CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46553/99
by S.C.C.
against Sweden

The European Court of Human Rights (First Section) sitting on 15 February 2000 as a Chamber composed of

Mr J. Casadevall, *President*,
Mrs E. Palm,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr C. Bîrsan,
Mrs W. Thomassen,
Mr T. Panţîru, *judges*,

and Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 3 March 1999 by S.C.C. against Sweden and registered on 5 March 1999 under file no. 46553/99;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 6 May 1999 and the observations in reply submitted by the applicant on 23 July 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Zambian national born in 1962. At present she resides at Spånga, Sweden. She is represented before the Court by Mr Peter Bergquist, a lawyer practising at Tyresö, Sweden.

A. Particular circumstances of the case

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

The applicant entered Sweden on 26 April 1990 with her husband, a first secretary at the Zambian Embassy in Stockholm, and their two children, born in 1988 and 1990. The applicant's two children from a previous marriage, born in 1982 and 1985, remained in Zambia. The applicant was granted a work permit for one year as from November 1992. On 30 December 1993 she applied for an extended work permit. She stated, *inter alia*, that she and her husband did not have a good marriage and that he assaulted her, that she had rented an apartment in Stockholm, and that she could not return to Zambia since she was afraid of her husband's relatives. In December 1993 the applicant's two children who had remained in Zambia were brought to Sweden.

The applicant remained in Sweden until early 1994 when it appears she returned to Zambia in connection with her husband's end of work at the Embassy.

On 17 March 1994 the National Immigration Board (*Statens invandrarverk*) rejected her above application for a work permit. The Board found that she had no connection to Sweden and that she had left the country.

On 8 May 1996 the applicant, having returned to Sweden, applied for a work permit and a residence permit for one year as from August 1996. The investigations made by the National Immigration Board disclosed that she and her husband, together with the four children, had returned to Zambia in 1994 and that they had intended to divorce. However, her husband died before the divorce became final. The applicant stated that she had returned to Sweden in November 1994 in order to pay her debts and because she had been employed at a hotel in Stockholm. She also stated that she stayed in Sweden for economical reasons and that she wanted a residence and work permit limited to one year, after which time she intended to return to Zambia.

On 9 January 1998 the National Immigration Board rejected the application and ordered the applicant's deportation to Zambia. The Board found that neither the applicant's previous stay in Sweden – as the wife of a diplomat – nor the alleged threats against her by her husband's relatives constituted grounds for granting her a residence permit. The Board also took into account that the applicant's children lived in Zambia.

The applicant appealed to the Aliens Appeals Board (*Utlänningsnämnden*). She now stated that she was infected with HIV and that she should be granted a residence permit on humanitarian grounds as the necessary medical care was not available in Zambia. She submitted two medical certificates issued on 2 February and 20 August 1998 according to which the applicant's HIV infection had been detected in 1995. She made regular visits to

the hospital. It was planned to commence an anti-HIV treatment during the next year. As such treatment was complicated and required strict adherence it was further indicated that treatment could only commence if the applicant was given a long-term permit to reside in Sweden.

On 10 November 1998 the Appeals Board upheld the Immigration Board's decision. Referring to a decision taken by the Swedish Government on 23 June 1994 (see below), the Appeals Board considered that the applicant's health status did not give reason to grant her a residence permit.

The applicant made a new application for a residence permit. She submitted a medical certificate issued on 25 January 1999, according to which her state of health had deteriorated. As a consequence, the anti-HIV treatment previously envisaged had been initiated. She also submitted a certificate issued on 27 January 1999 maintaining that a deportation of the applicant would result in the termination of her HIV treatment, the consequences of which would be a faster process towards the AIDS stage and her supposed death.

By a decision of 10 February 1999 the Appeals Board rejected the application stating, *inter alia*, that a new application has to be based on circumstances which have not previously been examined in the matter.

The applicant lodged a new application with the Appeals Board on 19 February 1999. In addition to what she had previously stated, she now claimed that she lived with F.R., a Somalian citizen who had been given a permit to reside in Sweden in 1992. He had been suffering from an HIV infection for about ten years. Allegedly, they had met in the summer of 1995 and had been cohabiting since the summer of 1996. The applicant claimed that she had not previously referred to this relationship, since she was afraid that it would be held against her. She further stated that she did not intend to bring her children to Sweden in case she was granted a residence permit. Her brother, who allegedly had taken over the responsibility for her children, planned to send them to school in England.

On 23 February 1999 the Appeals Board rejected the application. The Board noted, *inter alia*, that the applicant had not previously referred to her relationship with F.R. and considered that there were thus reasons to question the seriousness of the relationship. The Board did not find it obvious that the applicant would have been granted a residence permit on the ground of the alleged relationship, had she applied for it according to the main rule laid down in Chapter 2, Section 5 of the Aliens Act (see below). Furthermore, the Board found that it would not be contrary to requirements of humanity to execute the expulsion decision.

On 5 March 1999, following the Court's indication to the Swedish Government that it was desirable that the applicant not be expelled to Zambia before 16 March 1999 (see below), the National Immigration Board stayed the applicant's deportation. The Board's decision is still in force.

B. Relevant domestic law and practice

The basic provisions concerning the right of aliens to enter and to remain in Sweden are laid down in the 1989 Aliens Act (*utlänningslagen*, 1989:529). The Act also defines the conditions under which an alien can be expelled from the country, as well as procedures related to the enforcement of decisions under the Act. There are normally two instances that deal with matters concerning the right of aliens to enter and remain in Sweden; the National Immigration Board and the Aliens Appeals Board. In exceptional cases, the Government may determine whether or not an alien shall be allowed to remain in Sweden following a referral to the Government, by either Board, of an application for residence permit (Chapter 7, Section 11).

Chapter 1, Section 4 of the Aliens Act provides that an alien staying in Sweden for more than three months shall have a residence permit. Such a permit may be issued, *inter alia*, to an alien who is married to or cohabiting with a person domiciled in Sweden or who has been granted a residence permit to settle in Sweden. A permit may also be issued to an alien who, for humanitarian reasons, should be allowed to settle in Sweden (Chapter 2, Section 4). A permit to reside in Sweden shall, according to Chapter 2, Section 5, have been granted before entering the country. As a principal rule all applications made after the alien has entered the country shall be rejected. This does not apply, however, if, *inter alia*, the alien on humanitarian grounds should be allowed to settle in Sweden.

With regard to diplomatic officials employed by foreign powers in Sweden, together with their families, the Act only applies to the extent prescribed by the Government (cf. Chapter 12, Section 2). It follows from the Aliens Ordinance (*utlänningsförordningen*, 1989:547) that diplomatic officials and their families are exempted from the requirement to hold a residence permit.

As regards serious illness, this may in exceptional cases constitute humanitarian reasons for a residence permit on condition that it is a life-threatening illness for which no treatment can be provided in the alien's home country. Further, care or treatment in Sweden should lead to an improvement in the alien's condition or be life saving. Thus, the alien's condition should be so serious that he or she would be likely to die or his or her health would deteriorate considerably if he or she was to be sent home. These principles have been expressed and applied by the Government in a number of precedent rulings of 17 February 1994 concerning medical humanitarian reasons in general and in rulings of 23 June 1994 and 16 March 1995 concerning HIV infection as a reason for a residence permit. The Government also stated that the mere fact that treatment in Sweden is of a higher quality than in the alien's home country does not constitute grounds for granting a residence permit, nor are financial difficulties in getting the appropriate treatment in the receiving country a reason for granting such a permit.

The National Board of Health and Welfare (*Socialstyrelsen*) stated in an opinion of 25 March 1994, enclosed in the Government's decisions of 23 June 1994 and referred to in the decision of 16 March 1995, that the fact that a person is diagnosed with HIV or AIDS should not alone and generally be decisive of the question of humanitarian grounds. Instead, the assessment should be founded on the alien's general state of health taking serious clinical symptoms into consideration. The Board concluded that it found no reason, in this respect, to make a difference between HIV infection and other diseases with a serious prognosis.

Further, according to the Aliens Act, an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to residence in Sweden (Chapter 3, Section 4).

An alien who is to be refused entry or expelled in accordance with a decision that has gained legal force may be granted a residence permit if he or she files a so-called new application based on circumstances which have not previously been examined in the case of refusal of entry or expulsion and if (i) the alien is entitled to a residence permit under Chapter 3, Section 4, or (ii) it would be contrary to requirements of humanity to execute the refusal-of-entry or expulsion decision (Chapter 2, Section 5 b).

Also when it comes to enforcing a decision on refusal of entry or expulsion, regard is taken to the risk of torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 8, Section 1).

COMPLAINTS

1. The applicant claims that her state of health will deteriorate if she is expelled to Zambia. The therapeutic regime recently initiated to treat her HIV infection – which enables her to live a practically normal life – requires strict adherence on the part of the applicant. Furthermore, the treatment is not available in Zambia. Thus, her expulsion to that country would impair her health and lower her life expectancy in violation of Articles 2 and 3 of the Convention.

2. The applicant further asserts that the expulsion would violate her right to respect for her family life under Article 8 of the Convention, as she would be separated from F.R. Allegedly, his state of health prevents him from travelling to Africa.

3. Also under Article 8, the applicant states that her right to enjoy a good reputation has been violated as, allegedly, the Aliens Appeals Board sent one of its decisions concerning her to the wrong address, thus revealing her state of health to other people.

PROCEDURE

The application was introduced on 3 March 1999 and registered on 5 March 1999.

On 5 March 1999 the acting President of the First Section decided to indicate to the respondent Government, in accordance with Rule 39 § 1 of the Rules of Court, that it was desirable in the interest of the parties and the proper conduct of the proceedings not to expel the applicant to Zambia until 16 March 1999.

On 16 March 1999 the Court (First Section) decided to communicate the applicant's complaints submitted under Articles 2 and 3 of the Convention to the respondent Government under Rule 54 § 3 (b) of the Rules of Court and that the indication under Rule 39 be extended until further notice.

The Government's written observations were submitted on 6 May 1999, after an extension of the time-limit fixed for that purpose. The applicant replied on 23 July 1999, also after an extension of the time-limit.

THE LAW

1. The applicant claims that her expulsion to Zambia would impair her health and lower her life expectancy in violation of Articles 2 and 3 of the Convention.

Article 2 of the Convention reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 of the Convention reads as follows:

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

The Government consider that there is nothing to indicate that the expulsion of the applicant would amount to a violation of Article 2 of the Convention. In any event, the Government find it difficult to dissociate the complaint raised under Article 2 from the substance of her complaint under Article 3. They therefore deal with the substance of her complaints under the latter provision.

The Government maintain that there is no evidence that the applicant suffers from any illness related to HIV or that she has reached the stages of AIDS. It is moreover, according to a report submitted on 26 March 1999 by the Swedish Embassy in Zambia, possible for her to receive the same type of treatment in Zambia as in Sweden, however at considerable costs. The Government further assert that the applicant will be able to enjoy the moral and social support of her relatives in Zambia.

The Government conclude that it has not been shown that the applicant's expulsion to Zambia would violate her rights under Articles 2 and 3 of the Convention. In the Government's view, the applicant's complaints are therefore in this regard manifestly ill-founded.

The applicant contends that her state of health is so serious that she is undergoing treatment in order to delay the development of AIDS related symptoms. An interruption of the treatment would be detrimental to her health. The applicant was infected with the HIV virus prior to 1995. The average life expectancy in Africa for a person infected with HIV is 5–7 years from the time of infection, whilst in Sweden HIV is nowadays treated as a chronic disease. If treatment is initiated at an early stage of the infection, the probability of a successful outcome is higher. Modern antiretroviral drugs have the most potent impact on patients who are relatively healthy. For the applicant this means that an expulsion to Zambia would be more deleterious if she is in relatively good health than if she has started to develop AIDS symptoms.

The applicant contests that adequate care can be provided for her in Zambia since modern medicine is not available there. She furthermore lacks the necessary means to disburse for the care at hand in Zambia. Expulsion to Zambia would diminish her quality of life, thus constituting an inhuman treatment contrary to Article 3. It would also shorten her life and affect her career in violation of Article 2.

The applicant refers to a medical certificate issued on 20 July 1999, according to which the likelihood that HIV-infected people eventually develop AIDS is close to 100 % and that the applicant over the next few years will most likely develop AIDS and die. However, as a result of the treatment she is presently undergoing the suffering from developing AIDS may well be pushed far into the future. This life-prolonging process has a much better success-rate if the applicant may be given the chance to continue the treatment in Sweden since the standard of care and the monitoring possibilities in Zambia are reduced compared to what can be offered in Sweden.

The Court shares the view of the Government that the complaints raised by the applicant under Article 2 are indissociable from the substance of her complaint under Article 3 in respect of the consequences of a deportation for her life, health and welfare (cf. the D. v. United Kingdom judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 795, § 59). These complaints should therefore be examined in unison.

The Court recalls 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 expulsion of aliens. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies. The Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment (ibid., pp. 791–792, §§ 46–47).

The Court is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of 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 the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the deporting State (ibid., pp. 792–793, §§ 49–50; application no. 23634/94, Tanko v. Finland, Commission's decision of 19 May 1994, DR 77-A, p. 133 et seq.).

According to established case-law aliens who are subject to expulsion 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 expelling State. However, in exceptional circumstances an 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 above-mentioned D. v. the United Kingdom judgment, p. 794, § 54).

In that case the Court found that the applicant's deportation to St. Kitts would violate Article 3, taking into account his medical condition. The Court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (see pp. 793–794, §§ 51–54 of the judgment).

In a recent application the Commission found that the deportation to the Democratic Republic of Congo (formerly Zaire) of a person suffering from a HIV infection would violate Article 3, where the infection had already reached an advanced stage necessitating repeated hospital stays and where the care facilities in the receiving country were precarious (see application no. 30930/96, B.B. v. France, decision of 9 March 1998; case subsequently struck out by the Court on 7 September 1998).

Against this background the Court will determine whether the applicant's deportation to Zambia would be contrary to Article 3 in view of her present medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent available information on her state of health (cf. the Ahmed v. Austria judgment of 17 December 1996, *Reports* 1996-VI, p. 2207, § 43).

The Court recalls that the applicant's present medical status was diagnosed in 1995 and that her anti-HIV treatment has just recently commenced. The Court further recalls the conclusion of the Swedish National Board of Health and Welfare that, when assessing the humanitarian aspects of a case like this, an overall evaluation of the HIV infected alien's state of health should be made rather than letting the HIV diagnosis in itself be decisive. The Court finds that the Board's reasoning is still valid.

The Court notes that according to the above-mentioned report from the Swedish Embassy AIDS treatment is available in Zambia. It also notes that the applicant's children as well as other family members live in Zambia. Having regard to the above case-law and in the light of the material before it the Court finds that the applicant's situation is not such that her deportation would amount to treatment proscribed by Article 3.

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 pursuant to Article 35 § 4 of the Convention.

2. The applicant also complains that her expulsion would violate her right to respect for her family life as she would be separated from F.R. She invokes Article 8 of the Convention.

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 applicant claims that her right to respect for her family life would be violated if she is separated from F.R. She has maintained that she waited until 1999 to refer to this relationship because she was afraid that it would be held against her.

The Court recalls that the expulsion of a person from a country in which close members of his or her family live may amount to an unjustified interference with the right to respect for family life as guaranteed by the above provision (cf., e.g., the Boughanemi v. France judgment of 24 April 1996, *Reports* 1996-II, p. 609–610, § 41).

The Court notes that the existence of a "family life" was put in question by the national authorities. However, the Court does not find it necessary to examine this question further. Assuming that the decision to deport the applicant to Zambia would amount to an interference with her right to respect for her family life within the meaning of Article 8 § 1 of the Convention it is necessary to ascertain whether the deportation would satisfy the conditions of Article 8 § 2 of the Convention, i.e. whether it is "in accordance with law", pursues one or more of the legitimate aims set out in that paragraph, and is "necessary in a democratic society" for the achievement of that aim or aims.

It is not contested that the decision ordering the applicant's expulsion is based on the relevant provisions of the Aliens Act. The Court further finds that the interference in issue has aims which are compatible with the Convention, namely "the economic well-being of the country". The Court reiterates, furthermore, that it is for the Contracting States to maintain public order, *inter alia*, by exercising their right to control the entry and residence of aliens.

As regards the question whether the expulsion order is "necessary in a democratic society" in pursuit of the above-mentioned aim the Court recalls that the alleged relationship with F.R. commenced at a time when the applicant was illegally residing in Sweden. Consequently, she could not reasonably have expected to be able to continue the cohabitation in Sweden. Moreover, she made no reference to the relationship in her applications to the immigration authorities until early 1999, about three and a half years after it had supposedly started. The Court also notes that the applicant's four children as well as other family members live in Zambia.

In these circumstances, and taking into account the margin of appreciation left to the Contracting States as well as the reasons set out above in respect of Article 3 of the Convention, the Court concludes that the national authorities did strike a fair balance between the applicant's rights on the one hand and the legitimate interests of the Contracting State on the other. Thus, her deportation, if effected, may reasonably be considered "necessary" within the meaning of Article 8 § 2 of the Convention.

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

3. Lastly, the applicant claims that her right under Article 8 to enjoy a good reputation has been violated as, allegedly, the Aliens Appeals Board sent one of its decisions concerning her to the wrong address, thus revealing her state of health to other people.

The Court finds that the complaint regarding the postal handling of a decision sent out by the Aliens Appeals Board is unsubstantiated and that it does not disclose any appearance of a violation of Article 8 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 pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Josep Casadevall
President