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

FIFTH SECTION

DECISION

Application no. 37074/13
Mico KERKEZ
against Germany

The European Court of Human Rights (Fifth Section), sitting on 24 March 2015 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to the above application lodged on 3 June 2013,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Mico Kerkez, is a national of Bosnia and Herzegovina, who lived in München, in Germany. He was represented before the Court by Mr S. Altuntas, a lawyer practising in München.

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

A. The circumstances of the case

1. Personal circumstances

3. The applicant was born in 1979 in Germany. A couple of months after his birth he was brought to the former Yugoslavia and stayed there with his grandmother for several years. He attended his first year of elementary school there. In 1987, when was 8, he was sent back to Germany where he resided from then on, staying with his parents.

4. The applicant went to elementary and lower secondary school in Germany but did not obtain a school certificate. Then he attended an apprenticeship programme as metalworker but did not conclude it because

of his fear of examinations. Later he started but did not conclude other re-training courses, because he did not attend the final examination. So far, he has only had short term employments or lived of unemployment benefits.

5. On 20 July 1999 the applicant was given a permanent residence permit in Germany.

6. The applicant is not married and has no children. Even as an adult, until his later arrest, he lived in the household of his parents and his sister. The parents hold permanent residence permits; the sister is a German national.

2. The applicant's conviction

7. On 9 July 2009 the München Regional Court found the applicant guilty of possession and the trafficking of substantial quantities of drugs in three cases between summer 2007 and autumn 2008, including one case while armed, and sentenced him to 5 years and 6 months of imprisonment. The court established that the applicant had been in possession of 150 g marijuana and had sold part of it. Moreover, he had been in possession of once 50 g and twice 100 g cocaine of which he also sold some on several occasions. At least one of the sales took place in the applicant's room in his parents' flat where he had deposited a bat and a knife within easy reach. Furthermore, considering the applicant's drug consumption, described as addiction regarding marihuana and as excessive use regarding cocaine, the court ordered his placement in a drug rehabilitation centre.

8. On 8 January 2010 the applicant started his stay in the rehabilitation centre.

3. Expulsion proceedings

9. On 6 September 2010, the Authority of the City of München issued an expulsion order and a 10 year re-entry ban against the applicant which took effect on the date of expulsion. The authority established that in the applicant's case Section 53 of the Residence Act *(Aufenthaltsgesetz)* applied, which provides for the expulsion of an offender who has been sentenced to a prison term for at least three years for an intentionally committed offence or two years for an intentionally committed offence under the Narcotics Act *(Betäubungsmittelgesetz)*. While Section 56 of the Residence Act provided a degree of protection for aliens who have lengthy, lawful residence in Germany, there was nevertheless a presumption of removal when requirements of Section 53 were fulfilled.

10. In the applicant's case however, due to his long stay in Germany an exceptional case was assumed, in which a presumption of removal could no longer be maintained but all circumstances had to be balanced before a discretionary decision be taken.

11. The authority emphasised the significant interference with public security and order by the crimes committed. It was the applicant's first conviction, but his drug dependency and the volume of the drug sales, especially of cocaine, had particular weight in this case. Furthermore, the authority considered that the applicant had held dangerous weapons within reach during one of the sales. Taking into account that he suffered from a drug dependency, an increased possibility of reoffending could be assumed. The applicant had lived with his family, who were however not able or willing to influence him. Even though his father suffered from cancer the applicant would not, due to his stay in the rehabilitation facility, play any role in his care. His family relations to his parents and his sister did therefore not carry significant weight. All in all, it could not be concluded that the applicant was integrated into the German society. Furthermore, the authority assumed that the applicant still spoke Bosnian and that he had some family contacts there.

12. On 17 March 2011, the München Administrative Court dismissed the applicant's appeal against this order. Underlining the applicant's criminal conviction and his drug dependency, he continued to be a danger to the public even though he had started a drug rehabilitation programme. It found that the decision to expel him was also in accordance with Article 8 of the Convention. It could be assumed that he was still familiar with the Bosnian language and culture. Integration in Bosnia might be challenging, but no real social or economic integration into the German society had taken place. No disproportionate interference with his right of family or private life could be established.

13. On 16 March 2012, the Bavarian Administrative Court of Appeal dismissed the applicant's request for leave to appeal and confirmed the Administrative Court's conclusions. There was no reason to doubt the lawfulness of the Administrative Court's judgment. The facts as described by the Administrative Court led to the conclusion that a danger of reoffending existed and that after balancing the applicant's long stay with the circumstances of the crime and his low level of integration into German society, the expulsion could not be considered a disproportionate restriction of his rights.

14. On 20 November 2012 the Federal Constitutional Court dismissed the applicant's constitutional complaint without further reasoning.

15. During the course of his rehabilitation programme, the applicant was granted several privileges which included limited grants of leave from the institution, up to the point when he was allowed to have his own flat, to leave the institution for up to 14 days and to start a vocational training at an agency for temporary work. On 2 October 2012 the responsible psychiatrist gave a positive prognosis on the progress of his therapy and advocated his release on parole under the condition that he continued his therapy und underwent drug screenings on a regular basis. It appears that he also

continued to have regular contacts to his mother and sister (the father had died).

16. No specific information has been submitted if and when he was officially released.

17. On 17 July 2013 the immigration authorities ordered the applicant to present himself at the airport in order to receive his passport and board a flight out of Germany. They also pointed out that he had started the vocational training programme without holding a valid work permit. The applicant complied with the order and since then has lived in Bosnia and Herzegovina.

B. Relevant domestic law

18. Section 53 paras. 1 and 2 of the Residence Act (*Aufenthaltsgesetz*) read as follows:

> "An alien shall be expelled, if he or she
>
> 1. has been sentenced by final judgment to a prison term or a term of youth custody of at least three years for one or more intentionally committed offences or several prison terms or terms of youth custody for intentionally committed offences totalling at least three years within a five-year period or preventive detention has been ordered in connection with the most recent final conviction,
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> 2. has been sentenced by final judgment to at least two years youth custody or a prison term for an intentionally committed offence under the Narcotics Act, for a breach of the peace under the conditions specified in Section 125a, sentence 2 of the Criminal Code or for a breach of the peace committed at a prohibited public gathering or a prohibited procession pursuant to Section 125 of the Criminal Code and the sentence has not been suspended on probation, ..."

19. Section 56 para. 1 of the Residence Act reads as follows:

> "An alien who
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> 1. possesses a settlement permit and has lawfully resided in the Federal territory for at least five years, ...
>
> 2. possesses a residence permit, was born in the Federal territory or entered the Federal territory as a minor and has been lawfully resident in the Federal territory for at least five years, ...
>
> 4. cohabits with a German dependent or life partner in a family unit or a registered partnership, ...
>
> shall enjoy special protection from expulsion. He or she shall only be expelled on serious grounds pertaining to public security and law and order. As a general rule, serious grounds of public security and order are given in the cases of Sections 53 and 54 paras. 5 to 5b and 7. If the requirements of Section 53 are fulfilled, as a general rule, the alien will be expelled. ..."

COMPLAINT

20. The applicant complained under Articles 8 and 6 of the Convention that as a result of his expulsion he was unable to exercise his right to private and family life and that he did not receive fair appeal proceedings following the first instance court's decision.

THE LAW

A. Alleged violation of Article 8 of the Convention

21. The applicant complained that his expulsion infringed his right to private and family life guaranteed by Article 8 which provides, in so far as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety..., for the prevention of disorder or crime ..."

22. The applicant argued that his expulsion was disproportionate because he was born in Germany, had lived in Germany since he was a child, had gone to school in Germany and had strong personal and family ties to Germany and was about to start to reintegrate himself socially and economically into the society. The domestic courts had not sufficiently considered his relationship to his mother and sister. Furthermore, he claimed that it should have been taken into account that he had committed the offences because of a severe drug addiction. He then overcame the addiction so that no more danger of reoffending existed.

23. The Court reaffirms 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. 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, insofar as they may interfere with a right protected under paragraph 1 of Article 8 of the Convention, 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 *Üner v. Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII).

24. The Court notes that the domestic courts found that the applicant's relations to his parents and sister were not of significant importance when

assessing the claim under the guarantee of family life under Article 8 of the Convention. Even assuming that during his stay in the rehabilitation institution he continued to have regular contacts to his mother and sister, such relations as an adult do not enjoy the protection under Article 8 unless there are other elements of dependence than normal bonds of affection between family members (*Ezzouhdi v. France*, no. 47160/99, § 34, 13 February 2001; *Yilmaz v. Germany*, no. 52853/99, § 44, 17 April 2003).

25. Not all settled 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, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life (see *Üner*, cited above, § 59; *Maslov v. Austria* [GC], no. 1638/03, § 63, ECHR 2008).

26. The Court further notes that the expulsion had a basis in domestic law, namely in Section 53 paras. 1 and 2 read in conjunction with Section 56 para. 1 no. 1 of the Residence Act, and that it served a legitimate aim, namely the prevention of disorder and crime.

27. It has thus to be determined whether the expulsion was "necessary in a democratic society", that is to say, if it was justified by a pressing social need and proportionate to the legitimate aim pursued.

28. The Court reiterates the criteria to be applied when assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued (see *Üner*, cited above, §§ 57-58; *Maslov*, cited above, §§ 69-71):

> "– the nature and seriousness of the offence committed by the applicant;
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> – the length of the applicant's stay in the country from which he or she is to be expelled;
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> – 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;
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> – 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."

29. In applying these criteria to the present case the Court first observes the nature of the offences committed: the applicant was convicted of trafficking with substantial quantities of narcotics. The Court has frequently found that States have legitimate reasons to combat the distribution of drugs firmly (*A.W. Khan v. the United Kingdom*, no. 47486/06, §§ 40, 41, 12 January 2010; *Dalia v. France*, 19 February 1998, § 54, *Reports of Judgments and Decisions* 1998-I; *Baghli v. France*, no. 34374/97, § 48, ECHR 1999-VIII). The prison sentence of five and a half years bears testimony that he had committed very serious crimes. The Court notes that it was the applicant's first conviction but also takes into account that he was in possession of relatively high amounts of a dangerous drug. Moreover, weapons were present at least during one of the crimes. It further considers that the domestic criminal court found that the applicant suffered from a severe drug addiction.

30. As regards the length of the applicant's stay in Germany, the Court observes that the applicant was born in and except during a time period of eight years as a child, had been living in Germany. Therefore, he had strong ties with Germany.

31. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court notes that he committed the crimes between summer 2007 and autumn 2008 when he was 28 and 29 years old and therefore an adult. The criminal trial took place in July 2009. The deportation order was then served whilst the applicant was still undergoing the ordered drug rehabilitation program. The court proceedings regarding his expulsion concluded in November 2012, and the applicant ultimately left Germany in July 2013. The Court considers that the proceedings were advanced with reasonable expedition. There is no indication that he re-offended after the criminal conviction, even during periods of time when he was granted leave from the rehabilitation facility. But the Court also notes that, while the applicant enjoyed privileges of leave, his behaviour continued to be closely monitored.

32. By the time the applicant was ultimately ordered to return to Bosnia and Herzegovina it appeared that he had made significant progress regarding his addition problem, but none of the documents submitted suggests that the applicant had completely overcome his addiction.

33. As to the applicant's family life, even assuming a close relationship to his mother and sister, the Court notes the absence of any special circumstances that would require the constant presence of the applicant. On

the contrary, one of the aims of the rehabilitation programme, in which the applicant claims he has made significant progress, was to prepare him for an independent life. Contacts can continue by phone and e-mail as well as by way of visits to Bosnia and Herzegovina.

34. The Court also looks for significant relations within the society of the country of residence and notes that apart from mentioning that he went to school and having started vocational trainings and other courses in Germany the applicant submits nothing by way of evidence of his participation in social life. It has to be noted that he only specifically referred to his long stay in Germany and contacts with his mother and sister (see *Trabelsi v. Germany*, no. 41548/06, § 62, 13 October 2011, § 58; *Lukic v. Germany* (dec.), no. 25021/08, 20 September 2011; *Mutlag v. Germany*, no. 40601/05, § 58, 25 March 2010). He further mentioned that in the past he had had some friends but no specific information on his social contacts was provided. The Court also notes that it appears that during his adult life he was never integrated into the German labour market and even when he later started another vocational training he could not rely on its completion as he did so without holding a valid work permit.

35. As to the applicant's ties to his country of origin, the Court notes that the applicant lived in the former Yugoslavia until he was eight, and that he did not claim that he was not able to speak or understand the language. The Court therefore does not consider his reintegration in Bosnia and Herzegovina impossible.

36. Moreover, the Court also notes the fact that the expulsion from German territory will not necessarily be permanent as a ten years' time-limit has been set on the effects of his expulsion.

37. In particular, against the background of the gravity of the applicant's drug related offences and risk of relapse, and considering the sovereignty of member States to control and regulate the residence of aliens on their territory, the Court accepts that the domestic authorities balanced the applicant's right to respect for his family and his private life reasonably against the State's interest in preventing disorder and crime. Appreciating the consequences of the expulsion for the applicant, the Court cannot find that in the present case the respondent State attributed too much weight to its own interests when it decided to impose this measure.

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

B. Other complaints

39. The applicant complained under Article 6 § 1 of the Convention that the refusal of the domestic court to allow an appeal was arbitrary and therefore amounted to a violation of the guarantee to have a fair hearing.

40. The Court considers that the fact that the expulsion might have repercussions on the applicant's private or family life cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention. The Court further considers that orders excluding aliens do not concern the determination of a criminal charge either (see *Maaouia v. France* [GC], no. 39652/98, §§ 38-40, ECHR 2000-X). Hence, the Court considers that Article 6 § 1 is not applicable in the instant case. It follows that this part of the application is inadmissible under Article 35 § 3(a) and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 16 April 2015.

Milan Blaško
Deputy Registrar

Boštjan M. Zupančič
President