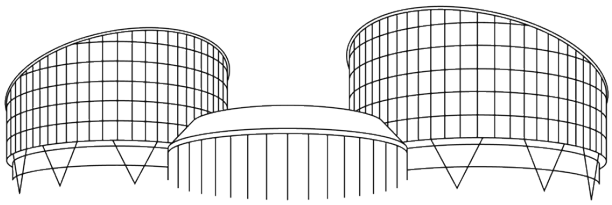

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 57442/11
B.V.
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 13 November 2012 as a Chamber composed of:

Mark Villiger, *President,*
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens,
Helena Jäderblom, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 6 September 2011,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The first and second applicants are a married couple of Serbian nationality and originating from Kosovo. They were born in 1978 and 1982, respectively. The third and fourth applicants are their children, born in 2004 and 2007, respectively. The family is currently in Sweden. They were

represented before the Court by Mr. M. Ekelöf, a lawyer practising in Växjö.

The Swedish Government ("the Government") were represented by their Agent, Ms H. Kristiansson, of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

In March 2004, the first and second applicants applied for asylum and residence permits in Sweden. Before the Migration Board (*Migrationsverket*), they submitted the following. The first applicant had performed his military service in 1998-1999, and had been suspected by Albanians of having taken part in a massacre where Kosovo Albanians had been killed. Although he had not been present, the couple had been harassed and threatened by Albanians where they lived. People had thrown rocks at them and, during her pregnancy, the second applicant had received numerous death threats and had been beaten on several occasions. They had turned to the local police several times, but had not received any help. In March 2004 a neighbour had warned them that their house would be attacked and later they had been visited by KFOR or UNMIK police, who had told them to flee. They had stayed with the UNMIK police for two days before leaving the country.

On 13 September 2004, the Migration Board rejected the application. The Board found that the applicants had a well-founded fear of persecution in Kosovo and thus could not be expected to return there. However, it considered that they could relocate to another area within Serbia and Montenegro since they were ethnic Serbs. The fact that they did not have any connection to another area was not sufficient to grant them leave to remain in Sweden.

The applicants appealed against the decision to the Aliens Appeals Board (*Utlänningsnämnden*) and added that the first applicant had witnessed a massacre. Pictures of him in his military uniform had been published by CNN and the BBC in 2000 and his name had been published in the local newspapers in connection with the massacre. He was therefore known as a traitor throughout Serbia and Montenegro. Moreover, the family lacked a social network outside Kosovo.

On 15 November 2005, the Aliens Appeals Board upheld the Migration Board's decision in full.

Following the enactment of an interim amendment to the Aliens Act, the applicants requested to have their case reviewed and referred mainly to discrimination against Serbs in Kosovo. On 21 August 2006, the Migration Board decided not to grant them residence permits in Sweden on the basis of the interim amendment.

In 2007 and 2008, the applicants twice applied for re-examination of their case, claiming that there were impediments to the enforcement of their deportation order. On each occasion, the Migration Board rejected the applications.

On 11 November 2009, the deportation order against the applicants became time-barred and they lodged a new application for asylum and residence permits. They stated that their only connection to Serbia was their ethnicity and that they had integrated into Swedish society. They submitted documents from the third applicant's school, stating that he was insecure but developing well, and that he was learning Swedish.

On 22 September 2010, the Migration Board rejected the application. Through contacts with the Serbian Ministry of the Interior, the Board had been informed that the first and the second applicants were registered as Serbian nationals and as residents in Kragujevac in Serbia. In relation to Kosovo, the Board found that there were no longer any threats against the applicants there and thus no risk if they returned. As concerned Serbia, it noted that the applicants had not invoked any individual grounds for fear. Since they were nationals of Serbia and residents there, there were no grounds for them not to return. Moreover, the Board noted that the applicants had remained in Sweden due to their own passivity and unwillingness to cooperate with the Board to arrange their return. Having regard to all the circumstances of the case, the Board found that there were no exceptional reasons to allow the family to remain in Sweden. In reaching this decision, it considered it to be in the best interests of the children to accompany their parents to a country where they had relatives and spoke the language.

The applicants appealed to the Migration Court (*Migrationsdomstolen*), maintaining their claims and adding that they had lived in Kosovo but the only reason they had been registered in Serbia was to obtain financial aid from the government. Moreover, it would be very difficult for them to settle in Serbia. The second applicant also suffered from poor mental health and was scheduled to receive psychiatric care after she had given birth to a stillborn child. They wanted to be near the child's grave.

On 27 May 2011 the Migration Court upheld the Board's decision. It agreed with the Board that the applicants were not in need of protection in relation to either Kosovo or Serbia. Moreover, it found that the second applicant's state of health was not so serious that she could be granted a residence permit on that ground. In conclusion, there were no reasons to grant the family leave to remain, even considering that the case involved children.

Upon further appeal, on 27 July 2011, the Migration Court of Appeal (*Migrationsöverdomstolen*) refused leave to appeal.

B. Relevant domestic law

The basic provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as "the 2005 Act") which replaced, on 31 March 2006, the old Aliens Act (*Utlänningslagen*, 1989:529). Both the old Aliens Act and the 2005 Act define the conditions under which an alien can be deported or expelled from the country, as well as the procedures relating to the enforcement of such decisions.

Chapter 5, Section 1, of the 2005 Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, Section 1, of the 2005 Act, the term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals.

By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, Section 2, of the 2005 Act).

Moreover, if a residence permit cannot be granted on the above grounds, a permit may nevertheless be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) as to allow him or her to remain in Sweden (Chapter 5, section 6 of the Aliens Act). During this assessment, special consideration should be given to, *inter alia*, the alien's state of health. In the preparatory works to this provision (*travaux préparatoires* 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for granting a residence permit.

As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment

(Chapter 12, Section 1, of the 2005 Act). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, Section 2, of the 2005 Act).

Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies, under Chapter 12, Section 18, of the 2005 Act, where new circumstances have emerged that mean there are reasonable grounds for believing, *inter alia*, that enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the 2005 Act, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not doing so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, Section 19, of the 2005 Act).

Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances; the Migration Board, the Migration Court and the Migration Court of Appeal (Chapter 14, Section 3, and Chapter 16, Section 9, of the 2005 Act). Hence, upon entry into force on 31 March 2006 of the 2005 Act, the Aliens Appeals Board ceased to exist.

COMPLAINTS

The applicants complained under Article 3 of the Convention that if they were deported to Kosovo they would be persecuted and ill-treated. Moreover, it would be inhuman to send them to Serbia since they had no connections there. They further claimed that the Swedish authorities had decided to deport the first applicant to Serbia and the other applicants to Kosovo, which would shatter their family life contrary to Article 8 of the Convention. Last, they complained under Article 6 of the Convention that they had been denied fair proceedings in Sweden.

THE LAW

1. The applicants complained under Article 3 of the Convention that they would risk being persecuted and ill-treated if returned to Kosovo due to their Serbian ethnicity. They further complained under Article 8 of the Convention that an implementation of the order to deport the first applicant to Serbia and the other family members to Kosovo, would lead to separation of the family. These provisions read in relevant parts:

Article 3 (prohibition of torture)

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8 (right to respect for private and family life)

"Everyone has the right to respect for his private and family life, his home and his correspondence..."

The Government submitted that these complaints should be declared manifestly ill-founded.

They stressed that the Migration Board would deport all of the applicants to Serbia, which had agreed to receive them. It further pointed out that the Migration Board had issued a Laissez-Passer for each of the applicants for Serbia and that the first and second applicants had already signed their Laissez-Passer.

The applicants maintained their claims. They noted the Government's submission that all of them would be deported to Serbia but stressed that they had not received any written evidence in support of this.

The Court observes that the applicants are being deported to Serbia together and that this has been substantiated by the issuing of Laissez-Passer for all of them. Consequently, since the applicants will not be sent to Kosovo, their complaints under Article 3 regarding Kosovo and their complaint under Article 8 about family separation are not an issue.

It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicants further complained, also under Articles 3 and 8 of the Convention, that they could not return to Serbia since they never had lived there and since their connection to that country was limited to their ethnicity. Moreover, they stressed that such a deportation would impair their social and family life since they had integrated well into Swedish society and since the third and fourth applicants, who had only ever lived in Sweden, now attended Swedish school and day care. Also, they would not be able to visit their stillborn child's grave situated in Sweden.

The Government submitted that these complaints should also be declared manifestly ill-founded. They emphasised that it had been established during the proceedings that the applicants were Serbian nationals and that they were registered as permanent residents of Serbia. Consequently, they were entitled to both social benefits and health care. Regarding the applicants' ties to Sweden, the Government argued that although the applicants had been in Sweden for quite a long time, this was mainly due to their unwillingness to leave Sweden after the decision to reject their request for asylum had become final. Moreover, they noted that the applicants had not fulfilled their obligation to assist the Swedish authorities in the enforcement of the deportation order against them. The Government further observed that since December 2009, the visa requirement for the Schengen area had been abolished for Serbian nationals and thus nothing would prevent the applicants from visiting their stillborn child's grave in the future.

The applicants disputed that they had been unwilling to leave Sweden and stressed that it was not until recently that the Serbian authorities had agreed to receive the third and fourth applicants. Moreover, it would be inhuman to force the children to move to what was, for them, an unknown country.

The Court reiterates that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, *inter alia*, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102 Series A no. 215, p. 34,). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 of the Convention implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).

Moreover, expulsion by a Contracting State may give rise to an issue under Article 8, and hence engage the responsibility of that State under the Convention, although there is no general obligation for a State to respect immigrants' choice of the country of their residence (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38).

The Court is aware that, where Contracting States tolerate the presence of aliens in their territory while the latter await a decision on an application for a residence permit, an appeal against such a decision or a request to re-open such proceedings, this enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. However, as set out above, this does not entail that the authorities of the Contracting State involved are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their

country. In this context a parallel may be drawn with the situation where a person who, without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a *fait accompli*. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see *Darren Omoregie and Others v. Norway*, no. 265/07, § 64, 31 July 2008; *Roslina Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; and *Yash Priya v. Denmark* (dec.), no. 13594/03, 6 July 2006).

Turning to the present complaints, the Court considers that they do not raise an issue under Article 3 but are to be dealt with under Article 8 of the Convention. Thus, as concerns the applicants' right to respect for their family and private life, the Court recognises that the applicants have been in Sweden for more than eight years, during which time they have adapted to Swedish society. However, the Court notes that the Swedish authorities dealt with the applicants' request for asylum within one year and eight months for each of the two set of proceedings, which cannot be considered excessively lengthy. Moreover, since their arrival in Sweden, the applicants have known that they might not be allowed to remain and they have never held Swedish residence permits. On the contrary, since 15 November 2005, when the Aliens Appeals Board refused leave to appeal and the deportation order against the applicants gained legal force, they have been under an obligation to leave Sweden, with the exception of the period from November 2009 to July 2011 when their new application for asylum was considered. It follows that they have remained in Sweden for several years despite valid deportation orders against them. Consequently, the fact that they have spent a long period in Sweden cannot be decisive for the Court's assessment.

As regards the applicants' ties to Serbia and their integration into Swedish society, the Court notes that the first and second applicants are Serbian nationals who have been registered as residents there, even though they claim that they registered in order to receive financial aid from the Serbian authorities. The Court further observes that all of the applicants speak the language and that both the first and second applicants have close family there.

Whilst recognising the applicants' wish to visit their stillborn child's grave in Sweden, the Court finds that, since visas are no longer required for Serbs to visit Sweden, there will be no impediments for the applicants to visit the grave when they so wish.

Having regard to all of the above, the Court considers that, if the applicants were to be deported from Sweden to Serbia, their right to family and private life would not be affected in a manner contrary to Article 8 of the Convention. This part of the application is therefore also manifestly ill-

founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Turning to the applicants' complaint under Article 6 of the Convention, that they have been denied a fair trial, the Court notes that this provision does not apply to asylum proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

Under these circumstances, the interim measure applied under Rule 39 of the Rules of Court also comes to an end.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President