

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

SECOND SECTION

CASE OF VASQUEZ v. SWITZERLAND

(Application no. 1785/08)

JUDGMENT

STRASBOURG

26 November 2013

FINAL

26/02/2014

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



In the case of Vasquez v. Switzerland,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 October 2013,

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

PROCEDURE

1. The case originated in an application (no. 1785/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Peruvian national, Mr Angel Francisco Vasquez Flores ("the applicant"), on 4 January 2008.

2. The applicant was represented by Mr C. Meyer, a lawyer practising in Strasbourg. The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger, of the Federal Office of Justice.

3. The applicant alleged, in particular, that the Swiss authorities' refusal to allow him to reside in Switzerland constituted a breach of his right to respect for family and private life as guaranteed by Article 8 of the Convention. He also claimed that this decision violated his right under Article 6 § 2 of the Convention.

4. On 16 March 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The applicant and the Government each submitted observations on the merits (Rule 59 § 1 of the Rules of Court).

6. On 1 February 2011 the Court's Sections were reorganised. The application was assigned to the Second Section (Rules 25 § 1 and 52 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1965 in Puno, Peru, and now lives in Gaillard, France.

8. The applicant entered Switzerland in 1992. On 21 August 1992 he married a Swiss citizen and obtained a residence permit. The couple got divorced on 21 March 1999.

9. In 1995 the applicant was the subject of a criminal investigation following an accusation against him by two young women (minors) of indecent assault and rape, offences under Articles 189 and 190 of the Swiss Criminal Code (see paragraph 24 below). On 1 September 1995 the public prosecutor discontinued the criminal proceedings for lack of evidence. That decision was upheld on appeal by the Court of Justice of the Canton of Geneva on 24 November 1995.

10. On 24 September 2001 the Criminal Court of Cassation of the Canton of Vaud (*Cour de cassation penale du canton de Vaud*) found the applicant guilty of an offence against the sexual integrity of a person incapable of resistance and exploitation of a person in a position of need or dependency under Articles 191 and 193 of the Swiss Criminal Code (see paragraph 24 below). The applicant received a custodial sentence of three years. In addition, the court ordered the applicant's expulsion from Swiss territory for the following ten years, but suspended execution of the order on condition that his behaviour was irreproachable for the following five years, a penalty provided for under the former Swiss Criminal Code. The applicant was ordered to pay the victim compensation in the amount of 10,000 Swiss francs (CHF) (approximately 8,150 euros (EUR)). Subsequently, the applicant served the prison sentence and was released on parole in December 2002.

11. On 28 October 2002 the Department of Justice, Police and Public Security of the Canton of Geneva ordered the applicant's expulsion from Swiss territory for an unlimited duration of time. It held that, independently of the (suspended) expulsion ordered in the criminal proceedings, it was competent to order the applicant's expulsion in administrative proceedings. The applicant appealed against that decision to the Cantonal Appeals Board of the Geneva Immigration Police (*La commission cantonale de recours de police des étrangers de Genève*; hereafter "the Cantonal Appeals Board").

12. On 5 April 2003 the applicant remarried. His second wife had dual citizenship of Germany and Switzerland. On the basis of this marriage he applied for a residence permit to the Office for Migration of the Canton of Geneva (*L'office cantonal de la population de Genève*), which refused his

request on 7 December 2004. The applicant appealed also against this decision to the Cantonal Appeals Board.

13. At the beginning of 2005 the applicant's wife, who until then had been living and working in Germany, joined her husband in Geneva.

14. The Cantonal Appeals Board combined the applicant's two appeals and dismissed them on 19 May 2005.

15. On 9 January 2006, following an appeal lodged by the applicant, the Federal Supreme Court quashed the judgment of the Cantonal Appeals Board and ordered it to reassess the applicant's case under Article 5 § 1 of Annex I of the Agreement on the Free Movement of Persons between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other hand, of 30 April 2002 (hereafter "the AFMP"; see paragraph 22 below).

16. In December 2006 a new criminal charge was brought against the applicant for sexual acts with persons incapable of judgment or resistance, an offence under Article 191 of the Swiss Criminal Code (see paragraph 24 below). On 9 February 2007 the public prosecutor of the Canton of Geneva, however, ordered the discontinuation of the criminal proceedings. He ruled that although the applicant's behaviour towards the woman who had made the accusation against him had been inappropriate, it had not been criminal. Although the woman had been inebriated, she had not been in such a state of intoxication as to be incapable of resistance. Furthermore, the applicant had immediately stopped touching her when she had expressed her refusal, and he had left her home.

17. On 14 February 2007 the Cantonal Appeal Commission reassessed the applicant's appeal under the AFMP and again dismissed it. It ruled that the refusal of the residence permit and the applicant's expulsion from Swiss territory had been justified on the ground of public safety, in accordance with Article 5 § 1 of Annex I of the AFMP, and were proportionate to the aim pursued. It held, in particular, that the fact that a criminal charge had been brought against the applicant in 2006 proved that he posed a risk of recidivism and was therefore still a threat to public safety. The applicant appealed against this decision to the Federal Supreme Court.

18. On 25 June 2007 the Federal Supreme Court upheld the decision of the Cantonal Appeal Commission. It ruled that the applicant's behaviour in 2006 had called into question whether he was fully aware of the severity of the acts he had been sentenced for in 2001 and the effectiveness of the psychiatric treatment that he had received until the end of 2006. It held that the writ of *nolle prosequi* did not provide a basis for concluding that the applicant was no longer a threat to public safety. By contrast, the events in 2006 showed that the applicant still had difficulties controlling his sexual instincts in the presence of women who were in a situation in which they were not able to defend themselves, and that there was therefore a risk of recidivism. The Federal Supreme Court further held that his expulsion was

proportionate under Article 8 of the Convention. It established that after his release from prison in December 2002, the applicant had been able to stay in Switzerland only because he had married a Swiss citizen in April 2003. It had learned from the hearings before the cantonal authorities that his wife, who had been informed about the applicant's situation since the beginning of their relationship, had hesitated to settle in Switzerland. Only two years after their wedding, had she left her job in Germany and come to live with the applicant. Furthermore, there was no indication that she wanted to stay in Switzerland in the long term. With regard to the applicant's personal life, the Federal Supreme Court noted that having arrived in Switzerland at the age of twenty-seven, he had always worked as a chauffeur but was neither professionally nor socially particularly well integrated. In the light of the seriousness of the crimes committed and the established risk of recidivism, the applicant's interest in remaining in Switzerland did not outweigh the State's interest in expelling him.

19. On 8 February 2008 the applicant left Swiss territory.

20. Upon request, the applicant informed this Court by letters of 17 June and 8 July 2013 that he was living with his second wife in Gaillard, France, where he had been granted a residence permit. Despite his requests, the Swiss authorities had refused to allow him to re-enter Switzerland.

21. On 14 August 2013 the Government made the following observations on the above-mentioned letters. The entry ban was still in force and the applicant could therefore not freely return to Switzerland. However, he retained the possibility to apply for permission to enter Switzerland as a tourist or even to request reconsideration of the entry ban. In July 2007, one month after the final decision of the Federal Supreme Court, the applicant – who at that time was probably still living in Switzerland – had unsuccessfully applied to the authorities of the Canton of Geneva for permission to return to Switzerland. In 2008 he had further applied for a Swiss work permit. The cantonal authorities in Geneva had however dismissed his request because of the entry ban in force. The applicant had not submitted any further requests to the Swiss authorities. The Government also informed the Court that on 10 January 2012 the applicant had received a new sentence in Switzerland for entering Swiss territory without the necessary authorisation and without a valid passport, and for riding a motorbike under the influence of alcohol without having his driving licence with him. From those proceedings it transpired that the applicant had already been sentenced for illegally entering and working in Switzerland on 5 May 2009, and that he had an adult son living in Peru.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

22. Articles 3 and 5 of Annex I of the AFMP (see paragraph 15 above) read as follows:

Article 3 – Members of the family

"1. A person who has the right of residence and is a national of a Contracting Party is entitled to be joined by the members of his family. An employed person must possess housing for his family which is regarded as of normal standard for national employed persons in the region where he is employed, but this provision may not lead to discrimination between national employed persons and employed persons from the other Contracting Party.

2. The following shall be regarded as members of the family, whatever their nationality:

a. his spouse and their relatives in the descending line who are under the age of 21 or are dependent;

..."

Article 5 – Public order

"1. The rights granted under the provisions of this Agreement may be restricted only by means of measures which are justified on grounds of public order, public security or public health.

..."

23. The Foreign Nationals Act of 16 March 1931, as in force at the relevant time, reads as follows:

Section 10

"1. A foreign national cannot be expelled from Switzerland or from a Canton except for one of the following reasons:

a. he or she has been convicted by a judicial authority for a crime or felony;

b. his or her behaviour, in its entirety, or his acts show an unwillingness to adapt to the order established in the country that offers him hospitality or if he is not capable of so adapting;

...

4. The present law does not concern the expulsion, as provided by the Constitution, of a foreign national who represents a threat to public security and order in Switzerland or expulsion ordered by a criminal court."

24. The Swiss Criminal Code of 21 December 1937, as in force at the relevant time, reads as follows:

Article 189
Offences against sexual liberty and honour /Indecent assault

"1. Any person who uses threats, force or psychological pressure on another person or makes that other person incapable of resistance in order to compel him or her to

tolerate a sexual act similar to intercourse or any other sexual act is liable to a custodial sentence not exceeding ten years or to a monetary penalty.

..."

Article 190 - Rape

"1. Any person who forces a person of the female sex by threats or violence, psychological pressure or by being made incapable of resistance to submit to sexual intercourse is liable to a custodial sentence of from one to ten years.

..."

Article 191
Sexual acts with persons incapable of judgment or resistance

"Any person who, in the knowledge that another person is incapable of judgment or resistance, has sexual intercourse with, or commits an act similar to sexual intercourse or any other sexual act on that person is liable to a custodial sentence not exceeding ten years or to a monetary penalty."

Article 193
Exploitation of a person in a position of need or dependency

"1. Any person who induces another to commit or submit to a sexual act by exploiting a position of need or a dependent relationship based on employment or another dependent relationship is liable to a custodial sentence not exceeding three years or to a monetary penalty."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the refusal of the Swiss authorities to grant him a residence permit and the decision to expel him were in breach of Article 8 of the Convention, which 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 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."

26. The Government contested that argument.

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The applicant

28. The applicant claimed that the Swiss authorities had not complied with their obligations, inherent in Article 8 of the Convention, to allow him to reside in Switzerland, thereby enabling him to enjoy family and private life in that country. He submitted that his personal interests in remaining in Switzerland outweighed the State's interest in securing public order and safety, and that his expulsion for an undetermined period of time was a disproportionate measure under Article 8 of the Convention. He alleged that the facts of his case were comparable to those in *Emre v. Switzerland* (no. 42034/04, 22 May 2008) because he too had been living in Switzerland for a long time, had established strong social and professional ties to that country and no longer had ties with his home country, Peru. In addition, he was enjoying family life in Switzerland since he had been residing there with his second wife between 2005 and 2008, and several of his brothers and sisters were living in the respondent State. Furthermore, by contrast to *Emre* (cited above), he had been sentenced only once.

29. The applicant expressed the view that the criminal charge brought against him in 2006 should not have been taken into account by the Swiss authorities when assessing whether he constituted a risk to public safety because the criminal proceedings had ended in a *nolle prosequi* and he had been declared innocent. He added that the domestic authorities and the Government had given too much weight to his conviction and the criminal charges brought against him, while disregarding all other elements. He maintained that his expulsion from Switzerland had not been necessary in a democratic society under Article 8 § 2 of the Convention.

30. Lastly, he claimed that the Government's argument – that the immigration measures taken did not have a great impact on his family and private life because he was able, owing to the German citizenship of his wife, to resettle in a country of the European Union close to the Swiss border (see paragraph 34 below) – was not relevant when assessing whether the interference with his rights protected under Article 8 of the Convention was proportionate. In this regard, the only relevant questions were the

strength of his ties to Switzerland and whether he still maintained social, professional and family ties with his country of origin, Peru.

b) The Government

31. The Government reiterated that the refusal of the residence permit and the expulsion order against the applicant were justified measures under Article 8 of the Convention. They submitted that the circumstances which had led to the applicant's conviction in 2001 were so serious that the immigration measures had been necessary in a democratic society in order to preserve public order and safety. They also considered that the applicant had shown neither remorse nor the necessary respect towards the victim during the criminal proceedings.

32. The Government acknowledged that after his release on parole, the applicant had made efforts to reintegrate into society and to take control of his life. He had regularly attended interviews with the cantonal authorities, which attested to his willingness to collaborate, he had continued his psychiatric treatment and had paid the victim compensation as ordered in the criminal judgment, and he had found a job as a chauffeur. However, he had not proven that his behaviour had changed in the long term. In the Government's view, the new charge brought against him in 2006 weighed heavily, especially as it related again to offences against the sexual integrity of persons incapable of resistance and showed that, despite his psychiatric treatment, the applicant still had difficulties in controlling his sexual behaviour towards women in vulnerable situations. Although the public prosecutor had discontinued the criminal investigations, those facts could be taken into account as they had either been recognised by the applicant himself or established by evidence. In the light of those circumstances, the Government concluded that the applicant was still a threat to public safety in Switzerland.

33. The Government further submitted that after the divorce from his first wife in 1999, the applicant had only been able to stay in Switzerland until 2002 because of his imprisonment, and subsequently owing to his second marriage to a Swiss citizen and the interim relief granted during the domestic proceedings. Therefore, also given the applicant's unsettled residence status in Switzerland for many years, the refusal of the residence permit and the expulsion order were proportionate.

34. Concerning the applicant's family life, the Government maintained that his wife had been informed about the applicant's conviction and uncertain residence status in Switzerland since the beginning of their relationship. Therefore, the couple had always been aware that the authorities might impede their ability to establish family life on Swiss territory. Nonetheless, in 2005 the applicant's wife had left her job in Germany and moved to Geneva. Furthermore, the refusal of the applicant's residence permit for Switzerland had little impact on his relationship with

his brothers and sisters or his social life. Owing to his wife's German nationality, the couple could resettle in any country of the European Union close to the Swiss border, where they could maintain contact with persons in Switzerland. In addition, there was nothing to prevent the applicant from applying for a tourist visa, for example, in order to travel to Switzerland. Lastly, the Government considered that the applicant could also easily establish a life in his home country, Peru, where he had grown up and where his mother was living.

35. In view of all the interests at stake, the Government were of the view that the State's interests in safeguarding public order and safety clearly outweighed the applicant's personal interests in remaining in Switzerland. Therefore, the expulsion order and the refusal of the residence permit were proportionate measures under Article 8 of the Convention and necessary in a democratic society.

2. The Court's assessment

a) General principles

36. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien 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 *Dalia v. France*, 19 February 1998, § 52, *Reports* 1998-I; *Mehemi v. France*, 26 September 1997, § 34, *Reports* 1997-VI; *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

37. The Court observes in this context that not all migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). It must therefore be accepted that the totality of social ties between settled migrants and the

community in which they are living constitute part of the concept of "private life" within the meaning of Article 8. An expulsion of a settled migrant can therefore constitute an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see *Üner v. the Netherlands*, no. 46410/99, § 59, 5 July 2005).

38. In order to assess whether an expulsion order and the refusal of a residence permit were necessary in a democratic society and proportionate to the legitimate aim pursued under Article 8 of the Convention, the Court has set out the relevant criteria in its case-law (see *Üner*, cited above, § 56; *Maslov v. Austria* [GC], no. 1638/03, §§ 68-76, ECHR 2008; and *Emre v. Switzerland*, no. 42034/04, §§ 65-71, 22 May 2008). In *Üner*, the Court has summarised those criteria as follows:

– 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 from the marriage, and if so, their age;

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;

– 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.

39. The Court has further consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see *Slivenko and Others*, cited above, § 113, and *Boultif* cited above). The exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly and the need for them in a given case must be convincingly established (see *Société Colas Est and Others v. France*, no. 37971/97, § 47, ECHR 2002-III).

b) Application of the above principles in the instant case

i. Interference with the rights established in Article 8 of the onvention

40. Between 1992 and 2008 – for more than fifteen years – the applicant resided in Switzerland, where he worked and lived with his first and, for the past three years, his second wife, both of whom are Swiss citizens. He also has brothers and sisters who live there. The Court has therefore no reason to doubt that the applicant has established social, professional and family ties in the respondent State. The immigration measures taken by the domestic authorities therefore clearly interfered with his rights under Article 8 of the Convention. This has also been acknowledged by the Swiss Government.

ii. Justification of the interference

41. The Court has no difficulty in accepting that the interference with the applicant's right to respect for private and family life was based on domestic law. The immigration measures taken by the Swiss authorities were based on the relevant provisions of the Foreign Nationals Act as well as the AFMP (see paragraphs 22 and 23 above).

42. The Court also considers that the interference with the applicant's right to respect for his private and family life was in pursuit of legitimate aims provided for in Article 8 § 2 of the Convention, that is to say, in the interest of public safety and the prevention of disorder or crime.

43. The current case therefore hinges on the question whether the expulsion order against the applicant and the refusal of his residence permit were necessary in a democratic society and proportionate to the legitimate aim pursued. In order to assess whether the respondent State has struck a fair balance between the applicant's interests and its own interests in safeguarding public safety, the Court will apply the criteria established in its case-law (see paragraph 38 above).

44. In this regard, the Court considers that the applicant's conviction in 2001 for offences against the sexual integrity of persons incapable of resistance was of a serious nature. In its judgment the Criminal Court of Cassation held that the applicant was guilty of gross sexual misconduct and that his behaviour towards the victim during the criminal proceedings had been appalling. The punishment was accordingly severe.

45. With regard to the duration of the applicant's stay in Switzerland, the Court holds that fifteen years was certainly a long enough period to enable the applicant to establish strong ties with Switzerland, especially because he was working there and lived with his first and subsequently second wife of Swiss nationality. However, the Court cannot overlook the fact that the applicant spent some of those years in prison and that his residence status had remained unsettled since October 2002. The Court is therefore not

willing to attribute the same weight to the applicant's duration of stay in Switzerland as it would had he lived there with a valid residence permit throughout that period. In the light of his conviction for a serious crime, the applicant should not have been entirely unprepared for the final endorsement of the expulsion order and the refusal of his residence permit by the Federal Supreme Court in 2007.

46. Regarding the assessment of the applicant's conduct after the commission of the offence, the Court holds that all the relevant facts at stake have to be taken into account. On the one hand, the applicant generally made considerable efforts to improve his behaviour after his release on parole in December 2002. He collaborated with the domestic authorities, received psychiatric treatment and continued working. On the other hand, although the criminal proceedings in 2006 were discontinued by order of the public prosecutor, the facts that led to those criminal proceedings are nevertheless a matter of concern to the Court. The charges were of a similar nature to those for which the applicant had been convicted in 2001 and the criminal charge against him in 1995. Furthermore, the public prosecutor described the applicant's behaviour towards the inebriated woman as not criminal but certainly inappropriate. In addition, information received from the Government this year further revealed that the applicant had been sentenced twice for illegal entry into Switzerland since his expulsion in 2008. The Court therefore concludes that although the applicant has shown willingness to improve his behaviour, there is still a certain risk of recidivism.

47. With regard to the nationalities of the persons involved and the applicant's family life, the Court notes that the applicant's wife, who has dual citizenship of Germany and Switzerland, had been informed about his criminal record and impending expulsion from the respondent State since the beginning of their relationship. Moreover, until she moved to Switzerland in 2005, she had been living and working in Germany. The Court therefore considers that the couple took a conscious decision to settle in Switzerland rather than in Germany, despite the risk that they might not be able to remain there. Furthermore, after the final domestic decision in 2007, the couple, who had no children, were able to resettle together in France, close to the Swiss border. Owing to the German nationality of the applicant's wife and the AFMP (see paragraph 22 above), they never faced the risk of being separated from each other. In that respect, the fact that the applicant's wife had a nationality other than that of the respondent State distinguishes this case from others where the spouse of the person to be expelled had only the nationality of the expelling State (see, for example, *Boultif,* cited above, § 53). For the same reasons, the couple did not have to consider the difficulties the wife would encounter if they had to establish a family life in the applicant's home country, Peru. Their family life has therefore not been directly affected by the expulsion order.

48. Regarding the relationship between the applicant and his brothers and sisters in Switzerland, the Court notes that the central relationships of family life under Article 8 are those of husband and wife, and parent and child. Under certain circumstances the relationship between siblings also falls under the concept of family life, depending on the existence of close personal ties (see *Moustaquim v. Belgium*, 18 February 1991, § 36, Series A no. 193; *Marckx v. Belgium*, judgment of 13 June 1979, § 31, series A no. 31; and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII). In the present case, however, the Court is of the view that the applicant has not demonstrated that especially close ties with his brothers and sisters existed. The Court therefore considers that although the applicant's relationships with his siblings are covered by the private life aspect of Article 8 of the Convention, they can be maintained from a distance, particularly given that he was able to settle close to the Swiss border in France where his brothers and sisters could easily visit him (see, *mutatis mutandis, Shala v. Switzerland*, no. 52873/09, § 54, 15 November 2012).

49. The Court points out that the applicant arrived in Switzerland as an adult aged twenty-seven. Unlike in *Emre* (cited above), he spent his childhood in his home country, Peru, where he received school education. Furthermore, his mother still lives there and apparently also his adult son from a former relationship. While the Court is prepared to accept that the applicant's ties to his country of origin might have weakened after all the years spent in Switzerland, it is of the view that the applicant would have retained some social and cultural, including linguistic, ties as well as family ties.

50. Lastly, in order to assess the proportionality of the impugned measures the Court must also take into account that the expulsion order against the applicant was pronounced by the domestic authorities for an indefinite duration. In its case-law the Court has repeatedly held that the permanent nature of an exclusion order was a very intrusive measure in a person's rights under Article 8 of the Convention and that, based on the particular facts of each case, a limited duration of such a measure was usually more proportionate (see *Emre*, cited above, § 85, and the case-law referred to therein). The Court however also notes that the Government have emphasised that the applicant could always apply for authorisation to enter Switzerland as a tourist or request the domestic authorities to reconsider the decision regarding the entry ban. The applicant has not made use of those possibilities. He only applied for permission to return to Switzerland in 2007, a month after the entry ban had entered into force, and for a work permit in 2008-2009, which the cantonal authorities refused on account of the expulsion order. The Court therefore observes that although the entry ban was for an unlimited period of time, the applicant was not completely prevented from entering Switzerland with the relevant authorisation. Furthermore, the entry ban might eventually be lifted entirely if the

applicant so requests (see, *mutatis mutandis, Kissiwa Koffi v. Switzerland*, no. 38005/07, § 70, 15 November 2012). The applicant now lives close to the Swiss border and his social ties with Switzerland are therefore not seriously disrupted by distance.

51. In view of the foregoing considerations, the Court finds that the domestic authorities have not overstepped their margin of appreciation when deciding in the applicant's case. The Court therefore holds that a fair balance was struck in that the refusal of the applicant's residence permit and his expulsion from Switzerland were proportionate to the aims pursued and could therefore be regarded as necessary in a democratic society. There has accordingly been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

52. The applicant further complained of a violation of the presumption of innocence, as provided for in Article 6 § 2 of the Convention. He claimed that the domestic authorities, when deciding on the immigration measures against him, had considered that his behaviour after his conviction in 2001 had not been irreproachable even though the criminal charge brought against him in 2006 had been withdrawn and he had been declared innocent. Therefore, the refusal of the residence permit and the expulsion from Swiss territory had breached his rights not only under Article 8 but also under Article 6 § 2 of the Convention.

53. The Court reiterates in this regard that decisions regarding the entry, stay and deportation of aliens do in principle not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention (see *Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

54. With regard to the presumption of innocence as provided in Article 6 § 2 of the Convention, the Court has nevertheless also repeatedly held that the general aim is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged (see *Allen v. the United Kingdom* [GC], no. 25424/09 [GC], § 94, 12 July 2013). In the present case, however, nothing indicates that the domestic authorities regarded the applicant as guilty of the offence. As established by the Government (see paragraph 32 above), the facts that led to the charge against the applicant in 2006 were taken into account by the domestic authorities only in so far as they had either been recognised by the applicant himself or established by evidence. In this regard, the Court reiterates that to rely on elements from other proceedings is as such not contrary to Article 6 § 2 of the Convention (see *Matos Dinis*, no. 61213/08 [dec.], §§ 37-39; *Jakumas v. Lithuania*, no. 6924/02, §§ 56-57, 18 July 2006 et al.).

55. Consequently, it follows that this complaint is manifestly ill-founded with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaint concerning Article 8 admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has not been a violation of Article 8 of the Convention.

Done in English, and notified in writing on 26 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

G.R.A.
S.H.N.

PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

I respectfully dissent with regard to the finding of no violation of Article 8 for the following reasons.

Firstly, the Criminal Court for the district of Rolle, by a judgment of 5 July 2000, found the applicant guilty of a serious offence of a sexual nature, sentenced him to twenty months' imprisonment and ordered his expulsion from Swiss territory for ten years subject to a five-year suspension (*sursis*). The court did not mince its words when referring to the applicant as an "animal on heat" ("*animal en rut*"), using language that one would expect to hear in the street rather than in a reasoned act of adjudication. But when it came to justifying the expulsion order, the sole argument given was as follows: "The need for an expulsion measure is self-evident. The clemency shown in such matters in the case-law requires that [the expulsion] be suspended" ("*Une mesure d'expulsion s'impose à l'evidence. La clémence de la jurisprudence en la matière impose le sursis*"). The Court of Cassation of the Canton of Vaud confirmed, by a judgment of 15 August 2000, the conviction and sentence, but on an appeal on grounds of nullity (*pourvoi en nullité*) by the public prosecutor, the Court of Cassation of the Federal Supreme Court annulled, by a judgment of 14 June 2001, the impugned judgment of the Court of Cassation of the Canton of Vaud and remitted the case for a new judgment. By a new judgment of the Cantonal Court of Vaud of 24 September 2001, the applicant was found guilty of the same offence and sentenced to three years' imprisonment. The expulsion order banning him from Swiss territory for the subsequent period of ten years was maintained, subject to a suspension on condition that his behaviour remained irreproachable for five years. By so finding, the first Criminal Court judgment did not provide any plausible legal ground for the expulsion order other than that it was "self-evident"! A single word, "clemency", was invoked to determine the suspension of the expulsion. No reference whatsoever was made to the factual and legal requirements for the imposition of such a measure.

Secondly, the Department of Justice, Police and Public Security of the Canton of Geneva ordered the applicant's expulsion for an unlimited period of time on 28 October 2002 and he was denied a residence permit by the Office for Migration of the Canton of Geneva on 7 December 2004. Both decisions were confirmed by a decision of the Cantonal Appeals Board of 19 May 2005, which was quashed by the Federal Supreme Court's judgment of 9 January 2006. After reassessing the situation, the same Cantonal Appeals Board reaffirmed, by a decision of 14 February 2007, its previous decision dismissing the applicant's appeal, with the argument that the applicant had in the meantime been charged with another criminal offence of a sexual nature, thus proving the existence of a threat to public

safety. The Federal Supreme Court explicitly upheld this understanding by a judgment of 25 June 2007. Yet the public prosecutor of Geneva had, on 9 February 2007, decided to discontinue the criminal proceedings for lack of evidence of any criminal conduct. In other words, the Federal Supreme Court based a presumption of a threat to public safety on a decision to discontinue criminal proceedings. In fact, the Federal Supreme Court invoked not one, but two decisions discontinuing criminal proceedings against the applicant, one referring to a complaint of 2006 and another referring to a much older complaint dating back to 1995. In both cases, the applicant was not even formally accused of any criminal offence, but that was enough for the Federal Supreme Court to ground a presumption of risk to public safety.

Thirdly, the sole sexual offence for which the applicant has ever been convicted and sentenced was committed on 21 November 1997 and after that he was never again convicted, either in Switzerland or in France, of any similar criminal offence. Almost 16 years have passed since those facts and the European Court of Human Rights ("the Court") has not been presented with any evidence of a threat of reoffending. The applicant had no criminal record when he committed the above-mentioned offence.

Fourthly, the applicant entered Switzerland in 1992 and was obliged to leave Switzerland on 8 February 2008. As the Federal Supreme Court acknowledged, the applicant fully complied with the conditions of parole after having served his prison sentence in December 2002. He followed psychiatric treatment and continued working as a chauffeur.

Fifthly, in spite of two denials of permission to return to Switzerland in 2007 and 2008, the applicant returned unlawfully, as on 5 May 2009 and 10 January 2012 he was convicted for illegal entry, among other minor offences. On the first date, he was found to be working illegally in Switzerland. It is clear that the applicant does maintain an interest in returning to Switzerland and, if possible, working there.

Finally, all the applicant's brothers and sisters, with whom he used to have regular contact, live in different Swiss cantons (see the testimony of the applicant's wife of 12 April 2005, attached to the file). His wife is a Swiss citizen and had lived in Switzerland with the applicant prior to February 2008.

In view of these facts, the expulsion order imposed on the applicant is disproportionate. The administrative order of expulsion for an unlimited period of time superseded a criminal expulsion order which was limited in time and had been suspended. In practical terms, the administrative authorities "punished" the applicant with a penalty that the criminal courts saw no need to apply. Moreover, it is to be stressed that the Federal Supreme Court inferred a threat to public safety from legally irrelevant facts. The discontinuance of the criminal proceedings initiated in 1995 and 2006 was not based on a procedural ground, but on the substantive ground

of a lack of criminal characterisation of the facts imputed to the applicant. A threat to public safety was ascertained on the basis of two decisions dismissing criminal charges for a lack of criminal characterisation of the facts. The arbitrariness of this presumption of risk or threat to public safety is patent.

With the benefit of hindsight, the arbitrariness of the presumption becomes even clearer. The best evidence of a lack of any threat to public safety is the fact that the applicant has not been convicted of any similar criminal offences for the last 16 years. But even without the benefit of hindsight, the plain fact that the only criminal offence for which the applicant had been convicted occurred in 1997 should have been enough for the Federal Supreme Court to find ten years later, in 2007, that there was no "current threat" ("*menace actuelle*") to public safety. On the contrary, the Federal Supreme Court attached extremely severe legal consequences, namely the applicant's expulsion, and not temporarily but for an unlimited period of time, to facts that had been considered legally irrelevant by the competent public prosecutors.

Furthermore, the "unlimited" nature of the administrative expulsion order aggravates the misapplication of national law. The Court has held in clear terms that unlimited expulsion orders, such as that in the present case, breach Article 8 of the European Convention on Human Rights (see *Emre v. Switzerland*, no. 42034/04, § 85, 22 May 2008). The same principle should have been applied in this case. If not for any other reason, this alone would suffice to find a breach of Article 8 in the applicant's case.