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. 70258/01
by Syzane and Aulona SELMANI
against Switzerland

The European Court of Human Rights (Second Section), sitting on 28 June 2001 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr G. BONELLO,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application introduced on 31 May 2001 and registered on 12 June 2001,

Having deliberated, decides as follows:

THE FACTS

The applicants, Yugoslav citizens of Kosovo origin, are mother and daughter born in 1974 and 1997, respectively. The first applicant, who works as a cleaning lady, is married to A.S., a Yugoslav citizen of Kosovo origin born in 1971 and currently detained in Lenzburg prison. A.S. is the father of the second applicant.

A. The circumstances of the case

A.S. entered Switzerland in 1989 where he obtained a residence permit (*Aufenthaltsbewilligung*) and worked as a manual worker and taxi driver. On 17 January 1997 he married the first applicant in Switzerland who henceforth also obtained a residence permit. On 10 October 1997, their daughter, the second applicant, was born in Switzerland.

On 14 September 1998, A.S. was remanded in custody.

On 16 September 1999 the Criminal Court (*Strafgericht*) of the Canton of Basel-Landschaft sentenced A.S. to 8 years' imprisonment and 15 years' prohibition to enter Switzerland on account of offences against the Narcotics Act (*Betäubungsmittelgesetz*). Upon, appeal, the Basel-Landschaft Court of Appeal (*Obergericht*) reduced the sentence to six years' imprisonment.

On 3 January 2000 the Basel-Landschaft Aliens' Police (*Fremdenpolizei*) decided not to prolong the residence permits of the applicants and A.S. and ordered the applicants to leave Switzerland by 31 May 2000, whereas A.S. was ordered to leave upon termination of his prison sentence.

The applicants' appeal against this decision was dismissed by the Basel-Landschaft Government (*Regierungsrat*) on 6 June 2000 on the grounds that the applicants depended on public welfare, and as the conduct of A.S. did not permit the conclusion that he was willing to integrate in Switzerland.

On 11 October 2000 the Basel-Landschaft Administrative Court (*Verwaltungsgericht*) dismissed the applicants' further appeal. The court noted that the applicants, if they returned to their home country, would in fact be separated from A.S. However, in the court's opinion, their family life was already considerably limited in view of the prison sentence of A.S. Given the public interest in an orderly implementation of the prison sentence, the applicants' additional separation from A.S. appeared insignificant (*geringfügig*), particularly as they had the possibility of communicating by mail and telephone with him. The court furthermore confirmed the decision of the Basel-Landschaft Government according to which the refusal to prolong the applicants' residence permit was based on

S. 10 § 1 (d) of the Federal Aliens' Act (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*) which envisaged a foreigner's expulsion if he or she depended continuously and substantially on public welfare.

The applicants filed an administrative law appeal (*Verwaltungsgerichts-beschwerde*) with the Federal Court which the latter declared inadmissible on 27 March 2001. It noted that S. 100 § 1 (b)(3) of the Organisation of Justice Act (*Organisationsgesetz*) only permitted administrative law appeals if the complainant could invoke an "entitlement". In cases of family separation this required as a rule that one of the family members had a "consolidated right to stay" (*gefestigtes Anwesenheitsrecht*) in Switzerland, for instance on account of Swiss nationality or of a right to domicile (*Niederlassungsbewilligung*), which was not the case for the present applicants. The judgment continued:

> "The only basis for such a right could ... at most, be Article 8 § 1 of the Convention and Article 13 § 1 of the Federal Constitution (*Bundesverfassung*), in that the family of applicants would provisionally be separated even more insofar as wife and child would have to leave Switzerland already before their husband and father is released from prison. However, for the applicants to live together as a family is in any event excluded until release from prison. The possible direct contacts between the detainee and his family will be limited until then to short visits in prison. Nevertheless, a right of the (remaining) family to stay in Switzerland merely to exercise such a limited right to visit the detained applicant, cannot *a priori* be derived from Article 8 of the Convention, *a fortiori* as this person only disposes of a ... residence permit rather than a consolidated right to stay, for which reason he cannot convey any rights to residence upon his wife and child. The (enforced) stay due to detention on remand or a prison sentence, based on an order of criminal procedure or penal law, cannot in itself provide a 'consolidated right to stay' within the meaning of the case-law to Article 8 of the Convention."

Subsequently, the Federal Aliens' Office (*Bundesamt für Ausländerfragen*) ordered the applicants to leave Switzerland by 29 June 2001, whereas A.S. was ordered to leave Switzerland upon release from detention.

The applicant's appeal against this decision was dismissed by the Federal Department of Justice and Police (*Eidgenössisches Justiz- und Polizeidepartment*) on 11 May 2001.

B. Relevant domestic law and practice

According to S. 13 § 1 of the Swiss Federal Constitution, "everyone has the right to respect for his private and family life, his home and his communications by mail, post and telecommunications".

S. 10 § 1 (d) of the Federal Aliens' Act provides that a foreigner may be expelled from Switzerland, *inter alia*, "if he, or a person for whom he has to care, continuously and substantially becomes a burden for public welfare".

S. 100 § 1 (b) (3) of the Organisation of Justice Act states that an administrative law appeal shall be inadmissible in matters of the aliens' police if it concerns the granting or the refusal of authorisations in respect of which federal law offers no entitlement.

COMPLAINTS

1. The applicants allege a breach of their right to respect for private and family life as enshrined in Article 8 of the Convention. They point out that A.S., their husband and father, respectively, will probably leave prison only in November 2002. If the applicants are obliged to leave Switzerland now, they will not be able to see their husband and father during a period of at least one and a half years. The applicants claim that it is financially impossible for them regularly to travel from Yugoslavia to Switzerland to visit A.S. in prison. There are no grounds justifying the expulsion of the first applicant who has never presented any danger to Swiss public order. The applicants admit that they currently live a limited family life with A.S. The first applicant visits her husband in prison whenever possible; later he will be able to spend his weekend leave from prison at home. These regular visits also counteract any estrangement between the second applicant and her father.

The first applicant submits that she has a regular work contract and does not depend on public welfare.

2. Under Article 14 of the Convention the applicants complain that they have been discriminated against on account of their family relations with A.S.

THE LAW

1. The applicants complain of a breach of Article 8 of the Convention in that they are obliged to leave Switzerland and will not, therefore, have the possibility to visit A.S., their husband and father, respectively, while he is serving his prison sentence.

Article 8 of the Convention states, insofar 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 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."

The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see the Moustaquim v. Belgium judgment of 18 February 1991, Series A no. 193, p. 18, § 16).

In the present case, A.S. is serving a prison sentence, though the applicants have the possibility of regularly visiting him in prison. The Court notes that in this respect the applicants have not complained of an interference with their right to respect for private and family life within the meaning of Article 8 of the Convention.

The applicants furthermore do not as such contest the decision of the Swiss authorities that they, together with A.S., have to return to Yugoslavia together as a family. However, they complain that, if they are forced to leave Switzerland separately, in Yugoslavia they will not have the means to travel regularly to Switzerland to visit A.S. in prison until his release in November 2002.

The issue arises, therefore, whether there exists an obligation under Article 8 of the Convention for a Member State actively to ensure that a family may regularly visit, either from within the territory of that State or from another country, a family member detained in prison.

The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see the Gül v. Switzerland judgment of 19 February 1996*, Reports of Judgments and Decisions* 1996-I, p. 175-176, § 38).

The Court further recalls that the Convention does not grant detained persons the right of choosing their place of detention, and that the separation and distance from his family are inevitably consequences of his detention. Nevertheless, the detention of a person in a prison at a distance from his family which renders any visit very difficult, if not impossible, may in exceptional circumstances constitute an interference with his family life, the possibility for members of the family to visit a prisoner being an essential factor for the maintenance of family life (see *Ospina Vargas v. Italy*, no. 40750/98, ECHR 2000-).

In the present case, the Court has had regard, on the one hand, to the considerable organisational difficulties which such a right for a family to visit a family member in prison would imply for Convention States. On the other hand, it notes that the Swiss authorities enable the applicants regularly to visit A.S. and to communicate with him in writing and by telephone, and that A.S. will apparently be released from prison in November 2002. The difficulties which the applicants may encounter are not, therefore, excessive and will not render family life impossible (see application no. 23241/94, decision of 20 October 1994, DR 79-B, p. 121, with further references).

In balancing the various interests, the Court does not consider that Article 8 encompasses, in the circumstances of the present case, an obligation for the Swiss authorities actively to ensure that the applicants can visit A.S. in prison.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

2. Insofar as the applicants complain under Article 14 of the Convention that they have been discriminated against on account of their family relations with A.S., the Court finds no issue under this provision. The remainder of the application is, therefore, also manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President