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. 50359/99
by Christian NWOSU
against Denmark

The European Court of Human Rights (Second Section), sitting on 10 July 2001 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr A. KOVLER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application introduced on 8 January 1999 and registered on 17 August 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Nigerian national, born in 1959. At present he is resident in Nigeria to where he was returned by the Danish authorities. He is represented before the Court by Mr Bjørn Elmquist, a lawyer practising in Copenhagen.

The respondent Government are represented by their Agent, Mr Hans Klingenberg, and Co-Agent Ms Nina Holst-Christensen of the Ministry of Justice.

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

The applicant came to Denmark in October 1992 and applied for asylum. In the beginning of 1993 he married a Danish citizen but the marriage only lasted about half a year. In December 1993 he married another Danish citizen. His request for asylum was rejected by the Danish authorities but he received in March 1994 a residence permit due to the fact that he was married to a Danish citizen. No children have resulted from any of the marriages. His parents as well as two sisters still live in Nigeria whereas other members of his family live in the United States and the United Kingdom. While living in Denmark the applicant visited Nigeria three times, most recently he spend a month there in January 1998. He experienced no problems while he was there. He received a new Nigerian passport in 1997.

In February 1998 the applicant was arrested and charged with narcotics offences, namely for having been in possession of 1,127 kilo of heroin and 200.5 grams of cocaine, for the purpose of passing it on. He was detained on remand. On 18 June 1998 an indictment was served and the trial commenced in the Copenhagen City Court (*byretten*) on 19 June 1998. The applicant pleaded guilty to the charges brought against him whereas he opposed the prosecutor's request for an expulsion due to the fact that he had lived in Denmark since 1992, had been married to a Danish citizen since 1993 and since he allegedly risked 5 years' imprisonment according to Nigerian law, due to his conviction in Denmark, in conditions which would be cruel and inhuman.

By judgment of the same day the applicant was found guilty of the charges brought against him and sentenced to 3½ years' imprisonment. The City Court also decided to expel the applicant from Denmark for ever.

The applicant appealed against the judgment requesting a more lenient sentence and acquittal as regards the decision to expel him. On 7 September 1998 the High Court of Eastern Denmark (*Østre Landsret*) upheld the City Court judgment in its entirety. As regards the expulsion order the High Court stated:

> "Due to the character and extent of the criminal activity concerned (the High Court) agrees that the requirements for expulsion pursuant to the Aliens Act ... are fulfilled. The allegations that (the applicant) might perhaps be sentenced to an additional term of imprisonment in Nigeria for the crimes committed and that serving a sentence in a Nigerian prison would run counter to the minimum standards of prison conditions acknowledged by Denmark do not speak decisively against expulsion. Furthermore, there appears to be no other special reasons speaking in favour of refraining from expulsion pursuant to the Aliens Act ..."

On 17 September 1998 the applicant applied for leave to appeal to the Supreme Court (*Højesteret*). This was refused on 26 October 1998. On 2 November 2000 the deportation order was carried out.

COMPLAINTS

1. The applicant complains that due to the narcotics crimes committed in Denmark he will be sentenced to 5 years' imprisonment in Nigeria, since Nigerian law stipulates that any Nigerian citizen found guilty in a foreign country of an offence involving narcotics and who thereby brings the name of Nigeria into disrepute receives such a sentence. Furthermore, he complains that prison conditions in Nigeria are such that serving a five-year sentence there would amount to inhuman treatment. The applicant invokes in this respect Article 3 of the Convention.

2. The applicant also maintains that he was not afforded a fair trial in the criminal proceedings since the prosecutor, in his view, did not properly investigate his possible fate if returned to Nigeria.

3. Finally, the applicant complains, under Article 8 of the Convention, that his family life will be unjustifiably interfered with since there is no realistic possibilities for his wife to follow him and settle in Nigeria.

THE LAW

1. The applicant alleged that being returned to Nigeria runs contrary to Articles 3 of the Convention, which read as follows:

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

The Court recalls that Contracting States have the right to control the entry, residence and expulsion of aliens. The right to asylum is not protected in either the Convention or its Protocols (cf. for example Vilvarajah and others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, § 102). However, expulsion by a Contracting State of an alien who has obtained asylum may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she is to be expelled (ibid., p. 34, § 103). A mere possibility of ill-treatment, however, is not in itself sufficient to give rise to a breach of Article 3 (ibid., p. 37, § 111).

The Court notes that no evidence has been submitted by the applicant that he has encountered any problems on his return to Nigeria on 2 November 2000. Also the Court notes that the applicant visited Nigeria several times while living in Denmark without any problems. Accordingly, the Court considers that there is no evidence in the case which indicates that the Nigerian authorities are, or will be, informed of the offences committed in Denmark. Furthermore, the mere possibility of being convicted under Nigerian law for discrediting the country does not, as such, run counter to Article 3 of the Convention.

Thus, the Court considers, on the evidence before it, that it has not been established that there are substantial grounds for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention if expelled to that country.

As a consequence of the above the Court does not find that the facts of the case disclose any appearance of a violation of Article 3 of the Convention.

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

2. The applicant also complains that in the criminal proceedings brought against him, he did not receive a fair trial since the prosecution failed to investigate properly his fate if returned to Nigeria. He invokes Article 6 of the Convention which as far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Court notes that the applicant's case was heard in two court instances where, assisted by counsel, he could submit whatever he found to be of importance. The Court has found no elements which could lead to the conclusion that the applicant's trial did not comply with the requirements of fairness as guaranteed by Article 6 of the Convention or of any other Article.

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

3. Finally the applicant complains under Article 8 of the Convention, that as a result of his expulsion, he will be separated from his wife who cannot be expected to follow him to Nigeria.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 Government submit that the present case discloses no appearance of a violation of Article 8 of the Convention. The Government do not contest that the expulsion from Denmark and deportation to Nigeria interferes with the applicant's right to respect for his family life, but given the serious and damaging offence which the applicant committed in Denmark the measure of expulsion was called for in the interest of public safety, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, and the measure was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

In the opinion of the Government the applicant has very strong ties with his country of origin since he left Nigeria as an adult, 33 years old, and therefor spent his entire childhood and a large part of his adult life in his country of origin. He speaks the language and he went to school, got his education and worked in Nigeria. Furthermore, the applicant who possesses a Nigerian passport has been to Nigeria several times since he came to Denmark, most recently he stayed a month there in January 1998. Undoubtedly, the applicant also has family ties with Nigeria, as his parents, sisters and other family live there.

The Government point out in comparison that the applicant does not have strong ties with Denmark. Since at the time the expulsion decision was made he had resided only 5 years and 8 months in Denmark and according to a previous statement from the applicant, apart from his wife and a few African friends there are no other persons in Denmark with whom he has close links. In the Government's opinion the fact that the applicant is married to a Danish citizen cannot in itself be a bar to expulsion of the applicant owing to serious drug offences.

The applicant submits that his wife cannot count on being issued with a residence permit in Nigeria, since as a married couple they would not share a common address when the applicant goes to jail, which probably is one of the criteria for obtaining a residence permit there.

Moreover, the applicant submits that being a prisoner he will not be able to support his wife, and since the applicant's wife would not be able to support herself in Nigeria, for this additional reason the authorities in Nigeria would most probably deny her a residence permit.

Accordingly, an expulsion would result in the breaking up of his family life

The Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. For that purpose they are entitled to order the expulsion of persons convicted of criminal offences.

However, their decisions in this domain must, in so far as they may interfere with a right protected under § 1 of Article 8, be 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, among other authorities, the following judgments: Beldjoudi v. France, 26 March 1992, Series A no. 234-A, p. 27, § 74; Nasri v. France, 13 July 1995, Series A no. 320-B, p. 25, § 41; Boughanemi v. France, 24 April 1996, *Reports of Judgments and Decisions* 1996 II, pp. 609-610, § 41; and C. v. Belgium, 7 August 1996, *Reports* 1996-III, p. 924, § 31). The Court's task is to determine whether the expulsion at issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court has only to a limited extent decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in 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; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.

The Court observes from the outset that the expulsion order was based on the particularly serious and damaging nature of the offences of which the applicant was convicted, namely for having been in possession of 1,127 kilo of heroin and 200.5 grams of cocaine, for the purpose of passing it on. In view of the devastating effects drugs have on peoples' lives, the Court understands why the authorities show great firmness to those who actively contribute to the spread of this scourge (see *inter alia* the Dalia v. France judgment of 19 February 1998, *Reports* 1998-I, p. 92, §54). In the Court's view, even if the applicant had not previously been convicted, this does not detract from the seriousness and gravity of such a crime (see the Bouchelkia v. France judgment of 29 January 1997, *Reports*, 1997-I, p. 65, § 51).

The Court agrees with the Government that the applicant has maintained strong links with his country of origin. As to the applicant's ties with Denmark, these appear to be connected mainly to his marriage to a Danish citizen.

As to the question whether the applicant's wife will be excluded from following the applicant to Nigeria, the Court is not convinced by the arguments submitted by the applicant since, as stated above, the Court does not consider that there is evidence in the case which indicates that the Nigerian authorities are, or will be, informed of the offences committed in Denmark.

In the light of the above elements, the Court considers that in concluding that the public interest in the applicant's expulsion from Denmark to Nigeria was preponderant, the Danish authorities thoroughly examined and balanced the above interest and acted within their margin of appreciation. The Court finds that the interference with the applicant's right to respect for private and family life was supported by relevant and sufficient reasons, was proportionate for the purposes of Article 8 § 2 and could reasonably be viewed as necessary in a democratic society.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President