CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## FIFTH SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 14474/03
by Hamit CÖMERT
against Denmark

The European Court of Human Rights (Fifth Section), sitting on 10 April 2006 as a Chamber composed of:

Mrs S. BOTOUCHAROVA, *President*,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 10 January 2003,

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

Having deliberated, decides as follows:

## THE FACTS

The applicant, Mr Hamit Cömert, is a Turkish national who was born in 1967 and lives in Konya. He is represented before the Court by Mr Haci Ali Özhan, a lawyer practising in Ankara. The Government are represented by their Agent, Mr Peter Taksøe-Jensen, of the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, of the Ministry of Justice.

## A. The circumstances of the case

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

The applicant is a Turkish national, born in 1967. He entered Denmark in 1980, when he was thirteen years old.

Four years later, in Turkey he married a Turkish woman who remained in their country of origin. There, the spouses had a daughter in 1987 and a son in 1989.

In 1992, the applicant's wife and his two children entered Denmark under the rules regarding family unification. In 1994 the spouses had another daughter.

On 19 April 2002 the applicant was detained on remand, charged with sexual offences allegedly having been committed throughout the past four years against his eldest daughter as from the time when she was eleven years old.

An indictment of 6 June 2002 was submitted to the Copenhagen City Court (*Københavns Byret*), before which the applicant, the daughter and three witnesses were heard, including a teacher in whom the daughter had confided, and a police officer who worked at the institution where the daughter had been placed**.** The applicant pleaded not guilty and explained among other things that he had commenced sleeping on a mattress in his daughter's bedroom some years ago, approximately every 14 days, usually in connection with him having come home from a late night out. He did not wish to wake up his wife and his youngest daughter, who slept in the spouses' bedroom. Also, he was suffering from backache, and it did him good to sleep on a flat surface. In response to the fact that a forensic examination of the sheets in his daughter's bedroom revealed sperm cells, the applicant explained that he had slept with his wife in the daughter's bedroom.

Before the Court the daughter explained among other things that the applicant had started sleeping with her when she was eleven years old in connection with her mother having gone to Turkey for a funeral.

The applicant's wife was called to the witness stand but declined to give testimony against her husband. She was therefore exempted in accordance with the Administration of Justice Act (*Retsplejeloven*).

By judgment of 11 July 2002, pursuant to sections 232; 210, subsection 3 taken together with subsection 1; and 222, subsection 2 taken together with subsection 1; section 224; and partly section 21 of the Penal Code (*Straffeloven*) the applicant was convicted of having sexually abused his daughter by resorting to violence and threats during the period from the beginning of 1998 until April 2002

The Court found it established that the sexual abuse involved masturbation, oral sex, and attempts of intercourse, the latter having failed

only because the daughter had expressed pain and because it had been physically impossible for the applicant.

The applicant was also convicted pursuant to section 266 of the Penal Code for having uttered threats against his daughter's life in that, after the sexual abuse had been reported to the police, he sent her a Short Message Service (SMS) in which he wrote: "you are superfluous in Denmark, if I see you on the street, I will kill you. This I promise". Also, it was found established that he had sent her an SMS in which he threatened to come and "fuck her" if she did not call him within 10 minutes.

The applicant was sentenced to 3 years' imprisonment. Furthermore, pursuant to section 22 (ii) and (vi) of the Aliens Act (*Udlændingeloven*) he was expelled from Denmark forever. As to the latter the court noted on the one hand that the applicant had entered Denmark when he was 13 years old, that he had lived there for 21 years, and that his father and three siblings also lived in Denmark. On the other hand the court noted the seriousness and the nature of the crime, that the applicant's mother and five siblings lived in Turkey, that the applicant had maintained strong contact with them and that almost every year he had spent his vacation in Turkey.

On 31 October 2002, on appeal, the judgment was upheld by the High Court of Eastern Denmark *(Østre Landsret)*, before which the applicant's wife agreed to testify. She confirmed that in March 1998 she had been in Turkey for sixteen days to participate in a funeral, and stated among other things that she had initiated a divorce from the applicant.

Leave to appeal against the judgment to the Supreme Court (*Højesteret*) was refused by the Leave to Appeal Board (*Procesbevillingsnævnet*) on 10 January 2003.

By judgment of 3 February 2003 the Copenhagen City Court granted the applicant's wife a divorce and awarded her custody over the three children. The applicant did not request access to any of his children.

On 28 January 2004 the applicant was released from prison and expelled to Turkey.

The applicant's father and brother who lived in Denmark also returned to Turkey, and the applicant's family in Turkey thus consisted of his parents and five siblings.

In the summer of 2004 the applicant's wife went to Turkey to obtain a divorce from the applicant also according to Turkish law. It appears that the applicant objected thereto and that the proceedings thereon are still pending.

During that summer the applicant's two youngest children visited him and his family in Turkey.

During the summer of 2005 the applicant's son stayed with him in Turkey.

## B. Relevant domestic law

The Aliens Act provided in so far as relevant:

### Section 22

"An alien who has lawfully lived in Denmark for more than the last seven years, and an alien issued with a residence permit under sections 7or 8 may be expelled if:

...

(ii) the alien, for several criminal counts, is sentenced to minimum 2 years' imprisonment or other criminal sanction involving or allowing deprivation of liberty in respect of an offence that would have resulted in a punishment of this duration;

...

(vi) the alien is sentenced, pursuant to provisions in Parts XII and XIII of the Penal Code or pursuant to section 119(1) and (2), 180, 181, 183(1) and (2), 183 a, 186(1), 187(1), 192 a, section 210(1) and (3), cf. subsection (1), section 216, 222, sections 224 and 225, cf. sections 216 and 222, section 237, 245, 245 a, 246, 252(2), 261(2), section 276, cf. section 286, sections 278 to 283, cf. section 286, section 288 or 290(2) of the Penal Code, to imprisonment or other criminal sanction involving or allowing deprivation of liberty in respect of an offence that would have resulted in a punishment of this nature.

### Section 26:

1. "In deciding on expulsion, regard must be had to the question whether expulsion must be assumed to be particularly burdensome, in particular because of:

(i) the alien's ties with the Danish community, including whether the alien came to Denmark in his childhood or tender years;

(ii) the duration of the alien's stay in Denmark;

(iii) the alien's age, health, and other personal circumstances;

(iv) the alien's ties with persons living in Denmark;

(v) the consequences of the expulsion for the alien's close relatives livening in Denmark;

(vi) the alien's slight or non-existent ties with his country of origin or any other country in which he may be expected to take up residence;

(vii) the risk that, in cases other that those mentioned in section 7(1) and (2), the alien will be ill-treated in his country of origin or any other country in which he may be expected to take up residence.

2. An alien may be expelled pursuant to section 22(iv) to (vi) unless the circumstances mentioned in subsection 1 above constitute a decisive argument against doing so."

## COMPLAINTS

1. The applicant complained that his expulsion to Turkey was in breach of Article 8 of the Convention.

2. On 8 July 2005 the applicant also invoked Articles 6, 17 and 18 of the Convention and Articles 2 and 5 of Protocol No. 7 to the Convention.

## THE LAW

1. The applicant maintained that he had been the victim of a violation of Article 8 of the Convention, which provides:

> "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."

The Government submitted that the expulsion could hardly constitute an interference under Article 8 § 1 since it was the applicant himself, who by committing the crimes had destroyed his family life.

In any event they found that the expulsion was "in accordance with the law", pursued a "legitimate aim" and was necessary in a democratic society.

The Government recalled that the applicant had abused his daughter sexually from the time when she was only eleven years old until she was fourteen and that the crimes had escalated over the years. Thus, they were of very serious nature and deemed to have extremely damaging effects on his daughter's life.

Moreover, recalling that Denmark has a comparatively low level of punitive measures, the sentence imposed on the applicant i.e. three years' imprisonment was indeed severe – and equal for example to a usual sentence to be metered out for drug dealing relating to 500 grams of heroine. Thus, the different levels of metering out sentences for various crimes in the Member States had to be taken into account in the assessment of the severity of the sentence.

The Government also pointed out that the applicant has maintained very strong ties with his country of origin and that as a result of his crime his ties with Denmark has weakened considerably.

Finally, they note that the applicant chose not to request access to his children. Nevertheless, the fact that his two youngest children have already visited him in Turkey illustrate that contact can be maintained, should their mother deem it desirable and safe.

The applicant found that he was convicted wrongly and that the expulsion order was disproportionate, notably since it hindered him from maintaining a family life with his two youngest children. He needed to take decisions about their upbringing, education and care. In his view an expulsion would only be justified if he had attempted to commit a crime again.

He alleged that the mother of the children forbade that their daughter, born in 1994, visited him in Turkey during the summer of 2005.

Moreover, he submitted that his ties with Denmark were very strong; he had passed his childhood and youth there, he spoke Danish and he had established many friendships there. He had also suffered a financial loss due to the expulsion order, among other things his monthly unemployment benefit.

Finally, the applicant maintained that his connection to Turkey was limited to vacation purposes; he had no job or income there.

The Court recalls that no right for an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see *inter alia* the *Moustaquim v. Belgium* judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

The applicant came to Denmark in 1980, when he was 13 years old. At the time of the expulsion order, the applicant's wife, three children, father and three of his siblings lived there. Accordingly, in the Court's view the expulsion order interfered with the applicant's family life within the meaning of Article 8 of the Convention.

Such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that are legitimate under paragraph 2 of Article 8 and can be regarded as "necessary in a democratic society" (see, among other authorities, *Bronda v. Italy*, judgment of 9 June 1998, *Reports* 1998-IV, § 52).

It is not disputed that the interference was prescribed by law and pursued a legitimate aim, namely the interest of public safety, the prevention of disorder and crime, and the protection of the rights and freedoms of others within the meaning of Article 8 § 2. The Court endorses this assessment. What is in dispute between the parties is whether the interference was necessary in a democratic society.

The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences**.** However, their decisions in this field must be justified by a pressing social need and, in particular, they must be proportionate to the legitimate aim pursued (see for example

*Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Mehemi v. France*, judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; and *Boultif v. Switzerland,* no. 54273/00, § 46, ECHR 2001-IX).

Thus, in the present case, the Court's task consists in ascertaining whether the Danish courts struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other (see *Jakupovic v. Austria*, no. 36757/97, § 26, 6 February 2003; *Amrollahi v. Denmark*, no. 56811/00, § 34, 11 July 2002; and *Nwosu v. Denmark* (dec.), no. 50359/99, 10 July 2001).

The Court notes that despite the considerable time spent by him in Denmark, he entered Denmark at the age of thirteen and thus spent most of his childhood and youth in Turkey. His situation was therefore not comparable to that of a second generation immigrant. Moreover, he was well acquainted with the Turkish language and culture, and almost every year he spend his vacations in Turkey, where at the relevant time his mother and five of his siblings resided. Subsequently his father and a brother left Denmark and returned to Turkey.

During the criminal proceedings, the applicant's wife filed for a divorce, which was granted by a Copenhagen City Court judgment of 3 February 2003. In the summer of 2004 the ex-wife wife went to Turkey to obtain a divorce from the applicant also according to Turkish law. Although it appears that the applicant objected thereto and that the divorce proceedings are still pending in Turkey, within the meaning of Article 8 of the Convention the applicant's "family-life" can no longer relate to his ex-wife. The case therefore differs from those in which the main obstacle to expulsion is the difficulties for the spouses to stay together (see for example *Boultif v. Switzerland* and *Amrollahi v. Denmark*, cited above).

Therefore, within the meaning of Article 8 of the Convention the applicant's "family-life" relates solely to his children, who are also of Turkish origin. Presently, they are eighteen, sixteen and eleven years old. The two eldest children were born in Turkey and lived separated from their father until they were five and three years old, respectively. It will be recalled that in connection with the divorce proceedings in Denmark, on 3 February 2003 the Copenhagen City Court awarded the applicant's ex-wife custody over the children.

This leads the Court to recall that besides the negative obligation under Article 8 of the Convention to refrain from measures which cause family ties to rupture, a positive obligation also exists to ensure that family life between parents and children can continue after divorce (see e.g. *Cılız v. the Netherlands*, no. 29192/95, § 62, ECHR 2000-VIII; and *mutatis mutandis*, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 50).

In the present case, however, the applicant did not request that he be granted access to any of the children. Nevertheless, with the ex-wife's

consent, during the summer of 2004 the applicant saw his son and youngest daughter, and during the summer of 2005 his son stayed with him.

Thus, the expulsion of the applicant to Turkey has not so far prevented him from seeing his two youngest children, and there are no elements in the case which suggest that in the future he cannot continue to maintain a family life, at least with his son, who in any event comes of age in two years.

The Court bears in mind, however, that the order to expel the applicant was imposed after he had been convicted to a prison sentence of three years for having sexually abused his minor daughter by resorting to violence and threats. He had committed the crimes during four years, from the time when his oldest daughter was eleven years old until she was fourteen, and their seriousness escalated over the years. In addition, subsequent to the offences having been reported to the police he uttered threats against her life.

Accordingly, there can be no doubt that the expulsion order was based on a crime, which was not only serious, but also of such a nature that the applicant himself, by committing it, significantly injured his family life.

In these circumstances, the Court finds that the interference was supported by relevant and sufficient reasons, and was proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. As regards the applicant's complaints under Articles 6, 17 and 18 of the Convention and Articles 2 and 5 of Protocol No. 7 to the Convention, the applicant did not submit any facts or arguments as to why these provisions should have been violated other than those submitted in relation to the complaint under Article 8 of the Convention.

In the light of this and having regard to its finding above, the Court finds that the present case does not disclose any appearances of a violation of the provisions to which the applicant has also referred.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Claudia WESTERDIEK
Registrar

Snejana BOTOUCHAROVA
President