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. 8628/05
by Ali RRUSTEMAJ and Others
against Sweden

The European Court of Human Rights (Second Section), sitting on 15 November 2005 as a Chamber composed of:

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

Having regard to the above application lodged with the European Court of Human Rights on 5 May 2005,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr A. Rrustemaj, Mrs S. Tiku Rrustemaj and their three daughters are nationals of Serbia and Montenegro, and were born in 1970,

1975, 1999, 2000 and 2002 respectively. They are currently in Sweden. They were represented before the Court by Mr M. Ekelöf, a lawyer practising in Växjö.

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 ethnic Albanians from the province of Kosovo in Serbia and Montenegro. In 1991 the first applicant travelled to Sweden and applied for asylum. This request was refused and he was deported to Kosovo in December 1992.

On 5 September 1997 the first applicant again came to Sweden and, on 6 October 1997, he submitted an application for asylum and a residence permit to the Migration Board (*Migrationsverket*). On 6 February 1998 the second applicant joined her husband in Sweden and, three days later, she also joined his application for asylum and a residence permit. Before the Migration Board, they stated that, upon arrival in his home country in 1992, the first applicant had been detained a few hours by the border police and had been instructed to report to the police in Pristina. He had done so with the result that he had been detained there for ten days and questioned about the activities of Albanians in Sweden. Roughly two months later, the police had showed up at his home and had questioned him and all the members of his family about the activities of Albanians in the neighbourhood. Subsequently, the police had on repeated occasions passed by the applicants' home and questioned the first applicant. In 1997 he had been contacted by a lawyer who had informed him that he was suspected of having connections with the UÇK (*Ushtria Çlirimtare Kombetare* – the Kosovo Liberation Army). Although the police had never accused him of this, the first applicant had decided to return to Sweden to avoid more problems. In December 1997 the police had come to the applicants' home and had asked the second applicant about her husband's whereabouts. They had, again, showed up in January 1998 at which time they had taken the second applicant to the police station and questioned her. She had been released after a few hours but the police had threatened to imprison her if her husband did not show up within ten days. For these reasons, the second applicant had travelled illegally to Sweden.

On 14 May 1998 the Migration Board refused the applicants' request for asylum. It considered that the harassment of which they had been the victims in their home country had been of a general character but not of a serious kind, and that they had not shown that they would be of special interest to the national authorities if they were to be returned to Kosovo.

Thus, they could not be granted asylum. Moreover, the applicants had presented no grounds on which they could be granted residence permits on humanitarian grounds.

The applicants appealed to the Aliens Appeals Board (*Utlänningsnämnden*), adding to their claims that, due to the deteriorating situation in Kosovo, it would be impossible to enforce the deportation order against them.

On 28 June 1999 the Aliens Appeals Board granted the applicants temporary residence permits for a period of eleven months, as of the date of the decision, due to the very unstable situation in Kosovo at that time.

Upon the expiry of their temporary residence permits, the applicants renewed their request for asylum and residence permits to stay in Sweden. On 6 September 2001 the Migration Board rejected the request and, on 2 April 2002, the Aliens Appeals Board upheld the Migration Board's decision in full and ordered the applicants to leave Sweden within two weeks from the date of the decision.

To avoid having to return to Kosovo, the applicants travelled to Norway and applied for asylum there. However, in accordance with the Dublin Convention, they were sent back to Sweden in December 2002 and, once again, lodged a new application for asylum and residence permits with the Migration Board. They stated that there was nothing left for them to return to in Kosovo as they would have nowhere to live and unemployment was very high. Moreover, they claimed that since they had not been in Kosovo since 1997/98 and their three children were born in Sweden, it would be inhuman to send them back. Furthermore, the second applicant was depressed and anxious, and she received medication for these problems.

On 7 August 2003 the Migration Board rejected the application. It first noted that the applicants had only invoked humanitarian grounds and they had not claimed that they would risk persecution in their home country. Thus, the Migration Board found that they were not in need of protection in Sweden, and stated that they could not be granted residence permits only because their financial situation would be difficult in Kosovo. Moreover, it noted that the three children were very young and did not have a strong connection to Sweden and that the second applicant's mental health was not so poor that the family could be granted leave to stay based on these grounds.

The applicants appealed against the decision to the Aliens Appeals Board, maintaining their earlier claims and adding that the first applicant was in poor mental health, suffering from anxiety and depression, and the second applicant's poor mental health had deteriorated further. On 19 April 2004 the Aliens Appeals Board upheld the Migration Board's decision and reasoning in full and ordered the applicants to leave Sweden within two weeks from the date of the decision.

The applicants remained illegally in Sweden and lodged a new application for residence permits with the Aliens Appeals Board, claiming that since they had been outside of Kosovo for almost seven years it would be inhuman to send them back, in particular since their children were born in Sweden. Thus, it would not be in the best interests of the children to deport them to a, for them, completely foreign country. Moreover, they alleged that the situation in Kosovo was unstable and that they were in need of protection in Sweden.

On 1 June 2004 the Aliens Appeals Board rejected the application. It first observed that it had already considered the applicants claims in its earlier decision and found no reason to change it. Moreover, it stressed that it was the applicants' own choice to have been away from Kosovo for so many years since, in spite of several negative decisions from the Swedish immigration authorities, they had remained illegally in Sweden.

The applicants lodged yet another new application for residence permits on humanitarian grounds, relying on the second applicant's deteriorating mental health. She had been diagnosed as suffering from Post Traumatic Stress Disorder and depression, and she had entertained thoughts of committing suicide.

On 16 November 2004 the Aliens Appeals Board also rejected this application, finding that the second applicant's mental health was not so poor that the family could be granted leave to stay in Sweden. Even having regard to all the circumstances of the case, the Aliens Appeals Board considered that it would not violate the standards of humanity to deport the applicants to Kosovo.

On 20 January 2005 the Aliens Appeals Board rejected yet another application lodged by the applicants as they had invoked no new circumstances.

2. Particulars on the applicants' state of health

The applicants submitted two medical certificates. The first, dated 15 October 2004, had been issued by H.-G. Nilsson, a psychologist, and the second certificate, dated 5 February 2005, had been issued by P.O. Elfstrand, a chief physician.

The certificates stated that the second applicant suffered from Post Traumatic Stress Disorder (PTSD) with recurring depressive instances, including suicidal thoughts, due to which she had been admitted to a psychiatric clinic on two occasions (the certificates did not specify the dates). Her poor mental health was the consequence of traumatic experiences in her home country and of the long, insecure waiting in Sweden. She was very afraid of returning to Kosovo.

As concerned the three children, it was observed that they only knew life in Sweden and had integrated into Swedish society. However, they had developed aggressive behaviour, suffered from nightmares and were afraid

of sudden noises. According to the certificates, a deportation to Kosovo, where the children had never been, could cause them to develop identity problems of a serious nature.

No information was provided as to the first applicant's state of health.

3. Application of Rule 39 of the Rules of Court and the request for a medical report on the second applicant's current state of health

On 5 March 2005 the applicants requested the Court to indicate to the Swedish Government under Rule 39 of the Rules of Court a suspension of their deportation to the province of Kosovo in Serbia and Montenegro.

On 15 March 2005 the President of the Section to which the case had been allocated decided to apply Rule 39. He further decided to request the Swedish Government to submit a recent, independent assessment of the physical and mental health of the second applicant.

On 4 April 2005 the Government informed the Court that, on 16 March 2005, the Migration Board, following the Court's request, had decided to stay the deportation of the applicants until further notice.

On 17 May 2005 the Government provided the Court with a medical report concerning the second applicant, dated 29 April 2005, by Dr I. Sjödin, doctor in psychiatry and psychosomatics and chief physician at the psychiatric clinic of the University Hospital of Linköping. The report was based on the medical documents available in the case and on a personal examination of the second applicant by the physician. The report stated that the second applicant had suffered from anxiety and sleeplessness already in her home country and that her mental health had deteriorated in June 1999 when she had been informed that her father and brother had been found in a mass grave in Kosovo. It had triggered a panic attack and she had been committed to closed psychiatric care between 20 and 28 June 1999, diagnosed as suffering from an adjustment disorder. Following a rejection of one of their applications for asylum by the Aliens Appeals Board, she had had a crisis reaction and again been committed to closed psychiatric care between 6 and 9 April 2002. One month later, between 7 and 23 May 2002, she was again taken into care and treated for depression. Since then she had taken medication to treat her anxiety and sleeplessness and, periodically, anti-depressants. During the personal examination of the second applicant, she had told the physician that she and the children mostly lived with her sister-in-law and her family because the first and second applicants had problems in their relationship. Moreover, she had stated that she only had sporadic contact with the health services and that, from time to time, she would get suicidal thoughts but that she had to live for the sake of her children.

According to the physician, the second applicant appeared tired and dejected but she showed no signs of being psychotic and had no physical health problems. He considered that she suffered from years of anxiety,

depression and nightmares which emanated from traumatic experiences in her home country, together with the protracted insecurity of her present situation and her complicated relationship with her husband. Her depressive symptoms appeared to have become chronic but she did not show any suicidal tendencies. The physician found that the second applicant's poor mental health was not so serious that, in itself, it could justify granting her leave to stay in Sweden on medical grounds. However, he considered that the family's situation as a whole, and in particular the children's vulnerability, had to be taken into account before deciding to deport them to their home country. He concluded that the second applicant's state of health was not an impediment to the enforcement of the deportation order.

COMPLAINT

The applicants complained under Article 3 of the Convention that, if deported from Sweden to the province of Kosovo in Serbia and Montenegro, it would cause irreparable harm to them because of the second applicant's poor mental health and the children's very strong ties to Sweden, where they had lived all their lives.

THE LAW

The applicants alleged that their deportation to Kosovo would constitute a violation of Article 3 of the Convention, which provides:

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

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 deportation of aliens. However, the deportation 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 deported, 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 deport that person (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

Moreover, 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 a deportation of the applicants to Kosovo would be contrary to Article 3 having regard to all the material before it at the time of its consideration of the case, including the most recently available information on the second applicant's state of health.

The Court would also 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 first and second applicant have experienced some traumatic experiences in the past which have affected them deeply and that they have suffered from the uncertain situation as asylum seekers in Sweden. However, the Court observes that the applicants have not claimed before it that they would be persecuted by the authorities in the province of Kosovo if they were to be return there and the Court finds no indications that they would risk such harassment or ill-treatment by the national authorities in their home country. Moreover, the applicants have remained illegally in Sweden for several years even though their applications for residence permits have been repeatedly rejected by the Swedish immigration authorities and they have been ordered to leave the country. The Court finds that the Swedish authorities cannot be held responsible for this decision by the first and second applicant on behalf of their family, as it is a choice they have made consciously, being aware of the consequences of it for themselves and their children. In this respect, it should be noted that the children are still very young and that, although it would be a great change for them to move to Kosovo, they would no longer have to live in the current, very insecure situation which has, naturally, had a negative impact on them, resulting in nightmares and aggressive behaviour. Moreover, they would continue to have the support and care of their parents.

As concerns the applicants' state of health, the Court notes that, according to the medical certificates submitted in the case, only the second

applicant has been in contact with the Swedish health services and that, since May 2002, she has only had sporadic contact with them. None of the other applicants appear to have been in regular contact with the health services or to have received treatment or medication. Moreover, according to the medical report of 17 May 2005, the second applicant's state of health was not so poor that it could justify granting her leave to stay in Sweden on medical grounds or impede the enforcement of the deportation order.

The Court is aware that, even though health care in the province of Kosovo is clearly not of the same standard as in Sweden, there are health care and medication available. In any event, the fact that the applicants' circumstances in their home country will be less favourable than those enjoyed by them while 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). In this respect, the Court attaches importance to the fact that the case concerns deportation to a 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).

Thus, although the Court accepts that it will be difficult for the applicants to return to their home country after such a long absence, it considers that the circumstances of the present case do not reach the threshold set by Article 3. Therefore, the Court does not find that the applicants' deportation to the province of Kosovo in Serbia and Montenegro would be contrary to the standards of this provision of the Convention. In the Court's view, the present case does not disclose the exceptional circumstances established by its case-law (see, among others, *D v. United Kingdom*, cited above, § 54).

It follows that 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