



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

FIRST SECTION

CASE OF CHAIR AND J. B. v. GERMANY

(Application no. 69735/01)

JUDGMENT

STRASBOURG

6 December 2007

FINAL

06/03/2008

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 Chair and J. B. v. Germany,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mrs R. JAEGER, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 15 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 69735/01) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moroccan national, Mr Abdellatif Chair, and a German national, Mrs J. B. ("the applicants"), on 11 August 2000. The President of the Chamber acceded to the second applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr W. Schindler, a lawyer practising in Hanover. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. The applicants alleged, in particular, that the first applicant's expulsion from German territory had violated their right to respect for their family life.

4. In a decision of 14 February 2006 the Court declared the application partly admissible. It decided to join to the merits of the case the examination of the Government's objection concerning the exhaustion of domestic remedies.

5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. General background

6. The first applicant was born in 1962 and lived in Morocco until 1987.

7. In 1987 he left Morocco in order to complete his chemistry studies in France. In June 1989 he went to Germany in order to obtain a doctorate in chemistry. From July 1993 to December 1994 he worked as a university assistant at Marburg University. In 1995 he moved to Hanover, where two of his brothers were living and where he worked in one of his brother's enterprises. Subsequently, he worked in his own kiosk. In 1998 he started training with a view to becoming an expert in logistics.

8. In 1990 the competent authorities granted the first applicant a temporary residence permit, which was prolonged first until March 1994 and then until the end of April 1997.

9. On 13 March 1997 the first applicant married the second applicant. His residence permit was thus prolonged until 14 May 2000.

10. In May 1997 a daughter was born to the applicants.

2. Proceedings for criminal offences

11. On 13 January 1998 the Hanover District Court (*Amtsgericht*) convicted the first applicant of aggravated theft and sentenced him to fifteen daily fines of thirty German marks.

12. On 14 January 1999 the applicant was arrested and subsequently detained on remand.

13. On 21 April 1999 the Hanover Regional Court (*Landgericht*) convicted the first applicant of rape. According to the facts established by the Regional Court, on 11 December 1998 he had forced a university student at knifepoint to engage in sexual contact with him. It sentenced him to five years and three months' imprisonment. In its reasoning, the Regional Court considered in particular the fact that the first applicant had for the most part confessed his crime, that he had used the knife only once at the beginning of the act and that he had lived an orderly life in spite of his difficulties in finding employment. The Regional Court took further into account that the crime had to a large part been committed owing to the first applicant's considerable intoxication and his growing frustration emanating from the lack of sexual contact with his wife. However, having regard to the fact that the first applicant had performed two acts of sexual coercion, that the incident had lasted for an overall duration of forty minutes and that he had constantly used force against his victim by exerting pressure with his

arm and his hand, respectively, these factors precluded further mitigation of sentence.

3. *Execution of the applicant's sentence*

14. Following his conviction, the first applicant served his sentence in Hanover Prison.

15. On 14 July 2000 the psychological expert P. submitted an expert opinion to the prison authorities. He considered that the first applicant had acknowledged his crime and was willing to change, in particular with regard to his alcohol consumption and his sexual conduct. There was no indication of sexual deviance. The expert further noted that the first applicant's upbringing in a traditional Moroccan family had led to a very restricted concept of masculinity, which he had not been able to revise. His relationship with the second applicant had been very burdened by the fact that the second applicant had refused sexual contact with him following the birth of their daughter and that he had not been able to talk to her about this. The expert further noted that there had been other situations prior to the rape where the applicant had harassed women, although such situations had not led to the commission of a sexual offence. He concluded that the first applicant was open-minded and self-critical. He was able to comprehend the circumstances which had led to the commission of the crime and to search for ways of overcoming his problems. Provided the first applicant engaged in pertinent couple therapy and managed to give up his illusionary concept of masculinity, a positive legal prognosis could be attributed to him.

16. According to the records of the regular conferences on the planning of sentence execution (*Vollzugsplankonferenz*), the first applicant attempted to instigate couple therapy. In February 2001, however, it was noted that the applicant's wife had expressed that she was experiencing great difficulties with her own situation, which she preferred to solve on her own before dealing with her husband's problems. She was uncertain whether she wished to continue the relationship.

17. From June 1999 until February 2000 the applicant attended meetings of Alcoholics Anonymous.

18. In the record dated 2 November 2001 the prison authorities noted that, in August 2001, the second applicant had had a conversation with a prison social worker, who gained the impression that she was not interested in meeting her husband and that she could not cope with the situation. The second applicant had not made use of her visiting rights for one year. In September 2001 the second applicant informed the social service by telephone that she agreed to meet her husband in spite of her doubts.

19. The participants in the conference of 2 November 2001 noted that the first applicant had been undergoing psychotherapy. They had, however, not gained the impression that he had made sufficient progress, as he was continuing to exert pressure on his wife and was trying to control her. It was

further noted that the applicant's conduct during his detention was impeccable.

20. In the record dated 28 November 2002 it was noted that the first applicant had been granted leave to visit his wife and daughter on seven occasions since May 2002. The staff accompanying the visits considered that the state of the applicants' marriage was still unclear. While there had been a certain rapprochement between the couple, the spouses still did not communicate much with each other, but rather via the child. The second applicant was not opposed to her husband's continuing to visit their daughter. It still appeared, however, that she wanted a separation. The participants in the conference further consulted three psychological experts, including P., who considered that the applicant had not resolved his problems as regards his partnership and social contact with females. All three considered, however, that the danger of recidivism was low.

4. *Expulsion proceedings*

21. On 28 July 2000 the Municipal Public Order Authority (*Ordnungsamt*) of Hanover ordered the first applicant's expulsion to Morocco. Deportation to Morocco was announced upon his release from prison. Although the applicant was in possession of a valid residence permit and married to a German national, they considered that his conviction for a serious crime made it necessary to expel him under sections 47 § 1 and 48 § 1 of the Aliens Act (*Ausländergesetz*, see Relevant domestic law below). The circumstances of the present case left no room for any discretion on the part of the German authorities. The circumstances leading to his last conviction proved that he possessed a considerable amount of criminal energy. As a recidivist (*Wiederholungstäter*), there was a risk that the first applicant would commit further criminal acts in the future. The first applicant's assumption that his victim had willingly engaged in sexual contact with him gave rise to doubts as to whether he had fully comprehended and absorbed the extent of his crime.

22. According to the authorities, the long period spent in Germany could not preclude his expulsion, as his criminal offences had shown that he had so far not adapted to the living conditions in Germany. Neither his marriage to a German national, nor the fact that they had a child, could lead to a different conclusion in view of the seriousness of his crime.

23. On 29 January 2001 the Hanover District Council (*Bezirksregierung*) rejected an objection lodged by the applicant.

24. On 13 February 2002 the Hanover Administrative Court (*Verwaltungsgericht*) confirmed the deportation order of 28 July 2000. Having regard to the reasons given for the first applicant's criminal conviction, it found that given the seriousness of his crime, his expulsion was necessary in the interest of general deterrence (*Generalprävention*). It also considered the expulsion justified in this particular case.

The Administrative Court did not view the first applicant as a recidivist, as his prior conviction for theft could not lead to the conclusion that he would continue to commit sexual offences. However, although the psychological expert P. had given the first applicant a positive social prognosis, a positive legal prognosis could only be given on condition that the first applicant engaged in successful therapy for couples and took leave of his “illusory concept of masculinity”. At the relevant time in January 2001 when the District Council gave its decision on the applicant's objection, these requirements had not been met.

25. Despite the first applicant's high professional qualifications and the fact that he had otherwise lived an orderly life, the two criminal offences committed in Germany attested to the fact that he had not succeeded in fully integrating himself into German society. This finding was also based on P.'s statement that there had been other situations prior to the rape where the first applicant had harassed women, even if such situations had not led to the commission of a sexual offence. If the first applicant did not learn how to deal adequately with problems and conflicts through pertinent therapy, the Administrative Court could not rule out the possibility that he might again commit criminal acts.

26. The Administrative Court further pointed out that, according to the legal practice in Germany, the existence of family ties alone could not preclude the first applicant's expulsion. In any event, at the time of the expulsion decision, there were severe doubts as to the stability of the applicants' marriage. It was not certain to what extent the second applicant knew about the details of the crime committed by her husband. The relationship between the spouses was considered to be problematic. The second applicant had also not reacted to an invitation to state her views on her husband's expulsion. The first applicant had not substantiated why it was necessary for his wife and child that he remain in Germany, in particular as his wife financially supported the family and had, already prior to the first applicant's imprisonment, arranged for their daughter to be cared for by a third person while she was at work.

27. The daughter's interest in her father's remaining in Germany could also not be considered as more important than the public interest in his expulsion. The right to have contact with his daughter was only protected in so far as that right had been exercised in the past. Despite regular meetings between the applicant and his daughter, which were apparently being continued, there was no indication that the daughter depended on these contacts. Having regard to the long periods of time which had elapsed between the visits and the fact that the daughter had not lived with the applicant since his arrest more than three years earlier, it appeared that they had a relationship based merely on occasional encounters (*Begegnungsgemeinschaft*). Under these circumstances, the applicant had

failed to substantiate that his ties with his daughter amounted to a strong parent-child relationship that would warrant his remaining in Germany.

28. On 28 May 2002 the Lower Saxony Administrative Court of Appeal (*Oberverwaltungsgericht*) upheld that decision and rejected the first applicant's request for leave to appeal.

29. On 12 December 2002 the Federal Constitutional Court refused to accept the applicant's complaint for adjudication.

5. Further developments

30. On 13 January 2003 the first applicant lodged a request for an interim order with the aim of obtaining a temporary suspension of deportation (*Duldung*). On 6 February 2003 the Hanover Administrative Court dismissed this request, stating firstly that his expulsion was not imminent as the first applicant was still serving his prison sentence. In any event, the applicant's request was unfounded. Referring to its own judgment of 13 February 2002, which had been upheld by the Administrative Court of Appeal, the Administrative Court held that the deportation order was in accordance with the law and that there was no cause for a suspension of the deportation. On 26 February 2003 the first applicant lodged an appeal. Following consultation of the case file, the applicant's counsel withdrew this appeal on 10 March 2003.

31. On 27 February 2003 the Hanover Regional Court, sitting as a post-sentencing chamber (*Strafvollstreckungskammer*), ordered the first applicant's release on probation. Based on psychological expert reports and on the submissions of the prison authorities, the Regional Court concluded that if the first applicant continued to abstain from abuse of alcohol, the risk that he might commit further crimes was comparatively low. It assumed that the four years spent in prison may have contributed to a complete cure from his former addiction and considered that he had comprehended the extent of his crime. While admitting that his relationship with the second applicant had probably deteriorated during the time spent in prison, the Regional Court considered it noteworthy that the couple had so far not divorced, nor had either of the spouses petitioned for a divorce.

32. Following the first applicant's release from prison on 2 April 2003 the applicants lived together with their child. According to the applicants' submissions, they started to follow couple therapy in March 2004. On 15 March 2004 the Kingdom of Morocco, on the Municipal Public Order Authority's request, issued a passport substitute document in order to allow the first applicant's deportation. After that the first applicant left his family and went into hiding.

33. On 18 March 2004 the applicant filed a request with the Municipal Authority to set a time-limit on the exclusion from German territory, which was a legal consequence of his expulsion.

34. On 24 July 2004 the applicant was arrested and on 16 September 2004 he was deported to Morocco.

35. On 9 August 2005 the Municipal Public Order Authority of Hanover limited the applicant's exclusion from the German territory to twelve years from the time of deportation, that is until 16 September 2016. The applicant's request for an earlier time-limit was rejected. The applicant was further granted the option to apply for a fresh examination of his request in 2013.

36. In February 2006 the first applicant re-entered German territory. On 16 March 2006 he was arrested on suspicion of theft accompanied by violence committed under the influence of alcohol. According to police investigations, he had reached into a cash register in a bar in order to procure the means to acquire more alcohol. The applicant remained in detention pending deportation to Morocco.

37. By a letter of 13 February 2007 the applicants' counsel informed the Court that the second applicant wished to withdraw her complaint.

II. RELEVANT DOMESTIC LAW

38. The rights of entry and residence for foreigners were, at the relevant time, governed by the Aliens Act (*Ausländergesetz*).

Under section 47 § 1, no. 1, of the Aliens Act, a foreigner was to be deported when he had been sentenced to a minimum of three years' imprisonment for having wilfully committed one or more criminal offences. If he was married to a German citizen, a foreigner could only be deported if serious reasons of public safety and order justified his expulsion (section 48 § 1). This was generally the case where section 47 § 1 was applicable.

39. Under section 8 § 2, a foreigner who had been deported was not permitted to re-enter German territory. A time-limit on the exclusion period was usually (*in der Regel*) granted upon an application by the deportee.

40. Section 53 § 4 stipulated that a foreigner could not be deported if such deportation would not be authorised under the European Convention on Human Rights.

41. Under section 55 § 2, a foreigner could be granted a temporary suspension of deportation (*Duldung*) for as long as there were legal or factual reasons making his deportation impossible.

42. The suspension of deportation did not affect the foreigner's duty to leave the country. The time-limit for such a suspension could not exceed one year, but it was renewable (section 56 §§ 1-2).

43. Since 1 January 2005 the entry and residence rights of foreigners have been governed by the Residence Act (*Aufenthaltsgesetz*).

THE LAW

I. AS REGARDS THE SECOND APPLICANT

44. The Court notes that in a letter of 13 February 2007 the applicants' counsel informed the Court that the second applicant wished to withdraw her complaint.

45. The Court finds no reasons of a general character affecting the observance of the Convention that would necessitate a further examination of her complaint, and thus decides to strike out the application in so far as it concerns the complaints of the second applicant, in accordance with Article 37 § 1 (a) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

46. The first applicant ("the applicant") complained that his expulsion to Morocco had interfered with his right to the enjoyment of his family life. He relied on Article 8 which, in so far as relevant, reads as follows:

"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...for the prevention of disorder or crime...or for the protection of the rights and freedoms of others."

A. The Government's objection of non-exhaustion of domestic remedies

47. The Government submitted that the applicant had failed to exhaust domestic remedies as he had not appealed against the decision of the Hanover Administrative Court of 6 February 2003 which denied him a temporary suspension of deportation. They argued that such a suspension could have effectively prevented a separation of his family.

48. The applicant claimed that he had withdrawn his appeal against the decision of 6 February 2003 because it did not have any prospect of success. He further pointed out that a suspension of deportation did not affect the validity and enforceability of the deportation order.

49. The Court does not consider it necessary to rule on the Government's preliminary objection, as it considers that there has been no violation of Article 8 of the Convention for the reasons set out below.

B. The merits of the complaint

1. The parties' submissions

50. The applicant submitted that the deportation order had interfered with his right to enjoy his family life, without being justified under paragraph 2 of Article 8. He pointed out that he had lived with his wife and their child before and following his detention. His wife and daughter could not reasonably be expected to follow him to Morocco and occasional contacts were insufficient to maintain the family relationship. He further stressed that he had not committed any further offences following his release from prison and that his expulsion would deprive the couple of the possibility of undergoing pertinent therapy and thus solving the problems which had initially led to the offence in question.

51. The Government accepted that the relationship between the applicant and his wife and child fell within the ambit of Article 8 § 1 of the Convention. They questioned however whether the deportation order itself could be regarded as an interference with this right, because the separation of the family was not affected by the deportation order as such, but by the actual deportation. Even assuming there had been an interference with the applicant's rights under Article 8 § 1, the Government regarded this to be justified under paragraph 2 of that same provision. In this connection they stressed the seriousness of the crime the applicant had committed. They further pointed out that the applicant had already been twenty-seven years' old on his arrival in Germany and had undisputedly maintained close family ties with Morocco. On the other hand, the ties between the spouses had become loose as a result of the imprisonment and the fact that the second applicant had refused any contact with the first applicant between November 2000 and November 2001.

52. With respect to the decision on the time-limit for the applicant's exclusion, the Government pointed out that this was a separate administrative act, against which the applicant could have appealed independently. As he had not lodged an appeal against the Hanover Municipal Public Order Authority's decision of 9 August 2005, he had not exhausted domestic remedies in this respect.

53. The Government finally alleged that the applicant's behaviour following his illegal re-entry into German territory in 2006 had made it clear that he continued to lack consciousness of his criminal behaviour and the consequences associated therewith.

2. The Court's assessment

54. The Court notes that it is not in dispute that the relationship between the applicant, his wife and their child falls within the ambit of Article 8 of the Convention. Given the considerable time spent by the applicant in

Germany and the fact that his expulsion severed the existing family ties between him and his wife and their daughter, the Court finds that the deportation order interfered with the applicant's private and family life within the meaning of Article 8 § 1.

55. The Court further notes that the applicant's expulsion was based on the pertinent provisions of the Aliens Act and pursued a legitimate aim, namely public safety and the prevention of disorder or crime. It therefore remains to be determined whether the measure imposed on the applicant was “necessary in a democratic society” for the achievement of these aims.

56. The Court reiterates that the Convention does not guarantee the right of an alien to enter or to reside in a particular country and that a State is entitled, subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. In pursuance of their task of maintaining public order, Contracting States have the power to expel aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, among many other authorities, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-...).

57. Accordingly, the Court's task in the present case consists in ascertaining whether the German authorities, by expelling the applicant from German territory, struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of crime, on the other.

58. The Court has reaffirmed that the following criteria should apply in all cases concerning settled migrants when assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued (see *Boultif v. Switzerland*, no. 54273/00, § 40, ECHR 2001-IX, and *Üner*, cited above, §§ 57-60):

- 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.

59. In the *Üner* judgment (cited above, § 58), the Court further made explicit the following two criteria:

- 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.

60. The Court further considers that it has to make its assessment in the light of the situation prevailing when the deportation order became final (see *El Boujaïdi v. France*, judgment of 26 September 1997, *Reports of Judgments and Decisions* 1997-VI, p. 1990, § 33; *Yildiz v. Austria*, no. 37295/97, §§ 34 and 44, 31 October 2002; *Yilmaz v. Germany*, no. 52853/99, §§ 37 and 45, 17 April 2003; and, implicitly, *Üner*, cited above, § 64). The question as to when the deportation order became final has to be determined by applying the domestic law. According to the domestic law, the complaint to the Federal Constitutional Court is devised as an extraordinary remedy which does not prevent the contested decision from becoming final. It follows that the deportation order became final on 28 May 2002 when the Lower-Saxony Court of Appeal rejected the first applicant's request for leave to appeal. The Court's task is thus to ascertain whether or not the domestic authorities had complied with their obligation to respect the applicant's private and family life at that particular moment, leaving aside circumstances which only came into being after the authorities took their decision (see *Yildiz*, cited above, § 44).

61. With regard to the nature and seriousness of the offence committed by the applicant, the Court observes that the applicant was convicted of rape. There can be no doubt that this offence was of an extremely serious nature, as is reflected in the prison sentence of five years and three months imposed on him. Although the applicant had for the most part confessed his crime, which had largely been committed owing to his state of considerable intoxication, this could, according to the criminal court, not lead to a mitigation of sentence, having regard to the fact that the applicant had performed two acts of sexual coercion, that the incident had lasted for an overall duration of forty minutes and that he had constantly used force against his victim.

62. With regard to the length of the applicant's stay in Germany, the Court notes that the applicant had entered Germany at the age of twenty-seven. By the time the deportation order became final in May 2002, he had lived there for almost thirteen years. Despite the considerable time spent by the applicant in Germany, the Court notes that his situation is not comparable to that of a so-called "second-generation immigrant", as he had arrived in Germany as an adult and had spent his childhood and youth and the first part of his university studies in Morocco. There can be no doubt

that he had retained sufficient social and cultural ties with his country of origin which would allow him to reintegrate into Moroccan society.

63. As to the applicant's conduct since the offences were committed, the Court notes that the applicant remained in prison until the deportation order became final. While the applicant had psychotherapy in an attempt to solve his personal problems, he had not managed to engage successfully in couple therapy – which appears to be explained by the fact that his wife did not feel ready for this. The Court further notes that the three psychological experts consulted by the prison authorities before the conference on 28 November 2002 considered that he had not completely come to terms with the problems which had led to the commission of his crimes, even though they deemed the risk of recidivism to be low (see paragraph 20 above).

64. With regard to the applicant's family situation, the Court notes that the applicant and his wife had been married since March 1997. The spouses' relationship had been considerably strained by his criminal conviction. By the time the deportation order became final, it was not clear whether the applicant's wife would continue the relationship or seek a separation.

65. With regard to the applicant's relationship with his daughter, the Court notes that the daughter was born within a marital union and that the family lived together until the applicant's arrest in January 1999, when the child was one and a half years' old. While contacts between the father and his child were rare in the earlier part of his prison term, the applicant received and paid regular visits to his daughter during the second part of his prison term.

66. With regard to the possibility of maintaining the parental relationship with his daughter following his deportation, the Court notes that the child was living with the applicant's wife. As it was uncertain at the relevant time if the applicant's wife would continue the relationship, there was no realistic prospect that she would follow him to Morocco, thus allowing them to maintain the father-child relationship. The Court further considers that the domestic authorities have not established whether the applicant's wife or their daughter speak the Arabic language. Even if the applicant's wife had been ready to join her husband in Morocco, she would inevitably have encountered very serious difficulties, bearing in mind that she had been the main provider of the family (see, *mutatis mutandis*, *Amrollahi v. Denmark*, no. 56811/00, § 41, 11 July 2002). It follows that the applicant's expulsion to Morocco necessarily entailed his separation from his daughter.

67. The Court appreciates that the applicant's expulsion had far-reaching consequences, in particular for his relationship with his young daughter. However, having regard to the nature and seriousness of the offence committed by the applicant, and bearing in mind that the psychological experts, at the relevant time, could not entirely rule out the danger of

recidivism, the Court cannot find that the respondent State attributed too much weight to its own interests when it decided to impose that measure.

Accordingly, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to strike out the application in so far as it concerns the complaints of the second applicant;
2. *Decides* by six votes to one that it is not necessary to rule on the Government's preliminary objection as to the non-exhaustion of domestic remedies;
3. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention;

Done in English, and notified in writing on 6 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mrs Steiner is annexed to this judgment.

C.R.
S.N.

DISSENTING OPINION OF JUDGE STEINER

I voted for finding a violation of Article 8 as I consider that the domestic authorities, when ordering the applicant's expulsion from German territory, did not sufficiently take into account the applicant's interest in maintaining his relationship with his daughter, who was five years old by the time the deportation order became final. I consider the applicant's separation from his daughter to be all the more serious as the child needed to remain in contact with her father, especially because of her young age (see, *mutatis mutandis*, *Berrehab v. the Netherlands*, judgment of 21 June 1988, Series A no. 138, § 37). On the other hand, one has to take into account that the applicant was convicted of a very serious crime. Having regard to these circumstances, I would have found the measure acceptable only if the applicant's exclusion from German territory had been, from the outset, adequately limited in time.

Quite apart from this, I consider that the Court should not have left the issue of exhaustion of domestic remedies undecided (see paragraphs 47 to 49 of the judgment), but should have dismissed the Government's preliminary objection in this respect. Having regard to the Court's consistent case-law and to the circumstances of this particular case, I consider that the applicant had clearly exhausted domestic remedies in the instant case.

The Court has consistently held that an applicant who has unsuccessfully availed himself of one appropriate remedy directly aimed at redressing the litigious situation cannot be expected to have had recourse to further remedies which might be in principle available to him, but which hardly offer better chances of success (see *Baumann v. France*, no. 33592/96, § 46, 22 May 2001; *De Moor v. Belgium*, judgment of 23 June 1994, Series A no. 292-A, § 50; *A. v. France*, judgment of 23 November 1993, Series A no. 277-B, § 48; *Müslim v. Turkey* (dec.), no. 53566/99, 1 October 2002; *Avci v. Belgium* (dec.), no. 61886/00, 6 May 2004; *Giacomelli v. Italy* (dec.), no. 59909, 15 March 2005; *Vitiello v. Italy* (dec.), no. 6870/03, 5 July 2005; *Paudiccio v. Italy* (dec.), no. 77606/01, 5 July 2005; and *EEG-SLACHTHUIS VERBIST v. Belgium* (dec.), no. 60559/00, 10 November 2005). Accordingly, an applicant who had unsuccessfully lodged an appeal against a deportation order had been found not to be under an obligation to avail himself of further possible remedies aimed at obtaining a suspension of the deportation proceedings (see *Avci*, cited above).

In the present case, the applicant duly exhausted domestic remedies with respect to the deportation order of 28 July 2000. In their decisions, the domestic courts expressly denied that the applicant's interest in the enjoyment of his family life outweighed the public interest in his expulsion. They considered, in particular, that the applicant's relationship with his daughter was not strong enough to warrant his remaining in Germany.

The applicant subsequently lodged a request for an interim order with the aim of obtaining temporary suspension of deportation (*Duldung*). The Hanover Administrative Court, in a decision of 6 February 2003, rejected the applicant's request, referring expressly to its own previous decision which had been upheld by the Administrative Court of Appeal.

Under these circumstances, I have serious doubts as to whether the applicant was obliged to lodge a request to suspend deportation in the first place. In any event, he could not have been reasonably expected to pursue his appeal further against the negative decision of the Hanover Administrative Court. Accordingly, the applicant has to be regarded as having exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention.