

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

FIFTH SECTION

DECISION

Application no. 15620/09
Gani SHALA
against Germany

The European Court of Human Rights (Fifth Section), sitting 22 January 2013 as a Committee composed of:

Ganna Yudkivska, *President,*
Angelika Nußberger,
André Potocki, *judges,*

and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 17 March 2009,

Having regard to the decision of 25 March 2010 to declare the application inadmissible and to the decision of 5 December 2012 to re-open the proceedings,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Gani Shala, lives in Kosovo[1] and declares himself to be a national of Kosovo. He was represented before the Court by Mr U. Rosskopf, a lawyer practising in Donauwörth, Germany.

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

[1] All reference of the Court relating to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

1. Personal circumstances

2. The applicant was born in 1963 in Kosovo and moved to Germany in 1988 in order to avoid persecution for political activities. He applied for asylum. After he returned to Kosovo at the beginning of 1989 the authorities dismissed his asylum application.

3. The applicant returned to Germany in 1991 and married a Serbian national in May 1992. Subsequently, he received a provisional residence permit (*Aufenthaltserlaubnis*), which was extended on several occasions. In 1998 the authorities granted him an unlimited residence permit.

4. The applicant and his wife have four children who were born in 1992, 1993, 1996 and 2002. According to the German courts all children have Kosovo nationality. The youngest child also has German nationality.

2. Criminal proceedings

5. On 4 October 2006 the applicant was arrested on suspicion of committing an offence under the Narcotics Act (*Betäubungsmittelgesetz*). On 8 November 2007 the Augsburg Regional Court convicted him of drug trafficking (*unerlaubtes Handeltreiben mit Betäubungsmitteln*) and sentenced him to five years and three months' imprisonment. It found that the applicant had, on different occasions, bought 150 grams, 250 grams and 15.05 grams of heroin, as well as 3.15 grams of cocaine, in order to resell it at a profit.

3. Expulsion proceedings

6. On 2 January 2008 the Donau-Ries District Authority (*Landratsamt Donau-Ries*) informed the applicant of its intention to expel him and invited him to make representations. The applicant submitted that he had been living with his family in Germany for seventeen years and that he had no family ties in Kosovo except for his mother and a brother. On 18 January 2008 the Landsberg detention centre (*Justizvollzugsanstalt Landsberg*) reported on the applicant's behaviour during detention, noting that the applicant had contacted the substance abuse service within the detention centre for counselling for the first time on 29 November 2007, and that the applicant had written contact with his family.

7. On 18 February 2008 the Donau-Ries District Authority ordered the applicant's expulsion from the territory of Germany and his deportation to the Republic of Serbia, to be effected directly from the detention centre. It further limited the effect of the expulsion (exclusion period) to four years from the time of the removal, and ordered the applicant to bear the expenses involved in his deportation.

8. The applicant appealed. On 11 February 2009 the Augsburg Administrative Court heard the case. During the hearing the applicant withdrew the part of his appeal concerning the limitation of the exclusion

period. The representative of the Donau-Ries District Authority declared that it revoked that part of the expulsion notification *proprio motu* and set a new time-limit on the applicant's request.

9. On the same day, the Administrative Court dismissed the appeal. It acknowledged that the applicant enjoyed special protection from expulsion as he had been living in Germany for more than five years in a marital relationship with his wife, who possessed a settlement permit (*Niederlassungserlaubnis*). Likewise, it took into account that one of the applicant's children also had German nationality.

10. However, relying on sections 53 § 1 and 2 of the Residence Act, the court held that although the applicant could indeed only be expelled for strong reasons of public safety and order, it found that the gravity of the crime committed by the applicant was such as to give sufficient cause for expulsion.

11. In this context, the Administrative Court found that there were no reasons to dismiss the risk of re-offending in the applicant's case. While the applicant had submitted that he had suffered from a drug addiction since 2004, the court observed that he had failed to finish a course of drug rehabilitation. Although this was the applicant's first prison sentence, the Administrative Court nevertheless found that there was an increased risk of him re-offending because of the fact that he had begun drug trafficking for the first time at the age of over forty, when living in a settled family situation. The court further noted that trafficking heroin revealed a profound criminal tendency as heroin was one of the most dangerous narcotics. In this connection, it underlined the immense social damage caused by drug crimes and the difficulties in investigating them. Referring explicitly to Article 8 of the Convention and the Court's judgments in *Kaya v. Germany* (no. 31753/02, 28 June 2007) and *Chair and J. B. v. Germany* (no. 69735/01, 6 December 2007), the Administrative Court balanced the applicant's right to family life against the public interest of the State in expelling the applicant. While it observed, in particular, that the applicant's younger children were still in need of his care and that they and his wife could not be expected to follow him to Kosovo, it held nevertheless that contact could be maintained by visits during the school holidays and by mail or phone. In this context it also stated that the applicant's family ties had not prevented him from committing the drug crime and that because of his detention over the last few years his contact with his family had been already limited in a similar way.

12. On 24 September 2009 the Bavarian Administrative Court of Appeal refused the applicant's request for leave to appeal. It found that the Administrative Court had given adequate consideration to the effects of the expulsion on the applicant's right to private life under Article 8 of the Convention. The Court of Appeal added that the applicant's youngest child would be ten years old in the year 2010, the earliest time at which the

deportation could be effected. At that age the child could be expected to understand the difference between a temporary and a permanent separation from his father.

13. On 19 October 2009 the applicant filed a letter of objection (*Gegenvorstellung*). Counsel pointed out that the applicant's youngest child would be only seven years old by 2010. He further maintained that the applicant could be deported at any moment as the expulsion decision had become final with the refusal of leave to appeal.

14. On 30 November 2009 the Bavarian Administrative Court of Appeal dismissed the applicant's objections. It agreed with the applicant that his youngest child would be only eight in 2010 but found that this fact alone did not change its assessment of the applicant's family situation or of the need for his expulsion. Further, it disagreed with the applicant that the deportation could be executed at any time up to 2 April 2010. The Bavarian Administrative Court of Appeal relied on their experience that the authorities did not effect deportations of prisoners under section 456a of the Code of Criminal Procedure before two-thirds of the sentence had been served, which in the applicant's case would not be before early April 2010.

15. On 4 March 2010 the Donau-Ries District Authority informed counsel that the applicant would be deported on 9 March 2010.

16. On 8 March 2010 the Federal Constitutional Court refused to admit the applicant's constitutional complaint for consideration, without giving further reasons (file no. 2 BvR 2858/09).

17. On 9 March 2010 the Augsburg Prosecutor's Office discontinued the execution of the applicant's prison sentence and he was deported to Kosovo.

18. On 15 March 2010 the Augsburg Prosecutor's Office issued an arrest warrant for the applicant in respect of the rest of the prison sentence, which amounted to 666 days.

4. Proceedings concerning the consequences of the deportation

19. On 2 March 2009 the Donau-Ries District Authority revoked the limitation on the exclusion period stipulated in its expulsion decision dated 18 February 2008.

20. On 4 March 2010 counsel requested the Donau-Ries District Authority to limit the exclusion period to one year. On 7 April 2010 the Donau-Ries District Authority set the exclusion period of the applicant's deportation at 8 March 2014. The applicant appealed. The Augsburg Administrative Court held a hearing on 22 March 2011. During the hearing the District Authority submitted a report on the applicant's family situation stating that the applicant had frequent contact with his family via the Internet and they had visited him in Kosovo. The applicant and the District Authority concluded a friendly settlement under which the effects of the applicant's deportation (exclusion period) were limited to 1 December 2012.

The applicant was also required to pay the expenses incurred by his deportation and to provide evidence that he had not consumed illegal drugs.

21. On 14 June 2012 the Donau-Ries District Authority informed counsel that the effects of the expulsion order and the deportation would be limited to 1 December 2012. Further, it informed the applicant that any re-entry into Germany would be subject to a separate visa procedure.

COMPLAINTS

22. The applicant complained under Article 8 of the Convention his deportation to Kosovo would destroy his relationship with his children and his wife.

23. Further, he complained under Articles 2, 5 and 6 that his right to life and to physical integrity would not be guaranteed in Kosovo.

THE LAW

A. The alleged violation of Article 8 of the Convention

24. The applicant complained that, as a result of his expulsion, he was unable to exercise his right to family life with his wife and their four children. He relied on Article 8 of the Convention which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his ... 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 ... for the prevention of disorder or crime ..."

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, in so far as they may interfere with a right protected under paragraph 1 of Article 8, 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. the Netherlands [GC], no. 46410/99, § 54, ECHR 2006-XII).

26. The Court notes that the applicant had established a family life in Germany with his wife and their children. After his detention he stayed in contact with his family by writing, by phone and by their visits to the detention centre. It further notes the domestic court's finding that his wife, who held a permanent settlement permit, and his children, who had been born and had grown up in Germany, could not be expected to move to Kosovo. The expulsion therefore interfered with his right to family life.

27. The Court further notes that the expulsion had a basis in domestic law, namely section 53 § 1 and 2 of the Residence Act, and that it served a legitimate aim, namely "the prevention of disorder and crime". 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. The Court reiterates the criteria it uses for such an assessment in cases where the main obstacle to expulsion is the difficulty for the spouses to stay together and for a spouse and children to live in the country of origin of the person to be expelled (compare *Üner v. the Netherlands* [GC], cited above, §§ 57-58):

> "– 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;
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> – 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."

28. In applying these criteria to the present case, the Court has regard to the fact that the applicant had committed a serious criminal offence – he had dealt in a considerable amount of heroin, a particularly dangerous drug with a high dependency potential – punishable by more than five years' imprisonment. In view of the devastating effects of drugs on people's lives and on society, the Court understands that authorities' need to show great firmness with regard to those who actively contribute to the spread of this scourge (compare *C. v. Belgium*, 7 August 1996, § 35, *Reports of Judgments and Decisions* 1996-III, and *Maslov v. Austria* [GC], no. 1638/03, § 80, ECHR 2008).

29. The Court further notes that the applicant had lived for some nineteen years in Germany when the expulsion order became final (see, *Maslov*, cited above, § 61). During this considerable length of time the applicant had married and founded a family. The Court recognises that the applicant's marriage had then lasted some seventeen years and that the applicant's expulsion would have resulted in splitting up the family. Even though all of his children had – as the German courts pointed out – Kosovo nationality, it is noted that all of them were born and grew up exclusively in Germany. Moreover, all of them were minors, aged 7, 13, 16 and 17. Although the applicant's relationship with this wife and children was severely limited after his detention in 2006, the Court concludes that the applicant's ties with Germany nevertheless remained quite strong (compare *Joseph Grant v. the United Kingdom*, no. 10606/07, § 40, 8 January 2009).

30. On the other hand, the Court observes that the applicant had spent more than the half of his life in Kosovo, where his mother and his oldest brother were still living. Neither the languages nor the customs were new for the applicant, who had grown up and lived in Kosovo until the age of 28. The Court therefore accepts that there were no insurmountable obstacles that prevented his reintegration in his country of origin (compare, *Miah v. United Kingdom*, no. 53080/07, § 25, 27 April 2010).

31. The Court agrees with the concern of the Augsburg Administrative Court that the applicant's younger children, especially, still depended on his care. However, the Court observes that the applicant had been detained since 4 October 2006. He was released from prison only on the condition of his deportation. Otherwise the execution of the prison sentence, with the attendant separation from his family, would have continued. Finally, considering the travel opportunities and the distance between Germany and Kosovo, the applicant's family had a reasonable chance of visiting him at least during the school holidays.

32. The Court further has regard to the fact that the expulsion from German territory was not for good and that the applicant had the opportunity to apply for a limitation on the exclusion order. The Court notes in this connection that this right was indeed exercised, as the Donau-Ries District Authority limited the exclusion period afterwards until 1 December 2012.

Relying on his family ties, he could subsequently request an entry visa and a residence permit.

33. Moreover, the Court notes that the applicant was at liberty to apply under Article 11 § 2 of the Residence Act for temporary entry into Germany for a short period prior to expiry of the exclusion period by way of exception, if his presence was required for compelling reasons or if the refusal of permission would cause undue hardship.

34. The Court recognises that the domestic courts reviewed the issues mentioned above in detail and with due consideration for the applicant's family situation. Against the background of the gravity of the drug crime 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 German courts gave due consideration to the applicant's right to respect for his family life and balanced it reasonably against the State's interest in preventing disorder and crime.

35. 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. The alleged violation of Articles 2, 5 and 6 of the Convention

36. The applicant complained under Articles 2, 5 and 6 that his right to life and to physical integrity would not be guaranteed in Kosovo. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

37. It follows that these parts of the application are also 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

Ganna Yudkivska
President