* ([GC], no. 46410/99, §§ 54-60, ECHR 2006-XII) and *Maslov v. Austria* ([GC], no. 1638/03, §§ 68-76, ECHR 2008).

(b) Application of those principles to the present case

25. The Court considers it established that there was an interference with the applicant's right to respect for his private life within the meaning of Article 8, that the expulsion order and the re-entry ban were "in accordance with the law" and that they pursued the legitimate aim of preventing disorder and crime (see also, for example, *Salem v. Denmark*, no. 77036/11, § 61, 1 December 2016).

26. As to the question of whether the interference was "necessary in a democratic society", the Court notes that the Danish courts took as their legal starting-point the relevant sections of the Aliens Act and the Penal Code and the criteria to be applied in the proportionality assessment, by virtue of Article 8 of the Convention and the Court's case-law. The Court recognises that the domestic courts thoroughly examined each criterion and that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of three and had lawfully spent most of his childhood and youth in the host country (see *Maslov*, cited above, § 75). The Court is therefore called upon to examine whether "very serious reasons" of that kind were adequately adduced and examined by the national authorities when assessing the applicant's case.

27. The domestic courts gave particular weight to the seriousness of the crimes committed and the sentence imposed. The applicant was found guilty of violating Article 191 of the Penal Code (carrying a sentence of imprisonment of up to ten years) for being in possession of 57.1 grams of MDMA and 12.1 grams of amphetamine for the purpose of distribution. He was also convicted of violating Article 192a of the Penal Code (carrying a sentence of imprisonment of up to eight years) by keeping a sawn-off shotgun and spare cartridges in an unlocked cabinet in his living room at home, with particularly aggravating circumstances. Those crimes were of such a nature that they could have had serious consequences for the lives of others (see, for example, *Avci v. Denmark,* no. 40240/19, § 30, 30 November 2021, and *Abdi*

v. Denmark, no. 41643/19, § 33, 14 September 2021, and the cases cited therein). He was sentenced to two years and nine months' imprisonment (see paragraph 9 above).

28. The domestic courts also took into account that the applicant had had a criminal past since 2010, which included a conviction for robbery, when he was a minor, and three convictions for violence and eight convictions for violations of the Controlled Substances Act, when he was an adult (see paragraphs 7 and 8 above). He had been issued with a suspended expulsion order in 2017, and the offence in question had been committed while the probation order had been in force. He had also been cautioned about the risk of expulsion when convicted in 2018 (see paragraph 8 (b) and (c) above).

29. With regard to the criterion "the length of the applicant's stay in the country from which he or she is to be expelled", the District Court duly took into account that the applicant had arrived in Denmark in 1998 and had lawfully resided there for many years (approximately twenty years – see paragraph 10 above).

30. The applicant has been in pre-trial detention or serving his sentence since the offence was committed, and the criterion "the time that has elapsed since the offence was committed and the applicant's conduct during that period" does not therefore come into play.

31. As to the criterion "the solidity of social, cultural and family ties with the host country and with the country of destination", the domestic courts properly took this into account. They accepted that the applicant's ties with Denmark were stronger than his ties with Iraq, but found that he would not be lacking the basic requirements for establishing a life in his country of origin.

32. The Court considers it doubtful that there has been an interference with the applicant's right to respect for family life. It notes that during the District Court proceedings the applicant's alleged family life consisted of his having met his girlfriend, a Danish national, a few days before he was detained on remand. Moreover, before the High Court, it was established that the child that the couple were at that time expecting (who was born in December 2020 – see paragraph 12 above) had been conceived while the applicant was in pre-trial detention. Accordingly, this information did not have any impact on the High Court's decision to uphold the expulsion order (see paragraph 11 above). In any event, the Court notes that the couple never lived together; even assuming that such a relationship would be sufficient for establishing a "family life" within the meaning of Article 8, the disruption of that family life would not have the same impact as it would have had if they had been living together as a family for a long time (see, for example, *Üner*, cited above, § 62). Moreover, the applicant never lived with his child, who was conceived while he was in detention. Family life was thus 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. In such a situation, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see, among many other authorities, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 108, 3 October 2014). In addition, the applicant has not pointed to any obstacles to maintaining contact, for example via the telephone or the Internet (see, among other authorities, *Salem*, cited above, § 81) or by meeting elsewhere.

33. Lastly, regard will be had to the duration of the expulsion order, in particular whether the re-entry ban was of limited or unlimited duration. The Court has previously found such a ban to be disproportionate on account of its unlimited duration, whereas in other cases it has considered the limited duration of the exclusion order to be a factor weighing in favour of its proportionality (see, for example, *Savran v. Denmark* [GC], no. 57467/15, §§ 182 and 199, 7 December 2021, and the cases cited therein). One of the elements relied on in this respect has been whether the crime leading to the expulsion order was of such a nature that the person in question posed a serious threat to public order (see, among other authorities, *Ezzouhdi v. France*, no. 47160/99, § 34 13 February 2001; *Keles v. Germany,* no. 32231/02, § 59, 27 October 2005; and *Bousarra v. France*, no. 25672/07, § 53, 23 September 2010, in which the Court found that the persons in question did not pose a serious threat to public order; see also *Mutlag v. Germany*, no. 40601/05, §§ 61-62, 25 March 2010, and *Balogun v. the United Kingdom*, no. 60286/09, § 49, 10 April 2012, in which the Court found that the person in question did pose a serious threat to public order).

34. In the present case, by virtue of the amended section 32 of the Aliens Act (see paragraph 16 above), the Danish courts had discretion to reduce the duration of the ban which would otherwise have been imposed under section 32(4)(vii) (contrast *Savran*, cited above, § 200). In the specific circumstances of the case, they decided to make the ban on re-entry permanent. The Court does not call into question the finding that the applicant's crimes leading to the expulsion order were of such a nature that he posed a serious threat to public order at the time (see also, among other authorities and *mutatis mutandis*, *Abdi*, cited above, § 39; *Mutlag*, cited above, §§ 61-62; and *Balogun*, cited above, § 53). It cannot be overlooked either that the applicant consistently demonstrated a lack of will to comply with Danish law, despite the fact that a suspended expulsion order had been issued against him in January 2017, and that he had once again been cautioned about the risk of expulsion in August 2018 (see paragraph 8 (b) and (c) above; see also, among other authorities, *Munir Johana v. Denmark*, no. 56803/18, § 58, 12 January 2021, and *Levakovic v. Denmark*, no. 7841/14, § 44, 23 October 2018).

35. Taking account of all of the elements described above, the Court concludes that the interference with the applicant's private and, possibly, family life was supported by relevant and sufficient reasons. It is satisfied that

"very serious reasons" were adequately adduced by the national authorities when assessing his case. It notes that at all levels of jurisdiction there was an explicit and thorough assessment of whether the expulsion order could be considered to be contrary to Denmark's international obligations. The Court points out in this connection that where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (*Savran*, cited above, § 189). In the Court's opinion, such strong reasons are absent in the present case.

36. It follows that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 5 September 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President