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

FIFTH SECTION

DECISION

Application no. 15069/08
Dejan LOY
against Germany

The European Court of Human Rights (Fifth Section), sitting on 7 October 2014 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Stephen Phillips, *Depuy Section Registrar,*

Having regard to the above application lodged on 22 March 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Dejan Loy, has a Serbian father and a Bosnian mother. He is a Serbian national and lived in Otterndorf, in Germany. He was represented before the Court by Mr J.-R. Albert, a lawyer practising in Fürth.

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 1974 in Austria and moved in 1979 from the former Yugoslavia to Germany. He subsequently visited the former Yugoslavia once in 1988. He went to school and completed a vocational training in Germany. In 1995 the German authorities granted him an unlimited residence permit. The applicant's father, stepmother and siblings reside in Germany. While the applicant mentioned contacts to a sister, no

information regarding the exact whereabouts or the relationship to other members of the family was provided.

4. The applicant entered into a relationship with a German citizen and is the father of two children who were born in 1993 and 1997. The children have German nationality and grew up in Germany. The applicant and the children's mother separated in 1998. The children live with their mother who has sole custody rights. Even though the applicant was registered under the same address for some time it is not clear whether he ever lived with them in the same household. According to the children's mother he never paid child support and was not interested or involved in any issue of education before his prison stay. The applicant did not provide a substantiated description of his relationship to them during this period.

5. Later the applicant became engaged to another German national. On 6 June 2006 they contacted the registry office for the first time regarding necessary documentation for marriage proceedings. They married on 8 February 2007 but later separated.

2. The applicant's convictions

6. Between 1996 and 1999 the applicant was convicted and fined four times, for attempted obstruction of justice, causing dangerous bodily harm, drunk driving and unauthorized residence.

7. On 7 February 2000, the applicant was convicted of causing bodily harm and sentenced to four months' imprisonment on probation after he had attacked the children's mother. The probation period was set at two years.

8. On 10 July 2003, he was convicted of causing bodily harm and sentenced to one year of imprisonment on probation. A four-year probation period was set. He had punched a person in the face in a night club, causing a bleeding of his lip and a loose tooth. He had subsequently fled the scene so that only a criminal investigation concerning an unrelated incident led to the exposure of his involvement in that case.

9. On 13 May 2004, the applicant was arrested on suspicion of drug trafficking. In July 2005 the domestic court sentenced him to two years and six months of imprisonment for aiding and abetting the trafficking of substantial quantities of drugs. The court established that the applicant had been involved in the coordination of the delivery of amphetamines on two occasions (0,5 kg and 2,5 kg respectively). The latest act had taken place on 13 May 2004, the applicant had been arrested immediately after a handover. In giving sentence, the criminal court took into account as a mitigating factor that an undercover agent had been involved as purchaser but it also considered the applicant's prior convictions. The court also revoked the probation regarding the sentence for bodily harm of 2003 and reinstated the prison sentence.

10. While the applicant's children did not visit him during his prison stay, the applicant had requested such contacts. He claimed that they did not

take place because he respected the mother's wish to spare them the experience of a visit to a prison facility. The mother of the children indicated that the older daughter had refused to see him, while she had not informed the younger son of such requests.

11. In October 2006 the domestic court released the applicant on parole. In its decision the court mentioned his very good behaviour in prison.

12. After his release, encounters with his children have taken place, at first facilitated by the applicant's sister, later unaccompanied ones. No substantial information on the frequency of contacts or further details was provided, apart from the general claim that he was in the process of intensifying his relationship to his children.

3. Expulsion proceedings

13. On 20 January 2006, the Authority of the City of Nürnberg issued an expulsion order against the applicant. 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, within a five year period, has been convicted to a prison sentence of at least two years for drug related offences under the Narcotics Act *(Betäubungsmittelgesetz)*, or a prison sentence of at least three years for other criminal offences. While Section 56 of the Residence Act provides a degree of protection for aliens who have lengthy, lawful residence in Germany, Section 53 nevertheless sets up a presumption of removal when its requirements are met. This was not an exceptional case in which the assumption of dangerousness in respect to the underlying offences was rebutted, nor did circumstances lead to the conclusion expulsion would give rise to unacceptable hardship.

14. On 27 July 2006, the Ansbach Administrative Court dismissed the applicant's appeal against this order. Underlining the applicant's criminal record, it noted that he had been convicted to prison sentences of a total of more than three years at relatively short intervals and partly during the probation period of previous offences. Furthermore, the applicant had committed drug-related offences under the Narcotics Act which had resulted in a prison sentence of two and a half years. Therefore he was a danger to public safety even though he had confessed and expressed regret for his offences and the criminal courts had found that he had been of good behaviour in prison. It held that the decision to expel him was also in accordance with Article 8 of the Convention. The applicant had two children who lived in Germany but his relation them could not be regarded as family-like (*familiäre Lebensgemeinschaft*). In particular, the only evidence he had submitted in this regard was an acknowledgement of paternity. The court underlined that the applicant's conviction for causing bodily harm had been for attacking the children's mother and that the children had not visited the applicant in prison. Moreover, the applicant did not know the address of his children at the time of the hearing. The court

further noted that the applicant had been engaged to a German citizen at the time of the oral hearing but pointed out that they had contacted the Registry Office (*Standesamt*) only after the decision of the authorities to expel him. The court further noted that the applicant had been living in Germany for a long time and had gone to school in Germany but it saw no grounds for not ordering the expulsion because of special circumstances regarding his offences or because he was especially integrated into German society.

15. On 30 October 2007, the Bavarian Administrative Court of Appeal dismissed the applicant's appeal and confirmed the Administrative Court's conclusions. It established that the administrative court's judgment was sufficiently reasoned and took into account all duly submitted arguments. Furthermore, the applicant's matter did not, as it had been claimed, raise legal questions of fundamental importance beyond the specific case.

16. On 19 December 2007 the Federal Constitutional Court dismissed the applicant's constitutional complaint and a request for interim measures without further reasoning (2 BvR 2522/07).

17. In March 2008 the applicant was expelled to Serbia.

18. The applicant's lawyer informed the Court that no time-limit has been set subsequently on the effects of the expulsion.

B. Relevant domestic law

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

> "An alien shall be expelled, if he or she
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> 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, ..."

20. Section 56 § 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 given, as a general rule, the alien will be expelled. ..."

COMPLAINTS

21. The applicant complains under Articles 8 and 12 of the Convention that as a result of his expulsion he would be unable to exercise his right to private and family life with his children and his wife.

THE LAW

22. The Court notes that the applicant was not prevented from marrying in 2007, and will deal with the case under Article 8 of the Convention.

23. The applicant complained that, as a result of his expulsion, he was unable to exercise his right to private and family life in his familiar environment, with his two children and with his spouse. He relied on Article 8 of the Convention which, in so far as relevant, provides:

"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 ..."

24. The applicant argued that the expulsion was disproportionate because he had lived in Germany since he was a child, had gone to school in Germany, was hardly able to speak Serbian and had strong personal and family ties to Germany. The domestic courts had not considered sufficiently that he had two minor children who live in Germany and that he was engaged to a German citizen. Furthermore, he claimed that it should have been considered that he had been instigated to commit the last offence by an undercover agent, had shown impeccable behaviour in prison and regretted his behaviour.

25. 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).

26. The Court notes that the domestic courts found that the applicant's relations to his children and his fiancée at the time of the oral hearing before the Administrative Court were not family-like.

27. 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).

28. The Court further notes that the expulsion had a basis in domestic law, namely in Section 53 §§ 1 and 2 read in conjunction with Section 56 § 1.1 of the Residence Act, and that it served a legitimate aim, namely the prevention of disorder and crime.

29. 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.

30. 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;
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> – the nationalities of the various persons concerned;
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> – 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."

31. In applying these criteria to the present case the Court first observes the nature of the offences committed: the applicant was convicted of aiding and abetting the trafficking of substantial quantities of amphetamines on two occasions. 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 imposed prison sentence of two and a half years bears testimony to the severity of the crime committed. In passing sentence, the criminal court took into account the fact that an undercover agent had been involved in the transaction. The Court further notes that the applicant had previously been convicted on three occasions within a relatively short time of causing bodily harm and that the offence took place within the probation period of a prior conviction.

32. As regards the length of the applicant's stay in Germany, the Court observes that the applicant had been living for almost 30 years in Germany and held an unlimited residence permit when the expulsion order became final.

33. With regard to the time elapsed since the offence was committed and the applicant's conduct during that period, the Court notes that the deportation order was served whilst the applicant was still serving the prison sentence for drugs offences, and the proceedings continued after his release in October 2006. The proceedings ended in December 2007, and the applicant was removed in March 2008. The Court considers that the proceedings were advanced with reasonable expedition, and notes that for most of the period between the commission of the offence and the actual removal (almost 29 out of 46 months), the applicant was in prison. There is no indication that he re-offended in the time between his release from prison and the end of the proceedings.

34. As to the applicant's family relationship with the children of his previous relationship, the Court notes that the applicant recognized paternity of the children. However, the applicant has not established that he was in any way involved in the children's upbringing before his arrest. The second of the applicant's convictions for violent offences relates to a physical

attack on the mother. The Court further notes that no visits took place during the applicant's stay in prison. His daughter refused to see him and his son was not informed about his prison stay. Only after his release (and when expulsion proceedings were under way) some encounters have taken place but in the absence of further substantiated information in this regard, the Court considers that the applicant's family ties with his children were not very developed.

35. The Court accepts that the applicant's expulsion resulted in separating him further from his children. However, the expulsion is unlikely to have the same impact as it would if the applicant and his children had been living together as a family. Moreover, the Court the children are now aged 21 and 17, and contacts can continue by phone and e-mail as well as by way of visits to the applicant (see *Onur*, cited above, § 58).

36. As to the applicant's family life with his spouse, the Court notes that when the applicant contacted the registry office in June 2006 (when the applicant was still in prison), the expulsion order had already been served, and by the time they married in February 2007, the applicant's first appeal against the expulsion order had been dismissed. Their family life, such as it was, was thus always against the background of pending expulsion proceedings. They separated soon after the marriage. In these circumstances, no decisive weight can be attached to the family relationship with his spouse (see *A.W. Khan v. the United Kingdom*, no. 47486/06, §§ 46, 47, 12 January 2010).

37. The Court also looks for significant relations within the society of the host country (see *Trabelsi*, cited above, § 62; *Mutlag*, cited above, § 58; *Lukic v. Germany* (dec.), no. 25021/08, 20 September 2011) and notes that apart from mentioning that he went to school and completed a vocational training in Germany in his submissions the applicant submits nothing by way of evidence of his participation in social life apart from the length of his residence. Apart from referring to his children and his former spouse he made reference to the fact that his father, stepmother and siblings live in Germany. He claims that he has contact with his sister, but gives no further details. No information on other social contacts was provided. Therefore, in the present case only few significant relations can be established.

38. As to the applicant's ties to his country of origin, the Court notes that the applicant lived in the former Yugoslavia until 1979, and it appears that he speaks some Serbian, although he claims that he is not able to read or write the language.

39. Moreover, the Court also notes the fact that the expulsion from German territory has not necessarily to be permanent as it is open to the applicant to file a request to have a time-limit set on the effects of his expulsion (see *Savasci v. Germany* (dec.), no. 45971, § 30, 19 March 2013).

40. Against the background of the gravity of the applicant's drug related offence, together with the earlier crimes of violence committed by the

applicant, 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.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Boštjan M. Zupančič
President