CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 17416/05
by HUKIĆ
against Sweden

The European Court of Human Rights (Second Section), sitting on 27 September 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Mr D. POPOVIĆ, *judges*,
Mr R. TÜRMEN,
and Mrs S. DOLLÉ, *Section Registrar,*

Having regard to the above application lodged with the European Court of Human Rights on 16 May 2005,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Sead Hukic, Mrs Sabina Hukic and their two children, Dzenita and Jasmin, are nationals of Bosnia and Herzegovina, and were born in 1967, 1972, 1993 and 2000, respectively. They are currently in Sweden. They were represented before the Court by Mr J. Wahlström, a lawyer practising in Lund.

A. The circumstances of the case

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

1. The background and proceedings before the national authorities

The applicants are Bosniacs and, until their departure from Bosnia and Herzegovina, they lived in Tuzla. On 17 January 2003 the first applicant arrived in Sweden and applied for asylum and a residence permit. On 3 February 2003 the other three applicants arrived and joined the first applicant's request for asylum and residence permits. Before the Migration Board (*Migrationsverket*) they stated that their primary reason for requesting asylum was that the fourth applicant suffered from Down's syndrome (a genetic disorder that causes mental retardation, severe learning disabilities and other problems) and epilepsy for which he had received no treatment or care in Bosnia and Herzegovina. On the contrary, he had been considered as a lower ranking person and treated in a degrading manner by physicians and people in their surroundings.

The applicants' second reason for requesting asylum was that the first applicant had belonged to a special unit of the police which, in November 2001, had arrested F.O., a dangerous criminal with ties to the mafia who had been wanted by Interpol. F.O. had tried to escape but the first applicant and another police officer had managed to catch him. On his arrest, F.O. had repeatedly threatened the first applicant. After about six to eight months in prison, F.O. had been released. However, just after F.O.'s arrest, the applicants had started to receive telephone threats and the first applicant had been attacked by unknown men in January 2002 and again in March, June, September and December 2002. Each time he had managed to defend himself but his aggressors had threatened him and had mentioned F.O.'s name. The first applicant had talked to his superiors about the threats and attacks, but he had received no support or protection. Thus, he had had to leave the country since F.O. had contacts all over the country and the applicants therefore would not be safe anywhere in Bosnia and Herzegovina.

On 16 May 2003 the Migration Board rejected the application. It noted that the purported threats and attacks had been carried out by criminals and were not sanctioned by the national authorities. It considered that the applicants had neither exhausted the possibilities to get help and protection in their home country nor shown that the national authorities would be unwilling or unable to help them. Thus, the applicants could not be granted asylum. As concerned the fourth applicant, the Migration Board considered that his handicap was not of such a kind that the family could be granted residence permits on humanitarian grounds. In reaching this conclusion, the Migration Board noted that there was medical care available in Bosnia and

Herzegovina and considered that the availability of care of a higher standard in Sweden was not a reason to let the family stay.

On 26 February 2004 the Aliens Appeals Board (*Utlänningsnämnden*) upheld the Migration Board's decision in full and ordered the applicants to leave Sweden within two weeks.

The applicants lodged a new application for residence permits on humanitarian grounds with the Aliens Appeals Board. They stated that the conditions for handicapped children were very poor in Bosnia and Herzegovina and that there was no care or treatment for persons with Down's syndrome. Society's attitude was that these children should not have been born. Although almost four years' old, the fourth applicant could not yet walk, stand or eat by himself. Moreover, his legs were shaking, he had a low immune defence and was lacking thyroxin (a hormone that regulates the metabolic activity of the body by controlling the rate of oxidation in cells and, when too low, retards growth and mental development in children). In Sweden he was receiving treatment and rehabilitation measures which were essential for his development and to which he was responding positively.

On 17 June 2004 the Aliens Appeals Board rejected the new application. It stated that it had already considered the fourth applicant's health in its previous decision and it found no reason to change that decision on the basis of the new information relied on by the applicants.

In the meantime, since the applicants had refused to leave Sweden voluntarily and the Aliens Appeals Board had refused to stay the enforcement of the deportation order awaiting its new decision, the matter had been handed over to the police who had scheduled their deportation to Bosnia and Herzegovina for 2 June 2004. However, on that date the applicants could not be found at their home. On 7 September 2004, the Danish immigration authorities requested Sweden to accept the family back in accordance with the Dublin Convention as they, on 26 June 2004, had requested asylum in Denmark. On 17 September 2004 the Migration Board accepted the request and, on 27 September 2004, the applicants were returned from Denmark to Sweden and renewed their request for asylum and residence permits. They maintained their earlier claims and added that during their stay in Denmark the fourth applicant's health had regressed as he had not received proper medication and the entire family was in poor mental health. Furthermore, they had no economic resources to survive in Bosnia and Herzegovina and no social assistance.

On 5 October 2004 the Migration Board rejected the application. It observed that the applicants' reasons for asylum had already been considered once and it found no grounds on which to change its former decision. It further decided that the applicants should be deported immediately since it was evident that they would not be granted asylum or

leave to stay for any other reason. On 30 November 2004 the Aliens Appeals Board upheld the Migration Board's decision in full.

The applicants lodged a new application for asylum with the Aliens Appeals Board, adding to their earlier claims that the first applicant had lodged a complaint with the European Union Police Mission concerning FO's threats to his family which was being investigated. Although FO had now been convicted of serious crimes and was in prison, the result of the investigation could show that the applicants were in need of protection in Sweden. Moreover, the fourth applicant's health had regressed somewhat and he was in need of more support and treatment.

On 14 February 2005 the Aliens Appeals Board rejected the new application on the grounds that it was up to the national authorities to protect the applicants against criminals within the country and that there were no circumstances which indicated that the authorities in Bosnia and Herzegovina would not be able or willing to offer such protection. Having regard to all the circumstances of the case, including the fourth applicant's situation, the Aliens Appeals Board found that it would not constitute a violation of humanitarian standards to deport the applicants to their home country.

On 19 May 2005 the Aliens Appeals Board rejected yet another new application for residence permits by the applicants as they had invoked no new circumstances.

2. The fourth applicant's state of health

The applicants have submitted two medical certificates concerning the fourth applicant, both issued by two specialists in child and youth neurology, Dr P. Sjöberg and Dr J. Landehag.

The first medical certificate was dated 16 March 2005 and stated that the fourth applicant was born with Down's syndrome and that he had a lack of thyroxin. Moreover, he suffered from an epileptic illness (the Landau-Kleffner syndrome) which had caused him to lose his ability to talk and communicate. He received medication and treatment for his handicap and illnesses but was in need of regular examinations. Furthermore, it was very important that he followed continuous treatment on several levels in order to have some quality of life. This sort of treatment was not available in Bosnia and Herzegovina.

The second medical certificate was dated 30 May 2005 and, besides referring to the above certificate, it stated the following: The fourth applicant has Down's syndrome and an epileptic illness which involves epileptic activities in the brain and the loss of language as well as the understanding of language. As concerns his Down's syndrome, he was undergoing good rehabilitation training, physiotherapy, occupational therapy, special education and speech therapy. They were concentrating on communication and motor activity. His problems with swallowing would be

examined by a speech therapist together with a dietician. He had shown clear progress after treatment with *Lamictal* (an anti-epileptic medicine) and had regained an interest in communication and could also pronounce one or two single words, a progress from having been completely wordless and almost without any interest in interplay with others. For the future, the physicians were planning continued rehabilitation and a renewed evaluation of his epilepsy to see how he had reacted to the medication. He would probably need an increased dose of *Lamictal* after the evaluation. In conclusion the physicians stated that he was reacting very well to the treatment and for this positive development to continue it was an absolute prerequisite that he remain in Sweden or another Western country where he could receive the same treatment.

3. Possibilities for treatment in Bosnia and Herzegovina

The applicants submitted a letter, dated 3 June 2005, by Prof. Dr. H. Tahirovic, ScD, and Ass. Dr. M. Hasanhodzic, M.Sc. at the Clinic for Children's Diseases, University Clinic in Tuzla, which provided the following information:

At the Clinic for Children's Diseases it was possible to diagnose Down's syndrome and to follow up the functions of the thyroid and to offer treatment for thyroid disorders. It was also possible to diagnose epilepsy, to prescribe *Lamictal* treatment and to have a child followed by neuro-paediatricians, endocrinologists, cardiologists, clinical geneticists and other specialists. However, at the moment, they could not promise that it would be possible to include a child in programmes of neuro-developing and stimulating exercises, speech pathology, psychological treatment or to include a child in a special school or pedagogical programme. Moreover, in the area, there were not enough institutions to receive and help all children with special needs and so parents were forced to care for their children and to implement necessary treatment in accordance with their financial capabilities.

According to information from 2002[1], there were special programmes for the social and health protection of children and families, the mentally handicapped, the elderly and civilian war victims. All ten cantons in Bosnia and Herzegovina provided social and child protection within 79 local centers. Most of these institutes had been modernized, and some had been newly established. There were also centers for persons with mental and physical handicaps.

[1] Cain, J. et al. In Cain, J. and Jakubowski, E., eds. *Health Care Systems in Transition: Bosnia and Herzegovina*. Copenhagen, European Observatory on Health Care Systems, **4**(7) (2002), pp. 70-71.

Furthermore, in August 2001 the *Act on the protection of mentally handicapped persons* was adopted in Bosnia and Herzegovina[1]. It provides for basic principles, means of organization and the realization of the protection of mentally handicapped persons, and it contains, *inter alia*, provisions relating to health care and the rights and obligations of beneficiaries.

COMPLAINTS

The applicants complained that, if deported to Bosnia and Herzegovina, they would risk being persecuted and/or killed by the mafia as the first applicant had arrested a criminal leader. Moreover, they claimed that deportation would cause irreparable damage to the fourth applicant since he was suffering from Down's syndrome and would receive no treatment or medical care in his home country for his handicap.

THE LAW

The applicants alleged that their deportation to Bosnia and Herzegovina would expose them to a real risk of being persecuted and of causing irreparable damage to the fourth applicant.

Their complaints fall within the scope of Article 3 of the Convention and will be considered in relation to this provision which reads:

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

1. The applicants stated that they would face a real risk of being persecuted or killed by the mafia because the first applicant had arrested a criminal leader.

The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see, among

[1] Text No. 522. Included in the *Sluzbene Novine*, 2001-08-15, No. 37, pp. 765-771.

other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

The Court observes that the applicants have submitted no evidence to substantiate either their claims about past threats and harassment in Bosnia and Herzegovina or that they would risk treatment contrary to Article 3 of the Convention upon return to their home country. Even assuming that the applicants' own account of events is accurate, the Court shares the conclusions of the Swedish immigration authorities that there is no indication that the attacks, of which the applicants claimed to have been the victims, had been approved by the authorities in Bosnia and Herzegovina or that the national authorities there would be unwilling or unable to protect them. In this respect the Court attaches importance to the fact that the case concerns deportation to another High Contracting Party to the European Convention on Human Rights, which has undertaken to secure the fundamental rights guaranteed under its provisions (see *Tomic v. the United Kingdom*, (dec.), no. 17837/03, 14 October 2003).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicants further alleged that their deportation from Sweden to Bosnia and Herzegovina would cause irreparable damage to the fourth applicant as he would receive no care or treatment for his handicap there.

The Court reiterates that, due to the fundamental importance of Article 3, the Court has reserved to itself the possibility of scrutinising an applicant's claim under Article 3 where the source of the risk of the proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. In any such contexts, however, the Court is obliged to subject all the circumstances surrounding the case to rigorous scrutiny, especially the applicant's personal situation in the deporting State (see the *D. v United Kingdom* judgment of 2 May 1997, *Reports* 1997-III, § 49).

Consequently, the Court will examine whether the deportation of the applicants to Bosnia and Herzegovina would be contrary to Article 3 having regard to all the material before it, including the most recently available information on the fourth applicant's state of health.

Here the Court would highlight that, according to established case-law, aliens who are subject to deportation cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the deporting State. However, in exceptional circumstances the implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3 (see, for example, the *D. v. United Kingdom* judgment, cited above, § 54).

The Court does not question that the fourth applicant's handicap is of a serious nature and that he is in need of support and treatment to enable him to develop and improve his quality of life. In this respect, the Court observes that there is care and treatment available in the applicant's home country, although not of the same standard as in Sweden and not as readily available. Still, according to the information obtained in the present case, the Clinic for Children's Diseases in Tuzla, the applicants' home town, can provide treatment and rehabilitation for children with Down's syndrome. Moreover, there exist special programmes for the mentally handicapped and children. The Court is aware that the care and treatment, if specialized, most probably would come at considerable cost for the individual. However, the fact that the fourth applicant's circumstances in Bosnia and Herzegovina would be less favourable than those enjoyed by him in Sweden cannot be regarded as decisive from the point of view of Article 3 (see, *Bensaid v. United Kingdom*, no. 44599/98, § 38, ECHR 2001-I; *Salkic and others v. Sweden*, (dec.), no. 7702/04, 29 June 2004, unreported).

Despite the seriousness of the fourth applicant's handicap, the Court considers that Down's syndrome cannot be compared to the final stages of a fatal illness. Thus, having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the possible harm, the Court does not find that the applicants' deportation to Bosnia and Herzegovina would be contrary to the standards of Article 3 of the Convention. In the Court's view, the present case does not disclose the exceptional circumstances established by its case-law (see, among other, *D v. United Kingdom*, cited above, § 54).

It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President