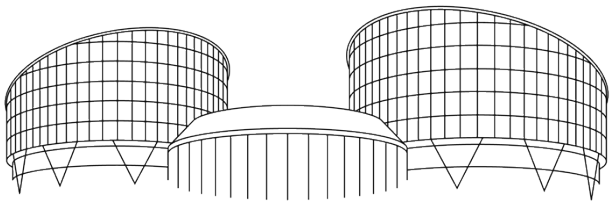

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 17471/11
Myahri ATAYEVA and Mats BURMAN
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 19 February 2013 as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 16 March 2011,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

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 applicant, Ms Myahri Atayeva, is a Turkmen national born in 1974, and the second applicant, Mr Mats Burman, is the first applicant's husband, a Swedish national born in 1954. They are currently in Sweden. They were represented before the Court by Mr. M. Ericsson, a lawyer practising in Luleå.

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.

On 25 March 2006, the first applicant arrived in Sweden with her son, A, born in 1999. On 17 April 2006, she married the second applicant. Subsequently, on 7 September 2006, she and A applied to the Migration Board (*Migrationsverket*) for asylum and residence permits, submitting that she belonged to a family of political opponents in Turkmenistan and was sought by the authorities there. At one point she had been arrested and tortured because she had helped a friend who was also a political opponent. A's father had helped her flee from prison but they had had a car accident on the way and he had died. She and A had finally managed to leave the country at the end of 2005 with the help of friends. She further invoked her marriage to the second applicant and the fact that she had converted to Christianity, a religion whose members are allegedly persecuted in Turkmenistan. To prove her identity, she submitted a work identity card, a birth certificate and the diploma of her degree as a medical doctor.

On 27 May 2008, the Migration Board rejected the application. It questioned the first applicant's credibility because her statements had been vague and inconsistent. In addition, she had not submitted her passport, of which the Board considered she was in possession, and she had not helped the domestic authorities to clarify her route to Sweden. In response to a question to the German Embassy in Ashgabat, the Board had been informed that the first applicant and A had been granted visas to visit Germany from 1 April to 22 April 2006. A's father had given his approval and, consequently, must have been alive in 2006. Hence, the first applicant's allegation about his death was questioned. As the first applicant had been granted a visa, the Board concluded that she had left Turkmenistan legally. Consequently, it was improbable that she was perceived as a political opponent. As concerned the first applicant's marriage to the second applicant, the Board questioned the seriousness of the applicants' marriage since they had married less than a month after the first applicant's arrival in Sweden and never met before. Moreover, an application for a residence permit on this ground should, as a main rule, be submitted before arrival in Sweden. When weighing the underlying State interest of this rule, namely to enable regulation of immigration into Sweden, against the inconvenience for the first applicant and A, it did not find it unreasonable to require them to return and apply for residence permits from their country of origin.

The first applicant and A appealed against the decision to the Migration Court (*Migrationsdomstolen*) and added that the visa documents were false

and obtained by a friend of the first applicant to help her leave the country. Moreover, their ties to Sweden were stronger than those to their home country since they had no remaining family in Turkmenistan but the first applicant's two sisters and the second applicant lived in Sweden.

On 29 April 2009, after having held an oral hearing, the Migration Court upheld the Board's decision in full. It considered that the documents related to the visas were most probably authentic whereas A's father's death certificate, submitted by the first applicant, had low evidentiary value. Moreover, the court found the applicant's asylum story at times to be contradictory, inconsistent and vague. Turning to whether the first applicant could be granted a residence permit because of her marriage, the court did not find it unreasonable to ask her and A to return to their country, or another country, and apply from there.

The first applicant and A appealed to the Migration Court of Appeal (*Migrationsöverdomstolen*) which, on 16 July 2009, refused leave to appeal.

On 28 January 2010, the first applicant gave birth to her and the second applicant's son, B, and lodged an application for reconsideration of her case on the basis of her family ties. She further invoked the risk of being persecuted in Turkmenistan.

On 11 August 2010, the Migration Board rejected her request as it considered that she could not be granted a residence permit due to her family ties and that there were no impediments to the enforcement of the deportation order. This decision was unsuccessfully appealed against to the Migration Court and the Migration Court of Appeal.

On 24 September 2010, A was adopted by the second applicant and hence became a Swedish citizen. Subsequently the first applicant again applied for reconsideration of her case, relying on her family ties with the second applicant, A and B.

On 28 March 2011, the Migration Board rejected the request. It stated that, in accordance with amendments to the Aliens Act which had entered into force on 1 July 2010, the court should especially consider the consequences for a child separated from his or her parents due to a deportation order. A prerequisite for this rule to apply, however, was that it clearly could be stated that a residence permit on grounds of personal ties would have been granted to the applicant if he or she had applied for such a permit before entering Sweden. In this regard, the Board noted that the applicant did not fulfil the basic requirement to obtain a residence permit, which was to submit a valid passport to prove her identity. It further noted that the first applicant had remained in Sweden for a long time without permission. Hence, in the Board's view, there were no grounds to deviate from the general rule on how to apply for a residence permit on the basis of family ties.

In a renewed request for reconsideration, the first applicant submitted a DNA analysis, proving her biological ties with her sister living in Sweden,

to prove her own identity. She further claimed that she could not obtain a passport from her home country.

On 5 July 2011, the Migration Board rejected the request as it found that no new circumstances of importance had been invoked.

In a renewed request for reconsideration, the first applicant maintained that she had travelled to Sweden illegally and not on a visa to Germany. She further submitted that she was wanted by the Turkmen police, for illegal activities against the State.

On 13 September 2011, the Migration Board rejected the request. It found no reason to deviate from its assessment made in March the same year and found the new allegations regarding accusations of criminal activities to be unsubstantiated.

The applicant appealed and submitted that her passport had been left with the people in Turkmenistan who had helped her flee and that she had constantly tried to get it back.

On 3 October 2011, the Migration Court upheld the Migration Board's decision.

The applicant appealed to the Migration Court of Appeal which, on 8 November 2011, refused leave to appeal.

In a renewed request for reconsideration, the first applicant maintained her claim of strong family ties and alleged that there was a risk that she would not be allowed to leave Turkmenistan.

On 23 November 2011, the Migration Board rejected the request. It stated that the applicant had had a legal obligation to leave Sweden since 2009 and that, according to case law, a long stay in Sweden without permission had greater weight when balanced against a child's interest of a united family. It further emphasised that it would be unreasonable if aliens who remained in Sweden illegally enjoyed a better position than those who followed the legal requirements for applying for residence permits.

## B. Relevant domestic law

### *1. The right of aliens to enter and remain in Sweden*

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). It defines 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.

See *Imamovic v. Sweden* ([dec.], no. 57633/10, 13 November 2012) for a substantive account of the relevant provisions of this Act.

*2. Relevant provisions of the Aliens Act as of 1 July 2010*

On 1 July 2010 Chapter 5, Section 18, was amended by the following addition: "When assessing what is reasonable under the second paragraph, point 5, particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted if the application had been examined before entry into Sweden." According to the preparatory works, this means that the alien should fulfil all requirements for a residence permit such as, *inter alia*, holding a valid passport, verified identity and strong family ties (Government Bill 2009/10:137, p. 17).

Chapter 12, Section 18, was also amended on 1 July 2010 by the following addition: "When assessing under the first paragraph, point 3, if there is another special reason for a decision not to be executed, particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted ... if the application had been examined before entry into Sweden."

*3. The process of application for family reunification from Turkmenistan*

Country information received from the Office of the Stockholm-based Swedish Embassy for Central Asia states that a person who lives in Turkmenistan and who wishes to apply for a Swedish residence permit on the grounds of family ties must hand in the application to the Swedish Embassy in Moscow. It further states that there is a possibility to apply for a residence permit through the online application system offered by the Migration Board provided that certain conditions are fulfilled, one of these being presentation of a valid national passport. Such a procedure takes approximately 3 months while the processing time for other applications is estimated at 7 to 10 months.

## C. Information on Turkmenistan

As regards visas to leave Turkmenistan, country information from 2011 by the Swedish Department for Foreign Affairs states that the requirement for exit visas for Turkmen citizens was formally abolished in January 2004 but that the Turkmen authorities, in practice, are still able to decide who can travel abroad. It has happened that Turkmen citizens with all papers in order have been denied authorisation to travel. The Human Rights Report of Turkmenistan from 2010, issued by the US Department of State, notes that the Turkmen government has denied that it maintains a list of persons not permitted to leave the country although certain citizens have continued to be barred from leaving, and that a 2005 migration law forbids travel by any citizen on certain grounds, *inter alia*, for those with access to state secrets or

whose travel is contrary to the interests of national security. The Country of Origin Information Centre (Landinfo), an independent human rights research body set up to provide the Norwegian immigration authorities with relevant information has, in a note concerning Turkmenistan, dated 15 September 2009, observed that it is possible for a person on the list to pay a sum of money in order to leave the country.

As regards visas to enter Turkmenistan, the Office of the Stockholm-based Swedish Embassy for Central Asia provides, *inter alia*, the following information on its internet site[1]. Swedish citizens need entry visas to visit Turkmenistan and in order to obtain such a visa, an invitation approved by the Turkmen Foreign Office is required. However, tourist visas can be obtained through travel agencies, who then handle all the formalities. The nearest embassies that grant visas are situated in Moscow and Berlin. It can take a long time to obtain a visa, but a fast track visa can be obtained for USD 150.

## COMPLAINTS

The first applicant complained under Article 3 of the Convention that, if deported from Sweden to Turkmenistan, she would be persecuted and arrested as she is a political opponent in Turkmenistan and has converted to Christianity. The applicants complained under Article 8 of the Convention that the enforcement of the deportation order against the first applicant would separate the family as she would not be able to obtain a passport from the Turkmen authorities and, thus, would not be able to apply for a residence permit at a Swedish Embassy or Consulate.

## THE LAW

### A. Article 3 of the Convention

The first applicant complained that an implementation of the order to deport her to Turkmenistan would subject her to treatment contrary to Article 3, which reads as follows:

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

[1] Information downloaded on 5 December 2012 from: http://www.swedenabroad.com/sv-SE/Ambassader/Central-Asia/Reseinformation/Reseinformation-Turkmenistan/

The Court reiterates that the 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*, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). 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 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).

The Court notes from the outset that the first applicant did not apply for asylum and a Swedish residence permit until more than five months after her arrival in Sweden. It further notes that since she failed to adduce any evidence in support of her statements concerning the ill-treatment she allegedly suffered in Turkmenistan, the domestic authorities had to rely solely on her asylum story, which they found reason to question in major parts. In this regard, the Court observes that, as a general principle, the national authorities are best placed to assess the credibility of witnesses since it is they who have had the opportunity to see, hear and assess the demeanour of the individuals concerned (see *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010). In the present case, the first applicant's request was examined on the merits by the Migration Board, which interviewed her, and by the Migration Court, which held an oral hearing. Moreover, the Migration Court of Appeal considered her appeal but found no grounds on which to grant leave to appeal. Furthermore, the first applicant requested several re-examinations of her case on the basis of new information, which were all considered by the Migration Board and, on two occasions, also by the Migration Court and the Migration Court of Appeal. Throughout the asylum proceedings, the first applicant was represented by legal counsel.

The Court finds that there are no indications that the proceedings before the domestic authorities lacked effective guarantees to protect the first applicant against arbitrary *refoulement* or were otherwise flawed. It further considers that the first applicant has submitted no circumstances, or supporting documents, to the Court which would lead it to depart from the domestic authorities' conclusions. In this regard it notes that documentation provided by the German authorities has contradicted central parts of her asylum story. In these circumstances, the Court finds that the first applicant has failed to substantiate that she would be at risk upon return to Turkmenistan.

This part of the application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## B. Article 8 of the Convention

The applicants maintained that an implementation of the order to deport the first applicant to Turkmenistan in order for her to apply for family reunification from there would lead to a separation of the family which would amount to a violation of Article 8 of the Convention. This provision, in relevant parts, reads:

> "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 ... the economic well-being of the country or for the prevention of disorder ..."

The Government submitted that this complaint should be declared inadmissible as being manifestly ill-founded. At the outset, the Government pointed out that it had not been finally decided whether the first applicant was entitled to a residence permit based on family reunification in Sweden. The decision to deport the first applicant followed from a procedural requirement. The question of the first applicant's right to a residence permit on the basis of her ties to the second applicant and their sons had accordingly not yet been examined by the Swedish authorities. They emphasised that the deportation of the first applicant would not lead to a permanent separation of the family and that it would not necessarily entail that the family had to be separated at all. The Government noted in that respect that the applicants had not pointed to any concrete obstacles preventing them all from going to Russia or Turkmenistan and there were no elements indicating that the first applicant would be at risk of ill-treatment upon return to Turkmenistan. Finally, even if the second applicant and the children did not follow the first applicant for the entire period while awaiting a decision on whether she could be granted a residence permit in Sweden, nothing prevented them from visiting her in Turkmenistan or Russia. Thus, the Government found it questionable whether there would be any interference with their family life.

In any event, they stated that the requirement in the present case was in accordance with the law and pursued the legitimate aims of protecting the economic well-being of the country and preventing disorder. As to whether the interference was necessary in a democratic society, they stressed that Member States were to enjoy a wider margin of appreciation when the impugned decision was not a final decision regarding the applicants' rights to exercise their family life in Sweden.

Moreover, the requirement that an alien apply for a residence permit on grounds of family ties before entering the country was a common requirement in neighbouring countries, including those EU member states bound by the Family Reunification Directive (Council Directive

2003/86/EC of 22 September 2003 on the right to family reunification). The domestic authorities had carefully examined whether there had been reasons to depart from this general rule, according to an exception provided by Swedish law, but had concluded that there were no such reasons in the first applicant's case. In this regard, it was noted that the first applicant had not submitted her passport to the Swedish migration authorities although there was a copy of it in the Schengen visa application and, upon her marriage to the second applicant, she had presented her original passport to the Swedish Tax Authority. Furthermore, it had been established that the first applicant's work identity card had been tampered with and she had at different times presented divergent information about her marital status when arriving in Sweden. The Government pointed out that the applicant still had the possibility to present a valid passport and hence claim that there were impediments to the deportation order. In addition, they emphasised that it was important that aliens who remained in Sweden illegally did not enjoy a better position than those who followed the authorities' rules and decisions.

In view of the above, the Government maintained that the decision was proportionate and necessary in a democratic society. Consequently, upholding the decision that the first applicant should return to Turkmenistan in order to apply for a residence permit would not amount to a violation of the applicants' right to respect for their family life under Article 8 of the Convention.

The applicants maintained that the deportation of the first applicant would lead to a separation of the family which contravened Article 8 of the Convention. In their view it would be impossible for the family to go to Turkmenistan or Russia together since neither of these countries would grant the second applicant, A and B visas for the required time. Moreover, the separation would be permanent since the first applicant did not possess a passport and consequently would not be able to apply successfully for a Swedish residence permit. They also submitted that it could not be concluded that the first applicant could return to Turkmenistan without any risk and that, in any event, her return would pose serious difficulties.

In light of the parties' submissions, the Court finds that this complaint raises serious issues of fact and law that require an examination of the merits and that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

For these reasons, the Court unanimously

*Declares* admissible, without prejudging the merits, the applicants' complaint under Article 8 of the Convention;

*Declares* inadmissible the remainder of the application.

Claudia Westerdiek
Registrar

Mark Villiger
President