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. 38025/02
by Muhamet HIDA
against Denmark

The European Court of Human Rights (First Section), sitting on 19 February 2004 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 15 October 2002,

Having deliberated, decides as follows:

THE FACTS

The applicant, Muhammad Hida, born in 1974, is a national of Serbia and Montenegro of Roma origin, who lives in Gram, Denmark. He is represented before the Court by Erik Støttrup Thomsen.

A. The circumstances of the case

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

The applicant, his spouse according to gypsy traditions, and their son entered Denmark on 19 February 2001 without any travel/identification papers, and requested asylum. In support thereof the applicant explained that on two occasions in June and December 1999 members of the Kosovo Liberation Army had beaten him, and eventually driven him and his family out of his hometown, Gjilane in Kosovo. From 25 December 1999 until 15 February 2001 they lived in Bujanovac, Serbia. Also, he maintained that in general being of Roma origin, he had been subjected to persecution and harassment by various persons since 1995.

On 6 February 2002 the Aliens Authorities (*Udlændingestyrelsen*) refused to grant the applicant asylum. On appeal, the decision was upheld on 26 September 2002 by the Refugee Board (*Flygtningenævnet).* Both instances noted that the statement of events made by the applicant and his spouse respectively had been divergent. However, even accepting the applicant's statements as facts, they found that the harassment and incidents referred to failed to attain the minimum level of severity in order to fall within the notion of persecution set out in section 7 of the Aliens Act *(Udlændingeloven).* Also, reiterating that the applicant had never been politically active, and noting the improvement of the security situation in Kosovo, they found that no concrete danger existed that the applicant would be subjected to persecution, if returned. Finally, reiterating that the applicant and his family had lived without any problems in Serbia, he was referred to reside elsewhere in the Federal Republic of Yugoslavia in case he did not wish to return to the Province of Kosovo. The applicant was ordered to leave the country immediately.

On 20 September 2002 the applicant requested that the Ministry of Refugee, Immigration and Integration Affairs *(Ministeriet for Flygtninge, Indvandrere og Integration)* grant him a residence permit on humanitarian grounds pursuant to section 9 b of the Aliens Act. In support thereof he maintained *inter alia* that his son suffered from asthma and bronchitis and had undergone surgery in Denmark. His request was refused on 7 April 2003 by the Ministry of Refugee, Immigration and Integration Affairs finding that the applicant did not suffer from a very serious physical

or mental illness, which could justify the granting of a residence permit on humanitarian grounds.

On 29 January 2003, referring to the general security situation in Kosovo, the applicant requested that the asylum proceedings be reopened. This was refused on 12 May 2003 by the Refugee Board. The applicant was ordered to leave the country immediately.

By letter of 20 May 2003 the Danish National Commissioner of Police *(Rigspolitichefen)* informed the applicant that the time limit for leaving Denmark was overdue.

In June 2003 the applicant and his family were moved to an immigration centre in Sandholm. It appears that there the applicant is provided with food, shelter and medical care, whereas he no longer receives a monthly payment to purchase necessities.

B. Relevant domestic law and background information

The Aliens Act and Kosovars in Denmark.

According to information provided by the Government, in the summer of 1999 Denmark evacuated a total of 2,855 Kosovars, which were selected together with UNHCR. The applicant in the present case was not among those evacuees. He entered Denmark himself in February 2001. A "Kosovo Emergency Act" of April 1999 created the legal basis at domestic level for receiving displaced persons from Kosovo with a need for temporary protection. The Act was repealed in 2000. At the same time a provision was inserted in the Aliens Act introducing the possibility of granting a residence permit to distressed persons from the Kosovo Province assumed to need temporary protection (now section 9 e (1)). A precondition for obtaining a residence permit under this provision is that the person in question must be assumed to need temporary protection in Denmark and formerly held a residence permit pursuant to the "Kosovo Emergency Act" or has been registered as an asylum-seeker before 30 April 1999. The assessment whether applicants are eligible for a residence permit under section 9 e (1) of the Aliens Act is made on the basis of UNHCR recommendations. Thus, in accordance with the UNHCR recommendations it is possible to issue residence permits under section 9 e (1) to persons - who formerly held a residence permit under the Kosovo Emergency Act or who applied for asylum before 30 April 1999 – and who can be referred to one of the categories of "chronically ill persons whose conditions requires specialised medical intervention of a type not yet available in Kosovo"; "Persons with severe and chronic mental illness whose conditions requires specialised medical intervention of a type not yet available in Kosovo"; "Severely handicapped persons (including their caregivers) whose wellbeing depends on a specialised support system not yet available in Kosovo";

"Unaccompanied elderly persons who have no relatives or any other form of societal support in Kosovo"; and " Separated children without relatives or caregivers in Kosovo, and for whom it is found not to be in the best interest to return to Kosovo". App1ications for a residence permit under section 9 e (1) of the Aliens Act are determined in the first instance by the Aliens Authorities and in the second instance by the Ministry of Refugee, Immigration and Integration Affairs.

The applicant in the present case is not covered by section 9 1 (e) of the Aliens Act because he never held a residence permit under the "Kosovo Emergency Act" and he entered Denmark after 30 April 1999. However - like asylum-seekers from other countries – he had the possibility of applying for asylum pursuant to section 7 of the Aliens Act; for a residence permit on humanitarian grounds pursuant to section 9 b of the Act; or for a residence permit due to extraordinary circumstances pursuant to section 9 c of the Act.

Asylum is granted to aliens, who satisfy the conditions of the Geneva Convention. Applications for asylum are determined in the first instance by the Aliens Authorities and in the second instance by the Refugee Board, which is an independent quasi-judicial body that is not subject to any instructions from the Danish Government. Thus, the Ministry of Refugee, Immigration and Integration Affairs has no authority to decide applications for asylum. UNHCR Recommendations are included in the background material of the asylum authorities in connection with the determination of concrete asylum cases.

The granting of a residence permit on humanitarian grounds pursuant to section 9 b of the Act is a discretionary decision, which according to practice may be granted to persons who do not satisfy the conditions of the Geneva Convention, but who is suffering from very severe physical or mental illness (unless the possibility of receiving the requisite medical assistance exists in the applicant's country of origin). Applications for a residence permit on humanitarian grounds cf. section 9 b (1) are determined by the Ministry of Refugee, Immigration and Integration Affairs.

A residence permit may be granted pursuant to section 9 c of the Aliens Act on a discretionary basis, if due to extraordinary circumstances, there are strong grounds for granting such. App1ications for a residence permit under this section of the Act are determined in the first instance by the Aliens Authorities and in the second instance by the Ministry of Refugee, Immigration and Integration Affairs.

According to the Aliens Act an alien whose application for a residence permit for Denmark has been refused must leave the country. Furthermore, under the Act it is possible to provide financial assistance if the person in question returns without undue delay voluntary.

In connection with the forced return of aliens from the Kosovo Province, UNMIK (United Nations Interim Administration Mission in Kosovo) is the relevant partner. In every case there is a close dialogue between the Danish National Commissioner of Police and UNMIK. Firstly the Danish National Commissioner of Police notifies UNMIK about the return to Kosovo of Kosovars whose applications for a residence permit in Denmark have been refused. Such notifications state the time of the individual's departure from Kosovo and entry into Denmark and inform of decisions made by the Danish authorities and the individual's personal situation, including his or her home town in Kosovo, the languages mastered by the individual and where his or her family members are staying. It also appears from the notification if the individual has been expelled due to crime. The notifications also state particulars on the individual's health status. This notification procedure was first established at a meeting held in Kosovo from 24 to 26 July 2000 between officials of the Danish National Commissioner of Police, the Aliens Authorities and UNMIK. The notification procedure was confirmed and expanded at a meeting in Kosovo on 22 January 2003 between a delegation of high officials from the immigration authorities and UNMIK, who agreed that UNMIK will be provided with extended information, especially concerning the mental status of Kosovars who are non-voluntarily sent back to Kosovo in order to support UNMIK in its efforts to solve its task. Such information will be available to UNMIK by offering the Kosovars in question a voluntary medical status report prior to the return to Kosovo. The Danish National Commissioner of Police has presented to UNMIK a number of Kosovars whose applications for a residence permit in Denmark have been refused for which reason they have had to leave Denmark. In some cases UNMIK objected to the return of the persons in question. In such situations the Danish National Commissioner of Police has suspended the return until further notice.

In the present case, the Danish National Commissioner of Police has not yet contacted UNMIK because the forced return of the applicant has not been planned yet. Normally a forced return takes quite some time, not less than two or three months.

Relevant international materials

With regard to the current security situation in Kosovo, the following statements/ findings are of particular relevance:

- The Secretary General on the United Nations Interim Administration Mission in Kosovo stated in his report of 14 April 2003 covering the activities of UNMIK and the developments in Kosovo, Serbia, and Montenegro among other

things that given the continued violence, harassment and discrimination faced by minorities, achieving sustainable minority returns to Kosovo was difficult, time-consuming and resource-intensive;

- In his report of 26 June 2003 he stated *inter alia* that incidents of violence and crimes against minorities continued to be a cause for concern within Kosovo;
- In his report of 15 October 2003 he stated *inter alia* that despite setbacks resulting from recent violent incidents involving Kosovo Serb victims, the overall rate of returns continued to accelerate during the reporting period. Over 2,200 displaced persons had returned so far that year to areas where they were a minority (including 1,016 Kosovo Serb, 693 Roma/ Ashkaelia /Egyptians, 242 Bosnians, 74 Gorani and 239 Kosovo Albanians). Funding expected from several major donors had been provided in Kosovo and work on a number of returns projects had begun in earnest, including the return of Kosovo Serbs to Podgorce (Gnjilane region) and Zhupa Valley (Prizren region), and Roma/ Ashkaelia/Egyptian returns to Magura (Pristinia region) and Pristina town. The heightened level of security within the Kosovo Serb and other minority communities had not resulted in the cancelling of any returns project, but it had led to numerous postponements of returns activities, at a stage in the season where such delays may mean that returns are not possible until next spring. It was also considered likely to have a dampening effect on individuals' return.
- The Tenth Assessment of the Situation of Ethnic Minorities in Kosovo of March 2003, conducted jointly by OSCE and the UNHCR, stated that minorities continue to face varying degrees of harassment, intimidation and provocation, as well as limited freedom of movement, and that considering the overall situation described in the report, the changes noted during the reporting period were not yet fundamental enough to conclude that conditions would exist for large scale return of ethnic minorities in the near future, underscoring the continuing need for international protection for members of ethnic communities, in particular Kosovo Serbs, Roma, Ashkaelia and Egyptians;
- The UNHCR Position Paper on the continued Protection Needs of individuals from Kosovo of January 2003 stated that especially Kosovo Serbs and Roma, but also Ashkaelia and Egyptians should continue to benefit from international protection in countries of asylum. UNHCR stressed that return of these minorities should take place on a strictly voluntary basis and be based on fully informed individual decisions. Any such voluntary

return movements should be properly co-ordinated, and re-integration should be supported through assistance to ensure sustainability. Kosovo Serb, Roma, Ashkaelia and Egyptian individuals or families should not be forced or induced to return to Kosovo.

- The First Vice-President of the Advisory Committee on the Framework Convention for the Protection of National Minorities, recommended in his mission report of March 2003 "Roma Returns to Serbia and Montenegro" for the Council of Europe, *inter alia* that Roma asylum seeker/returnees (from Western Europe), who fled Kosovo, should not be returned to Kosovo unless they wish to return and they are advised by UNMIK and UNCHR that it is safe for them personally to return to their homes, and
- In its report of 29 April 2003 - Serbia and Montenegro (Kosovo) "Prisoners in our own homes": Amnesty International's concerns for the human rights of minorities in Kosovo - Amnesty International urged *inter alia* host countries not to end international protection for all minority refugees from Kosovo and ensure that refugees still in need of protection were not subject in any way to pressure or inducement to "voluntarily return". Amnesty International considered that the forcible return of members of minority groups to Kosovo would be a violation of the principle of *non-refoulement* and place minority individuals at risk.

It follows from a "Memorandum of Understanding" between the Federal Minister of the Interior of Germany and the Special Representative of the Secretary-General of the United Nations for Kosovo of 31 March 2003 that approximately 33,000 members of ethnic minorities from Kosovo are required to leave Germany. It was agreed that certain members of specific ethnic minority groups were no longer in need of international protection and could therefore be returned to Kosovo, as from April 2003. In the first year Germany would return up to 1000 persons. This figure would include members of the Turkish, Bosnian, Gorani and Torbesh minority communities, as well as Ashkaelia and Egyptian minorities. As to the latter two groups of minorities, they would be returned depending on the results of an individualised screening process performed by UNMIK. Members of the Serb and Roma communities would not be returned in 2003.

COMPLAINTS

1. The applicant complains that an implementation of the order to deport him to Kosovo will be in breach of Article 3 of the Convention.

2. Moreover, the applicant complains that Articles 5, 7, 8, 10, 11, 13 and 14 of the Convention, Article 1 of Protocol no. 1 to the Convention, and Article 4 of Protocol nr. 4 to the Convention have been breached.

THE LAW

1. The applicant complains that being returned to Kosovo would amount to a breach of Article 3 of the Convention, which reads as follows:

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

In the applicant's view all Roma presently in Denmark should be granted asylum or a temporary residence permit on humanitarian grounds, in order that Denmark complies with its international obligations and the Convention.

As to the specific facts of the present case, the applicant refers to the statements made by various international organisations and NGOs on the security situation in Kosovo. Accordingly, he maintains that the circumstances leading him to flee Kosovo have not ceased to exist. Furthermore, as to the Refugee Board's finding that the applicant could reside elsewhere in the Federal Republic of Yugoslavia if he does not wish to return to the province of Kosovo, the applicant submits that the risk that he be persecuted and harassed there is equally real and concrete.

Also, the applicant alleges that his transfer to the centre in Sandholm in June 2003 was a mean of pressure imposed on him with the object that, against his will, he signed a "voluntary agreement of return", and that Denmark thereby allegedly attempted to circumvent the wish of UNMIK, not to receive Roma or other minority groups being returned by force.

The Court notes that the Ministry of Refugee, Immigration and Integration Affairs on 7 April 2003 refused to grant the applicant a residence permit pursuant to section 9 b of the Aliens Act. It appears that the applicant could have brought this decision before the ordinary courts but the question arises whether such a remedy can be said to be effective (cf. e.g. Çonka *v. Belgium*, no. 51564/99, § 79, ECHR 2002-I). The Court finds it unnecessary to examine this issue further as the case is in any event inadmissible for the following reasons:

The Court recalls 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. A deportation or expulsion decision may, however, give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the State, 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 (cf. for example *Vilvarajah and others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, § 103). A mere possibility of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 of the Convention (ibid., p. 37, § 111).

Moreover, while it is true that Article 3 has been more commonly applied by the Court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to 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. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see e.g. *Bensaid v. the United Kingdom*, no. 44599/98, §§ 32 and 34, ECHR 2001-I and *Arcila Henao v. the* Netherlands (dec.), no. 13669/03, 24 June 2003, unreported). 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 *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 794, § 54).

The Court will proceed on the assumption that the applicant will be returned to Kosovo by force, since nothing in the case indicates that he has signed a "voluntary agreement of return to Kosovo" or that he will be forced to return elsewhere in the Federal Republic of Yugoslavia.

As regards the general situation in Kosovo, the Court notes that incidents of violence and crimes against minorities continue to be a cause for concern, and that the need remain for international protection of members of ethnic communities, notably Kosovo Serbs, Roma, Ashkaelia and Egyptians. Consequently, the Secretary General on the United Nations Interim Administration Mission in Kosovo has recently stated, among other things, that achieving sustainable minority returns to Kosovo is difficult, time-consuming and resource-intensive. Over 2,200 displaced persons have returned in 2003 to areas where they are a minority (including 1,016 Kosovo Serb, 693 Roma/Ashkaelia/Egyptians, 242 Bosnians, 74 Gorani and 239 Kosovo Albanians). It is unclear whether these figures concern voluntary or forced returns. However, it is clear that forced returns to Kosovo is taking place and that such are carried out subsequent to an individualised screening process performed by UNMIK. In the present case the Court notes in particular that the Danish National Commissioner of Police has already presented to UNMIK a number of Kosovars whose applications for a residence permit in Denmark have been refused for which reason they were forced to leave Denmark. In some cases UNMIK objected to the return of the persons in question for which reason the Danish National Commissioner of Police suspended the return until further notice.

The Danish National Commissioner of Police has not yet contacted UNMIK as to the applicant in the present case since his forced return has not been planned yet. Thus, relying on the information provided by the Government, the Court is satisfied that in case UNMIK object to the return of the applicant, his return will be suspended until further notice.

In these circumstances the Court finds that no substantial grounds have been shown for believing that the applicant, being ethnic Roma, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment upon return to Kosovo.

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 invokes furthermore Articles 5, 7, 8, 10, 11, 13 and 14 of the Convention, Article 1 of Protocol no. 1 to the Convention, and Article 4 of Protocol no. 4 to the Convention. The Court has examined this part of the application as submitted by the applicant. In the light of all the material in its possession, the Court finds that this does not disclose any appearance of a violation of the rights and freedoms set out in the invoked

Articles of the Convention and the Protocols. 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.

Søren NIELSEN
Registrar

Christos ROZAKIS
President