

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

FIFTH SECTION

DECISION

Application no. 66837/11
Hamze Mohamad EL-HABACH
against Germany

The European Court of Human Rights (Fifth Section), sitting on 22 January 2013 as a Committee composed of:

Ganna Yudkivska, *President,*
Angelika Nußberger,
André Potocki, *judges,*

and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 26 October 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Hamze Mohamad El-Habach, is a Lebanese national, who was born in 1980 and currently lives in Lebanon. He was represented before the Court by Mr T. Matani, a lawyer practising in Göttingen.

A. The circumstances of the case

1. General background

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

3. The applicant was born in Lebanon. He went to Germany with his parents and four brothers in April 1985, when he was five years old. He attended school in Germany, but did not obtain a leaving certificate. During his adult years, he only held temporary employment. According to expert opinion, the applicant suffers from a learning disability.

4. In 1990 the applicant obtained a residence permit which was last extended until 31 July 1999. On 12 August 1998 the applicant married Ms C., a German national, and was granted a fresh residence permit which was last extended until 4 November 2003. In 1999 and 2002 two children were born to the couple. The couple divorced in July 2004, the applicant, who does not hold parental authority over the children, kept in touch with them by letters and telephone.

5. Since mid-2004 the applicant lived with another German national, Ms K. On 29 November 2004 a daughter, N., was born to the couple.

6. On 17 January 2005 the applicant was convicted of having caused bodily harm in January 2004 by having repeatedly punched his victim in the face and sentenced to six months' imprisonment, suspended on probation. The victim, who sustained bruises, haematoma and three fissures to his eardrums, was subsequently unable to work for one week. On 18 July 2006 the applicant was convicted of assault causing grievous bodily harm for having, in November 2004, hit his victim several times on the head with a beer bottle, thus causing concussion and six lacerations to his head, and sentenced to a cumulative sentence of one year and six months' imprisonment, suspended on probation. On 18 July 2006 the applicant was further convicted of two more counts of causing grievous bodily harm committed on 26 May 2005 by having stabbed two victims into the torso with a knife, thus causing life-threatening injury to one of them, and sentenced to a cumulative prison sentence of four years and six months. He served his sentence from 13 October 2006 until his probationary release on 11 September 2009.

7. The applicant lived together with Ms K. and the child N. until his arrest. Following his release from prison, the applicant entered into a relationship with a new partner, Ms B., which ended in October 2009. From October 2009 until his deportation in July 2011 he lived again with Ms K. and their daughter N.

2. Expulsion proceedings

8. On 30 October 2003 the applicant requested the Municipal Authority of Göttingen (*Oberbürgermeister*) to extend his residence permit. The municipal authority suspended the proceedings pending the criminal proceedings against the applicant. On 11 January 2007 the municipality of Göttingen rejected the applicant's request and ordered his expulsion to Lebanon following the serving of his prison sentence.

9. On 9 May 2007 the Göttingen Administrative Court quashed the municipality's decision on the ground that the latter had failed to take into account fresh case-law by the Federal Administrative Court.

10. On 25 August 2008 the municipal authority, applying the relevant provision of the German Residency Act, issued a fresh expulsion order against the applicant and rejected his request for a residence permit. Relying on the criteria laid down by the Court in the case of *Üner v. the Netherlands* ([GC], no. 46410/99, ECHR 2006-XII), the authority considered that the applicant's expulsion was necessary having particular regard to the gravity of his criminal offences and to the danger of recidivism. The authority took into account that the applicant had entered Germany at a young age and that he attended school in Germany without, however, obtaining any school leaving certificate. As the applicant's parents did not speak German, it could be expected that the applicant spoke the language of his country of origin.

11. With regard to the applicant's criminal convictions the authority observed that the applicant had committed several acts of violence which weighed heavily against him. It noted, in particular, that the applicant, on 26 May 2005, while being on probation, stabbed his victim with a knife. The injury sustained by the victim had been life-threatening, even though the criminal court had conceded that it would not necessarily have caused the victim's death without medical treatment. The criminal court had further considered that the applicant suffered from an impulse control disorder which was aggravated by drug- and alcohol abuse and from slight brain atrophy.

12. With regard to his family situation, the authority considered that the relationship with his two older children born in 1998 and 2000 was rather loose. It further considered that the youngest daughter N. had already had to spend most of her young life without the applicant, as the latter served his prison sentence and could only be visited on an hourly basis. Under these circumstances, the children's welfare did not appear to be jeopardised by the applicant's expulsion. Under the case-law of the European Court of Human Rights (the authority referred to the case of *Üner v. the Netherlands*, cited above), it had to be assumed that young children were adaptable. In cases of this kind, the disruption of family life would not have the same impact as it would have had if the family had been living together for a much longer time.

13. The authority further noted that the applicant attended group therapy for violence prevention and had regular therapeutic sessions with a psychologist. However, according to the therapist's assessment, the applicant remained in need of constant psychological counselling.

14. The authority further took into account that the applicant had been convicted for the first time at the age of fourteen and had been admonished by the alien authority for the first time in 1994 and twice in 1995. He attended group therapy and underwent in-house treatment in a psychiatric

hospital in December 1999. Under these circumstances, it was clear that psychotherapy could not prevent the applicant from committing further criminal acts. While it was true that the applicant had not come into conflict with the law since having started to serve his prison sentence, it could be expected that inmates were less inclined to commit criminal offences because of the high degree of supervision inside the institution. The authority concluded that the risk of recidivism following the applicant's release from prison outweighed the circumstances militating in the applicant's favour, in particular his family situation.

15. On 30 March 2009 the Göttingen Administrative Court quashed the municipality's decision of 25 August 2008 and ordered the municipality to grant the applicant a residence permit. The administrative court confirmed that the gravity and nature of the criminal offences committed by the applicant weighed heavily against him. However, this factor was outweighed by several factors militating in the applicant's favour. The administrative court attached particular weight to the applicant's relationship to his three children and specifically to his youngest daughter N. The administrative court did not concur with the opinion that younger children tended to be less affected by the separation from a parent than older ones. On the contrary, it was impossible for younger children like N. to discern the difference between a temporary and a permanent separation. It followed that the child's wellbeing would be massively jeopardised by the applicant's expulsion. There was, furthermore, no realistic chance of entertaining the family relationship in Lebanon. It followed that the criteria militating in the applicant's favour outweighed the nature and gravity of the criminal offences he committed, thus excluding the possibility of his expulsion.

16. On 25 August 2009 the Lower Saxony Administrative Court of Appeal granted the municipality of Göttingen leave to appeal. On 11 August 2010, that same court quashed the administrative court's judgment and rejected the applicant's motion.

17. The administrative court of appeal considered, in particular, that the applicant's expulsion was justified under Article 8 § 2 of the Convention by a pressing social need. In observed that the applicant, even though he had entered Germany at the age of five, had not succeeded in integrating in an economic, social and legal way. Although he had received all of his schooling in Germany, he had not been able to attain any school leaving certificate or professional education. The fact that he primarily depended on social welfare had not been changed by the qualification acquired during his prison term. Taking into account his financial obligations towards his children, this situation was not likely to change in the foreseeable future.

18. It was furthermore decisive that the applicant had committed serious criminal offences and that there was no appearance of any fundamental change in his behaviour. It had to be considered in the applicant's favour

that he had been serving his first prison sentence, that his prison record indicated that he had been influenced in a positive way by the execution of his sentence, that he had reacted in an adequate way when having been attacked by another prison inmate and that he did not re-offend following his release. On the other hand, the applicant had already come into conflict with the law as a minor and continued to commit criminal offences, including causing serious bodily harm, from 1994 to 1999. After a period without criminal convictions he committed four offences of causing – mostly serious – bodily harm which were characterised by an increasing degree of violence. It follows that neither the applicant's age, nor probationary measures, nor the admonishments under immigration law or his marriage with a German national and the birth of his children had prevented him from committing increasingly serious criminal offences. The various therapeutic measures followed by the applicant had not prevented him from re-offending. Nor had the applicant succeeded in establishing stable social and family relationships. Both his marriage and the relationship with Ms B. had failed. The relationship with Ms K. had been interrupted and could only offer him a limited degree of stability, taking into account that Ms K. had, at least in the past, worked as a prostitute and consumed drugs.

19. Taking further into account that the criminal offences committed by the applicant were serious acts of violence capable of jeopardising his victims' life, the risk of recidivism did not have to be particularly high. It followed that there was sufficient risk of the applicant's re-offending which outweighed the applicant's private interest in remaining in Germany. While it could be expected that the applicant would encounter difficulties in establishing a livelihood in Lebanon, he had lived there until the age of five and understood the language. Furthermore, one of his bothers, who had been expelled himself and currently lived in Lebanon, could assist him by sharing his experiences and also in a financial way.

20. The court finally considered that the applicant's expulsion was compatible with Article 8 of the Convention. The court noted that the applicant had not established that he entertained other contacts with his two older children than by mail and telephone, which could be maintained in case of his expulsion. Conversely, he currently lived together with his youngest daughter N. and her mother, with whom he exercised joint parental authority over the child. As the mother and the child were both German nationals, they could not be expected to follow the applicant to Lebanon. It followed that the expulsion would lead to a suspension of the family relationship, which weighed particularly heavily for the five year old daughter N. Notwithstanding the possibility to maintain contact by telephone and mail, the applicant's absence, which would last several years, would seriously disturb the mutual relationship between the applicant and his child. However, it was acknowledged in the case-law of the European

Court of Human Rights that even serious disturbances of the enjoyment of family life could be outweighed by the public interest in preventing an alien from committing serious crimes on German territory. Referring to its considerations above, the court of appeal considered that the applicant could be expected to commit further serious offences. It had further to be taken into account that the applicant had the possibility of requesting the authority to set a time-limit to the exclusion order. The administrative court of appeal concluded that the authority had exercised its discretion in a lawful way.

21. On 10 February 2011 the administrative court of appeal refused to grant the applicant leave to appeal. That court considered, in particular, that the judgment of the administrative court of appeal was in line with the case-law of the European Court of Human Rights.

22. On 19 April 2011 the Federal Constitutional Court refused to admit the applicant's constitutional complaint under the relevant provisions of its Rules of Procedure without giving any further reasons. This decision was served on the applicant's counsel on 29 April 2011.

23. On 15 July 2011 the applicant presented himself at the Göttingen police station with a view to his deportation to Lebanon, where he has lived since then.

COMPLAINTS

24. The applicant complained under Article 8 of the Convention that his expulsion to Lebanon violated his right to respect for his private and family life. He further complained about a violation of Article 3 § 1 of the UN Convention on the Rights of the Child.

THE LAW

25. The applicant submitted that his deportation to Lebanon violated his right to respect for his family life under Article 8 of the Convention, which provides 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 applicant alleged, in particular, that his expulsion was disproportionate. The gravity of the criminal offences committed by him was not comparable to those examined by the Court in the *Üner* case (*Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006‑...). Furthermore, the domestic authorities had failed to take into account his good conduct in prison, which led to his probationary release, the fact that he had followed therapy and that he attempted to make amends by paying compensation to his victims. It was highly probable that the applicant would not commit any further criminal offences. This was illustrated by the fact that he did not attempt to avoid deportation, but presented himself at the police station on his own motion. The applicant further emphasised that he had entered Germany at the age of five and underwent all his schooling there.

27. Furthermore, the domestic decisions did not sufficiently take into account the protected interests of his three children and, in particular, of his youngest daughter N., who had already suffered from the separation during his prison term and who was dependent on his presence for her wellbeing. As the child's mother was not willing to follow the applicant to Lebanon because of cultural and social difficulties, the expulsion led to a separation of the family.

28. The Court considers that the applicant's expulsion interfered with the right to respect for both his private and his family life. It further observes that the applicant did not contest that the expulsion order was based on the relevant provisions of the German Residency Act.

29. It thus remains to be determined whether the interference was "necessary in a democratic society". The relevant criteria that the Court uses to assess whether an expulsion measure is necessary in a democratic society are the following (see *Üner cited above*, §§ 57 - 58; also compare *Maslov v. Austria* [GC], no. 1638/03, § 68, ECHR 2008):

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

- 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.

30. Turning to the circumstances of the instant case, the Court observes that the applicant was convicted in 2005 and 2006 of altogether four counts of having caused bodily harm. On 18 July 2006 he was *inter alia* found guilty of having stabbed two victims in the torso, thus causing a life-threatening injury to one of them. The Court further notes that the administrative court of appeal had emphasised that the victims of these offences could have suffered more serious consequences, and that one of them could have even died of the inflicted injuries if he had not received medical treatment. The Court concludes that the offences the applicant had been convicted of were of a very serious nature. The Court further observes that the applicant did not commit these offences as a juvenile (compare, *a contrario*, *Maslov*, cited above, § 75), but at the age of twenty-five. The Court further observes that it appears from the applicant's criminal record that he had been in conflict with the law from an early age and that the gravity of his criminal offences had increased with time. It furthermore notes that the applicant reoffended even though the administrative authorities had warned him several times about the possible consequences of further criminal offences (see paragraph 14, above).

31. As regards the length of the applicant's stay in Germany, the Court notes that the applicant entered Germany at the age of five and resided there for twenty-six years prior to his deportation. The Court observes in this context that the applicant, in spite of his long residence in Germany, never acquired an unlimited residence permit. The applicant thus did not have any legitimate reason to expect not to be the object of an expulsion order (compare *Trabelsi v. Germany*, no. 41548/06, § 56, 13 October 2011 and, conversely, *Omojudi v. the United Kingdom*, no. 1820/08, § 45, 24 November 2009).

32. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court will have regard to the applicant's conduct between the commission of the last offence and his actual deportation (compare *Maslov*, cited above, § 95). The Court notes that the applicant committed the last criminal offence in May 2005 and was deported in July 2011. Of this period of six years and two months, the applicant spent two years and almost ten months in prison, namely from 13 October 2006 to 11 September 2009. Following his release from prison and up until July 2011 when he turned himself in with a view to his deportation, he spent one year and ten months at liberty without re-offending. It furthermore appears that his conduct in prison was without reproach and that he was granted probationary release.

33. The Court reiterates that the fact that a significant period of good conduct elapsed between the commission of the offences and the deportation of the person concerned necessarily has a certain impact on the risk which that person poses to society (see *Maslov*, cited above, § 90; also compare *Boultif v. Switzerland*, no. 54273/00, § 51, ECHR 2001-IX). The Court notes, however, that the domestic authorities and, in particular, the administrative court of appeal considered all these factors when assessing the risk of the applicant's re-offending. While taking into account all these circumstances, they considered that the factors militating in the applicant's favour were not capable of sufficiently reducing the risk of his re-offending, having particular regard to his personal circumstances, his previous criminal record and the increasing seriousness of the offences he had committed.

34. Regarding the applicant's family situation, the Court observes that the applicant lived together with his German partner, Ms. K., from mid-2004 until his arrest in 2006. The Court notes, however, that the applicant separated from Ms. K during his detention and had a relationship with a new partner, Ms B., following his release. Following the end of this relationship in October 2009, he lived again with Ms K. and their child until his deportation in July 2011. The Court observes that the applicant effectively lived more than three years with Ms K., but that the intermediate separation might cast certain doubt as to the solidity of their union.

35. The Court further notes that the applicant has three children. With the two older children the applicant communicated by letters and telephone only even before his expulsion. The Court accepts the domestic courts' assessment that this form of communication could be maintained following his deportation. However, the consequences for the relationship with his youngest daughter N. were more serious, as the applicant lived together with his younger daughter N. from her birth on 29 November 2004 until his arrest on 13 October 2006 and then again from October 2009 until his deportation in July 2011. He had thus lived approximately three and a half years and thus more than half of the child's life together with N. Furthermore, he maintained the relationship during the separation by receiving prison visits and had exercised joint parental authority over the child. There is thus no doubt that the applicant enjoyed a close family relationship with his daughter. The Court notes, however, that the administrative court of appeal, in the process of weighing the competing interests, fully appreciated that the applicant's absence would seriously disturb the mutual relationship between the applicant and his child, notwithstanding the possibility of corresponding by letter or telephone (see paragraph 20, above). That court considered, however, that the public interest in his expulsion prevailed.

36. With regard to the applicant's ties with Germany, the Court observes that the applicant spent the formative years of his childhood in Germany, where the majority of his close family live. He received his entire schooling

in Germany, without, however, attaining any degree. Since reaching adult age, he only held temporary employment and primarily depended on social welfare for sustenance.

37. As to the applicant's ties to his county of origin, the Court notes that the applicant spoke – but did not write or read – the Arab language. Furthermore, one of his brothers resided in Lebanon at the time of his deportation, and could be expected to offer a certain degree of advice and support. While it would be certainly difficult for the applicant to settle in a country he had not lived in since the age of five years, it has also be taken into account the applicant never held an unlimited residence permit in Germany and that he did not have steady employment in Germany.

38. The Court attaches particular importance to the fact that the domestic authorities and, in particular, the administrative court of appeal carefully examined the compatibility of the applicant's expulsion with Article 8 of the Convention, thereby applying the criteria established in the Court's relevant case-law. The Court observes, in particular, that the administrative court of appeal fully appreciated the importance of the relationship between the applicant and his youngest daughter N., and considered that the applicant's expulsion would seriously disturb the mutual relationship between the applicant and his child (see paragraph 22, above). The Court further observes that the administrative court of appeal carefully assessed the risk of the applicant's re-offending, thereby taking into account all relevant elements, including those militating in the applicant's favour.

39. The Court appreciates that the applicant's expulsion had far-reaching consequences for the applicant, having particular regard to his relationship with his young daughter. However, given the nature and seriousness of the offences committed by the applicant, and, in particular, the thorough examination of the Article 8 issue by the domestic authorities, it cannot find that the respondent State attributed too much weight to its own interests when it decided to impose that measure. There is, accordingly, no appearance of a violation of Article 8 of the Convention.

40. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

41. Insofar as the applicant complained about the domestic courts' alleged failure to observe Article 3 § 1 of the UN Convention on the Rights of the Child, the Court recalls that its jurisdiction exclusively extends to all matters concerning the interpretation and application of the European Convention on Human Rights and the Protocols thereto (compare Article 32 § 1 of the Convention). It follows that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips Deputy Registrar	Ganna Yudkivska President