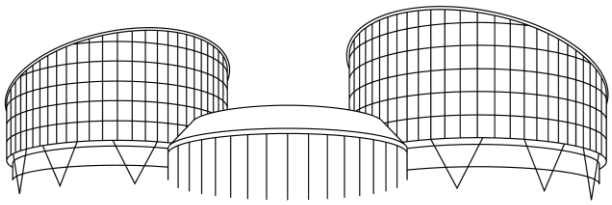

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MADAH AND OTHERS v. BULGARIA

(Application no. 45237/08)

JUDGMENT

STRASBOURG

10 May 2012

FINAL

10/08/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of **Madah and Others v. Bulgaria**,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 17 April 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45237/08) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Mohammad Rasoul Madah, an Iranian national, Mrs Maria Kerkenezova and Mr Daniel Mohammad Rasoul Madah, Bulgarian nationals, ("the applicants"), on 19 September 2008.

2. The applicants were represented by Ms D. Radoslavova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Kotzeva, of the Ministry of Justice.

3. The applicants alleged that the first applicant's proposed expulsion to Iran would expose him to a risk of ill-treatment, that it would amount to an unlawful and disproportionate interference with the applicants' family life and that they did not have effective remedies in that respect.

4. On 15 September 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first, second and third applicants were born in 1965, 1973 and 2006 respectively.

A. Background

6. In the period between 1990 and 2001 the first applicant visited Bulgaria on a number of occasions. It appears that in 1992 he obtained a temporary residence permit on the strength of his business activity. In 2001 he was granted a permanent residence permit.

7. In 2004 he met the second applicant and from the beginning of 2005 they lived together. Following a complicated pregnancy, on 10 April 2006 their son, the third applicant, was born. The child's health has been fragile ever since, with frequent episodes of pulmonary disease.

B. The order for the first applicant's expulsion and his ensuing detention

8. On 27 December 2005 the head of the National Security Service at the Ministry of Internal Affairs made an order for the first applicant's expulsion on the ground that he presented a threat to national security. He also deprived the applicant of the right to reside in Bulgaria and excluded him from entering Bulgarian territory for a period of ten years. No factual grounds were given. The order relied on a classified internal document of 15 December 2005, which was not served on the applicant. It appears that the applicant was able to consult it during the ensuing court proceedings (see paragraphs 12-16 below).

9. The internal document stated that the first applicant was involved in drug trafficking for the purposes of financing the militant Kurdish separatist group Kongra-Gel (the former PKK). The order stated that the first applicant should be detained pending expulsion and that it was subject to appeal to the Minister of Internal Affairs, but not to judicial review, and that it was immediately enforceable.

10. The first applicant was served with the order on 21 February 2006. On the same day the head of another government agency, the Migration Directorate of the national police, made another order for the first applicant's detention pending expulsion. The applicant was arrested and placed in a detention facility in Sofia. Pursuant to an order of 18 July 2006 he was transferred to another special detention facility outside the city.

11. The first applicant was released on 28 October 2006. It appears from his submissions that on an unspecified date after his release he was interviewed at the Iranian embassy about his alleged connections with a Kurdish separatist organisation.

C. The proceedings challenging the first applicant's expulsion

12. On 9 March 2006 the first applicant sought judicial review of the expulsion order by the Sofia City Court, claiming that the order was

unlawful and referring to his difficult family situation due to the complicated pregnancy of his partner, the second applicant.

13. On 13 March 2006 the first applicant also appealed against the order for his expulsion to the Minister of Internal Affairs. On 30 March 2006 the appeal was returned to the applicant on the ground that it had been submitted out of time and that judicial proceedings for the order's review were pending.

14. In the course of the court proceedings the first applicant provided the court with a document, issued by the National Investigation Service, certifying that at that time no criminal proceedings were pending against him. He also submitted written observations in which he claimed that he had never been involved in the activities mentioned in the classified internal document. He also referred to his family situation, the Convention and the case of *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002).

15. The defendant, the National Security Service, submitted a copy of the internal document of 15 December 2005 which had served as the basis for the expulsion. Despite the first applicant's request to this effect, the court did not order the head of the National Security Service to produce further information or evidence regarding the reasons for the applicant's expulsion.

16. By a judgment of 26 July 2007 the Sofia City Court dismissed the appeal. The court found, *inter alia*, that the document of 15 December 2005 had to be regarded as an official certification that the first applicant was a threat to national security and that as such it was binding on the court.

17. Upon the first applicant's appeal, by a final judgment of 28 May 2008 the Supreme Administrative Court upheld the lower court's judgment, fully endorsing its conclusions and not engaging in examination of the evidence allegedly supporting the view of the authorities that the first applicant posed a threat to the national security. The court held that the deportation order was lawful and fully justified by the attached internal document and did not run counter to the Convention because the applicant had been able to challenge it before a court. The court further stated that the first applicant's rights had been restricted in accordance with the law and for the protection of the public interest. It also noted that given the existence of information about the first applicant's involvement in drug trafficking for the purpose of financing a terrorist organisation, the executive authority had rightly decided that the applicant constituted a threat to national security.

D. The proceedings challenging the first applicant's detention

18. On an unspecified date in 2006 the first applicant challenged the order of 21 February 2006 for his placement in a special detention facility before the Sofia City Court. On 23 June 2006 he requested suspension of the execution of the detention order.

19. In a decision of 16 October 2006 the court granted the request and suspended the effect of the detention order for the course of the proceedings. The court stated, in particular, that the authorities had failed to provide evidence for the necessity of such a measure. It pointed to the duration of the detention (at that time eight months) and to the family situation of the first applicant. The decision became final on an unspecified date as the parties had not lodged an appeal and the applicant was released on 28 October 2006.

20. In a final judgment of 23 February 2009 the Supreme Administrative Court discontinued the proceedings without examining the appeal on the merits. It held that the order for the applicant's placement in a detention facility was subordinate to the order for his expulsion and issued within the course of expulsion proceedings. It was not therefore subject to judicial review by itself.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant domestic law and practice has been summarized in the Court's recent judgments in the cases of *Raza v. Bulgaria* (no. 31465/08, §§ 30-42, 11 February 2010) and *M. and Others v. Bulgaria* (no. 41416/08, §§ 45-53, 26 July 2011).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicants complained that the deportation order against the first applicant was in violation of their right to respect for their family life. They relied on Article 8 of the Convention, which reads in so far 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."

A. Admissibility

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

24. The Government maintained that the factual grounds for the first applicant's deportation were based on information lawfully obtained by the competent administrative body, the National Security Service. This information was not refuted during judicial review at two levels of jurisdiction. The balance between the first applicant's rights and the public interest had been respected. Furthermore, in case of expulsion the applicants could settle in the first applicant's country of origin or another country of their choice.

25. The applicants contended that the order for the first applicant's expulsion was arbitrary and based on unspecified information contained in a secret internal document. They further stated that during the proceedings the authorities failed to present any other information or documents in support of their allegations. Lastly, the applicants claimed that the domestic courts failed to examine the credibility of the executive's assertions and the necessity of the first applicant's expulsion.

2. The Court's assessment

26. In the present case the Government have not disputed that the applicants had established a genuine family life in Bulgaria, within the meaning of Article 8, and that the first applicant's deportation, if effected, would constitute interference by the State authorities with the applicants' right to respect for their family life. The Court finds no reason to hold otherwise.

27. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that provision as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

28. The Court observes that in a number of cases against Bulgaria it has found that deportations ordered on alleged national security grounds did not meet the Convention standard of lawfulness as the relevant law, procedures and practice did not offer even a minimum degree of protection against arbitrariness (see *M. and Others*, cited above, § 96 with further references). In particular, in *C.G. and Others v. Bulgaria* (no. 1365/07, §§ 42-47, 24 April 2008) the Court found that, first, the domestic courts had allowed the executive to stretch the notion of national security beyond its natural meaning, and, secondly, those courts had not examined whether the executive was able to demonstrate the existence of specific facts serving as a basis for its assessment that the applicant presented a national security risk. In the recent judgment of *M. and Others*, cited above, § 102, the Court

found that the domestic court applied a formalistic approach and left a governmental agency full and uncontrolled discretion to certify blankly, with reference to little more than its own general statements, that an alien was a threat to national security and must be deported. As such "certifications" were based on undisclosed internal information and were considered to be beyond any meaningful judicial scrutiny, there was no safeguard against arbitrariness.

29. The present case is very similar. The deportation order against the first applicant was based on a declaratory statement, contained in an internal document of the National Security Service, according to which he was involved in drug trafficking for the purposes of financing a terrorist organisation and therefore represented a national security threat. This document, which has not been submitted to the Court, apparently did not mention the factual grounds and the evidence on which the declaration was based. As in other similar cases against Bulgaria, it has not been alleged that the first applicant has ever been charged with related offences. Thus, the deportation order was issued on the basis of a purely internal assessment of undisclosed information. Furthermore, the domestic court dismissed the appeal against the deportation order, considering itself bound by the above-mentioned declaratory statement and failing to examine the existence of a factual basis for the order (see in this connection *M. and Others*, cited above, § 98).

30. In the Court's view in the present case the applicants did not enjoy the minimum degree of protection against arbitrariness inherent in the concept of lawfulness within the meaning of the Convention. Thus if the deportation order of 27 December 2005 were to be enforced, the resulting interference with the applicants' family life would not be "in accordance with the law", as required by Article 8 § 2 of the Convention.

31. In the light of this conclusion, the Court is not required to examine the remaining issues, which concern the existence of a legitimate aim and proportionality.

32. It follows that there would be a violation of Article 8 of the Convention in the event of the deportation order of 27 December 2005 being enforced.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

33. The applicants further complained that they did not have an effective remedy in relation to the violation of their rights under Article 8. Article 13 reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

34. The Court finds that the complaint under Article 8 is arguable and that therefore Article 13 is applicable.

35. It further finds that the complaint under Article 13 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

36. The Government maintained that both the Sofia City Court and the Supreme Administrative Court examined the applicants' appeal against the expulsion order on the merits.

37. The applicants stated that the domestic courts failed to scrutinise the factual grounds for the first applicant's expulsion and the necessity of the measure.

38. In several cases against Bulgaria (see *C.G. and Others*, cited above, §§ 59-64; *Raza*, cited above, §§ 62-63; and *M. and Others*, cited above, §§ 124-125) the Court found that the proceedings for judicial review of an expulsion order citing national security grounds were deficient in two respects. First, they did not involve a meaningful scrutiny of the executive's allegations. Secondly, the courts did not assess whether the interference with the applicants' rights answered a pressing social need and was proportionate to any legitimate aim pursued.

39. In the present case the Court has already found that the domestic court did not carry out a proper examination of the executive's assertion that the first applicant presented a national security risk as it did not examine the information and evidence allegedly supporting the view that the applicant presented a threat to the national security (see paragraphs 17 and 29 above). Also, it did not engage in a meaningful analysis of the proportionality of the first applicant's expulsion. The Court concludes that the judicial review proceedings in the present case did not comply with the requirements of Article 13, for the same reasons as in the above-mentioned cases. No other remedy has been suggested by the Government.

40. There has therefore been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

41. The first applicant complained under Article 3 of the Convention that his expulsion to Iran would expose him to the risk of ill-treatment and even the death penalty for his alleged involvement in drug trafficking with the aim of financing a terrorist organisation. He also complained, relying on

Article 13, that he did not have any domestic remedy in this respect. Articles 3 and 13 of the Convention provide as follows:

Article 3

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

42. The Government stated that pursuant to the domestic legislation (section 44a of the Aliens in the Republic of Bulgaria Act) the applicant would not be expelled to a country where his life was at risk. In the Government's view, the competent authorities checked the applicability of the said provision as a matter of course.

43. The applicant stated that the domestic courts could not examine the applicability of Article 44a of the Aliens Act as their review was limited solely to the issue of the lawfulness of the order. He further claimed that the only procedure where the applicant's grievances under Article 3 could be considered was the asylum procedure. However, possible proceedings under the Law on Asylum and Refugees were not capable of barring the expulsion of individuals who were considered a threat to national security.

44. The Court reiterates that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (*Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008-...). Having said that, the Court notes that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see, for example, *Saadi*, cited above, § 129; *Auad v. Bulgaria*, no. 46390/10, § 99, 11 October 2011; and *Mollazeinal v. Cyprus* (dec.), no. 20198/05, 18 June 2009).

45. Turning to the present case, the Court observes that the applicant has not submitted any evidence to substantiate his claims. His allegations before the Court are confined to general statements. There is no indication that the

first applicant is wanted by the Iranian authorities or that in the past he was persecuted or investigated in Iran. Apart from his general concerns that the Iranian authorities would be potentially interested in the allegations of the Bulgarian officials that he had committed a crime, if those allegations were to be communicated to them, the applicant fails to refer to any specific personal circumstances. Quite the opposite, he denies to belong to the Kurdish minority, to be in any way involved in the activities of Kongra-Gel or to be engaged in drug trafficking (see paragraph 14 above).

46. Moreover, on no occasion the first applicant raised his grievances under Article 3 before the Bulgarian authorities. There is no indication that he raised such complaints before the executive or before the courts which reviewed the deportation order.

47. Having regard to the foregoing considerations, the Court concludes that the first applicant has not established that there are substantial grounds for believing that he would be exposed to a real risk of being ill-treated contrary to Article 3, if he were to be deported to Iran. In these circumstances, the first applicant does not have an arguable claim of a breach of the Convention, requiring a remedy under Article 13 of the Convention (see, for the same approach, *Ayatollahi and Hosseinzadeh v. Turkey* (dec.), no. 32971/08, 23 March 2010).

48. In the light of the above considerations, the Court considers that those complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. THE REMAINDER OF THE APPLICANTS' COMPLAINTS

49. The first applicant complained, relying on Article 5 §§ 1 and 4 and Article 6 § 1, that his detention pending deportation was not justified and that he could not obtain a speedy and effective judicial review of the lawfulness of his detention. All the applicants complained that the first applicant's detention pending expulsion amounted to unjustified interference with their rights under Article 8.

50. The Court has examined these complaints as submitted by the applicants. 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.

51. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 46 AND ARTICLE 41 OF THE CONVENTION

A. Article 46

52. Article 46 of the Convention provides, in so far as relevant:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

53. The Court notes that in the judgment of *M. and Others* (cited above, §§ 134-138) in relation to similar violations of Articles 8 and 13 the Court expressed the view that general measures in execution of the judgment are necessary in order to prevent future violations of those Articles. In view of its findings in the present case, the Court reiterates that the general measures include legislative amendments and changes of judicial practice so as to ensure that even where national security is invoked as grounds of a deportation order, the factual basis and reasons for the conclusion that the alien must be deported should be subject to a thorough judicial scrutiny, if need be with appropriate procedural adjustments related to use of classified information and that the court examining an appeal against deportation should balance the legitimate aim pursued by the deportation order against the fundamental human rights of the affected individuals, including their right to respect for their family life.

B. Article 41

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

55. The applicants claimed 90,000 euros (EUR) in respect of the non-pecuniary damage resulting from the breaches of Article 8 and Article 13.

56. The Government submitted that those amounts were exorbitant. In their view, any award made should not exceed those granted in similar cases.

57. The Court observes that no breach of Article 8 has as yet occurred. Nevertheless, the Court having found that the decision to expel the first applicant would, if implemented, give rise to a breach of that provision,

Article 41 must be taken as applying to the facts of the case. That said, the Court considers that its finding regarding Article 8 in itself amounts to adequate just satisfaction for the purposes of Article 41 (see *M. and Others*, cited above, § 143). The same goes for the Court's related finding regarding Article 13 (see *Raza*, cited above, § 88).

2. Costs and expenses

58. The applicants also claimed EUR 1,543 for the costs and expenses incurred before the domestic courts, all of which represented legal fees. In support of this claim they presented a contract for legal representation established between the first applicant and a lawyer.

59. For the proceedings before the Court the applicants claimed EUR 1,800 for legal work by their lawyer and EUR 88 in costs for postage. They submitted a legal fees agreement between them and their lawyer, a timesheet, according to which their lawyer had charged them for 30 hours of work at an hourly rate of EUR 60, and postal invoices for the amount of BGN 90 (the equivalent of EUR 46).

60. The Government contested these claims as excessive.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

3. Default interest

62. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Articles 8 and 13 of the Convention concerning the interference with the applicants' family life and the alleged lack of effective remedies in this respect admissible and the remainder of the application inadmissible;

2. *Holds* that there would be a violation of the applicants' rights under Article 8 of the Convention in the event of the deportation order of 27 December 2005 being enforced;

3. *Holds* that there has been a violation of Article 13 in relation to Article 8 of the Convention;

4. *Holds*
(a) that the respondent State is to pay jointly to the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of costs and expenses, to be converted into Bulgarian levs at the rate applicable at the date of settlement, within three months from the date on which the judgment becomes final, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President