



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

FOURTH SECTION

CASE OF NGUYEN v. DENMARK

(Application no. 2116/21)

JUDGMENT

Art 8 • Expulsion • Private and family life • Disproportionate expulsion of settled migrant combined with twelve-year re-entry ban following convictions for serious offences • Question of applicant's subordinate role in offences not addressed • Lack of prior convictions and warnings of expulsion • No examination of criteria concerning "the best interests and well-being of the children" and of applicant's role as principal caregiver of her disabled daughter • Very strong ties with Denmark in contrast with her country of origin

Prepared by the Registry. Does not bind the Court.

STRASBOURG

9 April 2024

FINAL

09/07/2024

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Nguyen v. Denmark,

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

Gabriele Kucsko-Stadlmayer, *President*,

Faris Vehabović,

Branko Lubarda,

Anja Seibert-Fohr,

Ana Maria Guerra Martins,

Anne Louise Bormann,

Sebastian Rădulețu, *judges*,

and Andrea Tamietti, *Section Registrar*,

Having regard to:

the application (no. 2116/21) 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 a Vietnamese national, Ms Thi Kim Oanh Nguyen (“the applicant”), on 22 December 2020;

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

the parties’ observations;

Having deliberated in private on 19 March 2024,

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

INTRODUCTION

1. The application concerns an order made in criminal proceedings for the expulsion of a settled migrant. The applicant complained under Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1974 and lives in Copenhagen. She was represented by Mr Jesper Storm Thygesen, 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. On 18 May 1989, when the applicant was 13 years old, she entered Denmark, together with her parents, and was granted a residence permit under section 8, read with section 7(1), of the Danish Aliens Act (*udlændingeloven*) as a quota refugee. She was granted a permanent residence permit on 23 June 1994.

6. By a District Court (*Retten i Nykøbing Falster*) judgment of 18 June 2019, the applicant was convicted, under Article 191 of the Penal Code (carrying a sentence of imprisonment of up to ten years) and the Controlled Substances Act (*bekendtgørelse om euforiserende stoffer*), on four counts of serious drug offences (partly attempted) in that, jointly with certain other co-defendants, she had grown and possessed a considerable number of cannabis plants and cannabis cuttings with the intention of manufacturing a significant amount of hashish (totalling more than 125 kg from four separate production sites) intended for distribution to multiple individuals or for a significant sum.

7. She was also convicted under Article 276 read with Article 286 § 1 of the Penal Code on four counts of theft of a particularly aggravated nature in that, jointly with other co-defendants, she had unlawfully appropriated electricity, thereby inflicting financial losses totalling over 1.8 million Danish kroner (DKK – approximately 245,000 euros (EUR)) on two energy companies.

8. The applicant was sentenced to three years' imprisonment and expelled from Denmark with a permanent re-entry ban.

9. For the purposes of the criminal proceedings, the Aliens Board (*Udlændingestyrelsen*) gathered information about the applicant's personal circumstances, which included the fact that the applicant had been lawfully resident in Denmark since May 1989, that is to say, more than twenty-nine years at that point in time. She lived with her parents and her 15-year-old daughter. She also had two adult daughters aged 20 and 23. Before the District Court, the applicant stated, *inter alia*, that she worked as a waiter in a restaurant. She had been on vacation several times in Vietnam. Her 20-year-old daughter was mentally ill and had recently attempted suicide by jumping out of a window on the second floor of a building. Due to injuries from the fall, the daughter is paralysed in one side of the body and blind in one eye. The applicant was that daughter's primary caregiver.

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

“... [the applicant] is sentenced to imprisonment for a term of three years.

The court has taken into account the professional nature of the offences, the quantity of hashish, and the fact that [the applicant] played a prominent role.

It follows from section 22(1)(iv) and (vi), read with section 22(1)(ii), read with section 26(2), of the Aliens Act that the defendant must be expelled unless expulsion would “for certain” be contrary to Denmark's international obligations. In the assessment thereof, it is essential [to consider] whether such an expulsion would be contrary to Article 8 of the European Convention on Human Rights on the right to respect for private and family life. The purpose of expulsion is to prevent disorder or crime, which are legitimate reasons under Article 8 § 2. Accordingly, it is essential [to determine] whether expulsion must be considered necessary for those purposes, the assessment of which must be based on a proportionality test.

Some of the criteria taken into account in the proportionality test appear from the judgment delivered by the European Court of Human Rights on 23 June 2008 in *Maslov*

v. Austria. The proportionality test must include the societal needs for expulsion, particularly taking into account the nature of the offence committed by the alien now and previously, as well as the length of his or her stay in Denmark and in the country of origin, and the solidity of any family, social and cultural ties with Denmark and with the country to which the alien would be expelled. For a settled migrant like [the applicant], who entered Denmark as a child and has lawfully spent all or the major part of her childhood and youth in Denmark, very serious reasons are required to justify expulsion.

On the basis of the information available, the court considers it a fact that [the applicant's] social and cultural ties with Denmark are much stronger than her ties with Vietnam. [The applicant] has three children living in Denmark, the youngest of whom is under the age of 18.

In view of the nature and gravity of the offences of which [the applicant] has been convicted today and on the basis of an overall assessment, the court finds that the significance of the considerations [in favour of the applicant's] expulsion combined with a permanent re-entry ban outweigh the significance of the considerations against expulsion, namely [the applicant's] strong ties with Denmark and weak ties with Vietnam, given, *inter alia*, the fact that the defendant has been sentenced to imprisonment for a term of three years for very serious offences.

On the basis of the above, the court concludes that expulsion combined with a permanent re-entry ban will not amount to disproportionate interference contrary to Article 8 of the European Convention on Human Rights. The fact that [the applicant] has not previously been given a suspended sentence of expulsion cannot lead to a different outcome.

On that basis, the Court allows the claim for expulsion combined with a permanent re-entry ban pursuant to section 22(1)(ii), (iv) and (vi), read with section 32(2)(v), of the Aliens Act."

11. The applicant appealed against that judgment to the High Court of Eastern Denmark (*Østre Landsret*), before which she stated, *inter alia*, that her children had been born in Denmark and were Danish nationals. After nine years of school she had started a course to become a technical assistant, but had not completed the programme. She had been employed at cafés and restaurants since she was 21 years old. Her children's father, with whom she was no longer in a relationship, lived in Denmark. Her mentally ill daughter, for whom the applicant was the primary caregiver, did not live with her because the applicant worked a lot and had too little time. Her children would be unable to come with her to Vietnam as they were Danish nationals and knew nothing about Vietnam.

12. By a judgment of 26 June 2020 the High Court partly acquitted the applicant (on counts 2, 3, 4 and 5, regarding the production and possession of cannabis plants on two of the four production sites and the electricity theft related thereto – see paragraphs 6 and 7 above), and partly upheld the District Court's judgment (counts 7, 8, 9 and 10). Accordingly, it reduced the sentence to one year and six months' imprisonment. It took into account the professional nature of the offences, the quantity of hashish, and the fact that the applicant had only carried out practical tasks. In contrast two of her co-defendants were found to have had a superior and coordinating role.

13. In respect of the expulsion order, the High Court reduced the re-entry ban to twelve years, and found as follows:

“[The applicant] entered Denmark at the age of 13 and thus spent her childhood in Vietnam. She speaks and reads Vietnamese fluently and has been assisted by an interpreter to a small extent during the proceedings. Moreover, she has been to Vietnam several times on long holidays, most recently in 2018. Her three children, the youngest of whom is 16 years old, and her parents and seven siblings live in Denmark. She has permanent ties with the labour market, but has no education. Having regard to the nature and gravity of the offences of which [the applicant] has been convicted and on the basis of an overall assessment, the court upholds the order to expel [the applicant], with the difference that the re-entry ban is fixed at twelve years pursuant to section 22(1)(ii), (iv) and (vi), section 32(1) and section 32(4)(vi) of the Aliens Act.”

14. A request by the applicant for leave to appeal to the Supreme Court (*Højesteret*) was refused on 22 October 2020 by the Appeals Permission Board (*Procesbevillingsnævnet*).

15. The applicant was released from prison on 20 December 2020. At the date of the latest information available to the Court (10 February 2023), the expulsion order had not yet been implemented.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

16. 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).

17. 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 warning scheme, which did not provide for a requirement to specify a particular probation period.

18. 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 a 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)); for 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 the length would otherwise for certain be considered in breach of Denmark’s international obligations, including Article 8 of the Convention.

19. 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 (see also, *inter alia*, *Noorzae v. Denmark*, no. 44810/20, §§ 13-15, 5 September 2023).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The applicant complained that the High Court's decision of 26 June 2020 to expel her from Denmark with a re-entry ban for 12 years (see paragraph 13 above), which had become final on 22 October 2020 (see paragraph 14 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

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

22. The applicant disagreed.

23. 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. *Arguments by the parties*

24. The applicant submitted that the interference concerned both her right to respect for her private and her family life, the latter notably because she had a minor daughter and a mentally ill adult daughter who were dependent on her. The Danish courts had failed to take the relevant circumstances into account in the balancing test, notably that she had no criminal past, that her role in the crime had been of a subordinate nature, that she had never received an expulsion warning, that she had a family, and that she had strong ties to Denmark. Her disabled daughter needs her to take care of her. The daughter

lives with her parents, who are unable to care for her due to their age. Her youngest daughter also has health problems and has been hospitalised due to taking an overdose of painkillers. In her view, it had not been established that there were “very compelling reasons” to expel her.

25. The Government submitted that the Danish courts had carried out the proportionality test thoroughly, balancing the opposing interests and taking all the applicant’s personal circumstances into account. The applicant had committed serious drug offences and theft of a particularly aggravated nature. Moreover, 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, the Court should be reluctant, having regard to the subsidiarity principle, to disregard the outcome of the assessment made by the national courts.

2. *The Court’s assessment*

(a) **General principles**

26. 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**

27. The Court finds it established that there was an interference with the applicant’s right to respect for her private life and family 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).

28. 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, 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 examined the relevant criteria thoroughly given that very serious reasons were required to justify the expulsion of the applicant, a settled migrant who had entered Denmark at the age of 13 and had been lawfully resident in the host country for most of her childhood and youth (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 (see *Noorzae v. Denmark*, no. 44810/20, § 25, 5 September 2023, and *Sharifi v. Denmark*, no. 31434/21, § 2, 5 September 2023).

29. The High Court gave particular weight to the seriousness of the crime committed and the sentence imposed. The applicant was convicted under

Article 191 of the Penal Code for, jointly with other co-defendants, having grown and possessed a considerable number of cannabis plants and cannabis cuttings with the intention of manufacturing a significant amount of hashish on two production sites, intended for distribution to multiple individuals or for a significant sum, and, under Article 276 read with Article 286 § 1 of the Penal Code, of the theft of a particularly aggravated nature of electricity in relation to that production activity. She was sentenced to one year and six months' imprisonment (see paragraphs 6, 7 and 12 above). The High Court did not specifically address – when deciding on the expulsion and the length of the re-entry ban – the subordinate role of the applicant who was found to have only carried out practical tasks in contrast to those of her co-defendants who were found to have had a superior and coordinating role.

30. 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 High Court duly took into account the fact that the applicant had been around 13 years old when she had arrived in Denmark and had lawfully resided there for twenty-nine years (see, *mutatis mutandis*, *Noorzae*, cited above, § 28, and *Sharifi*, cited above, § 28).

31. The applicant was released from prison on 20 December 2020, after the expulsion order had become final on 22 October 2020 (see paragraphs 14 and 15 above). Accordingly, the criterion “the time that has elapsed since the offence was committed and the applicant’s conduct during that period”, does not appear relevant in the present case. It is noted, however, that, at the date of the latest information available to the Court (10 February 2023), the expulsion order had not yet been implemented (see paragraph 15 above).

32. As to the criterion “the solidity of social, cultural and family ties with the host country and with the country of destination”, the High Court properly took this into account and accepted that the applicant’s ties with Denmark were stronger than her ties with Vietnam.

33. The applicant had three daughters, aged 15, 20 and 23, when the case was pending before the District Court (see paragraph 9 above). As they are Danish citizens, they will be able to remain in Denmark if the applicant is expelled and two of them were already of age. However, the daughter who was still a minor was living with the applicant (and the applicant’s parents) at the time. It appears that the children’s father lived in Denmark. Nevertheless, in its judgment of 26 June 2020 (see paragraphs 12 and 13 above), the High Court did not further address the criteria concerning “the best interests and well-being of the children” (see, *Üner*, cited above, § 58). Nor did it address the information, provided by the applicant, that she was the principal caregiver of her 20-year-old daughter, who is mentally and physically disabled. (see paragraphs 9 and 11 above).

34. 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 an exclusion order to be a factor weighing in favour of being proportionate (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 connection has been whether the offence 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).

35. In the present case, the Court does not call into question the finding that the applicant's offence leading to the expulsion order was of such a nature that she posed a threat to public order at the time (see also, among other authorities and *mutatis mutandis*, *Abdi v. Denmark*, no. 41643/19, § 39, 14 September 2021; *Mutlag*, cited above, §§ 61-62; *Balogun*, cited above, § 53; *Noorzae*, cited above, § 32; and *Sharifi*, cited above, § 33).

36. It notes, however, that, that the applicant's role in the crime was merely of a practical nature, and that prior to the case at hand, she had never been convicted, or exhibited any behaviour indicating that in general she posed a threat to public order. In this respect the present case resembles the situation in, for example, *Ezzouhdi* (cited above, § 34), *Abdi* (cited above, § 40), *Noorzae* (cited above, § 33), and *Sharifi* (cited above, § 34).

37. The Court also observes that the applicant had not previously been warned about the risk of expulsion or given a conditional expulsion order (see, for example, *Abdi*, cited above, § 41, *Noorzae*, cited above, § 34, and *Sharifi*, cited above, § 35).

38. Nevertheless, despite the fact that the applicant had no previous convictions showing that she posed a threat to public order, that she had not received any previous warnings as to the risk of expulsion, that she had a minor daughter and that she was the primary caregiver of her disabled adult daughter, and although a relatively lenient sentence was imposed in the present case (compare *Abdi*, cited above, § 42), the High Court decided to combine the expulsion of the applicant with a re-entry ban for twelve years, although it could have reduced the length of the re-entry ban (see paragraph 18 above, and contrast *Savran*, cited above, § 200).

39. The above observation should also be seen in the light of the fact that the applicant had arrived in Denmark at a very young age and had lawfully resided there for approximately twenty-nine years. She therefore had very strong ties with Denmark, in contrast with her ties with Vietnam.

40. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a re-entry ban for twelve years was disproportionate (see, in particular and *mutatis mutandis*, *Ezzouhdi*, cited above, §§ 34-35; *Keles*, cited above, § 66; *Bousarra*, cited above, §§ 53-54; and *Abdi*, cited above, § 44, although all of those cases concerned permanent re-entry bans).

41. It follows that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

43. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

44. The Government submitted that the claim was excessive and that the finding of a violation in itself would constitute adequate just satisfaction.

45. The Court considers that, having regard to the circumstances of the case, the conclusion it has reached under Article 8 of the Convention constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. It therefore makes no award under this head (see, for example, *Savran*, cited above, § 208, and the case-law cited therein, as well as *Noorzae*, cited above, § 43).

B. Costs and expenses

46. The applicant claimed 40,420 Danish kroner (DKK – approximately EUR 5,400) plus VAT for cost and expenses incurred before the Court, corresponding to legal fees for a total of 21.5 hours of work carried out by her representative.

47. The Government pointed out that the applicant had applied for legal aid under the Danish Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*).

48. In the present case, it is uncertain whether the applicant will be granted legal aid under the Danish Legal Aid Act. Therefore, the Court finds it necessary to assess and decide her claim in respect of costs and expenses (see, *mutatis mutandis*, *Noorzae*, cited above, § 46).

49. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, and awards made in comparable cases against Denmark (see, notably, *Noorzae*, cited above, § 47), the Court considers it reasonable to award the sum of EUR 5,400, covering the costs for the proceedings before it in so far as these have not already been granted under the Danish Legal Aid Act.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,400 (five thousand four hundred euros), in respect of costs and expenses, to be converted into the currency of the respondent State at the date of settlement, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Gabriele Kucsko-Stadlmayer
President