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. 15017/03
by Fofana HUSSEIN MOSSI and Others
against Sweden

The European Court of Human Rights (Second Section), sitting on 8 March 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 29 April 2003,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr Fofana Hussein Mossi, born in 1962, is a national of the Democratic Republic of Congo. The other applicants are his former wife, Ms Patricia Hussein Mossi, and their two children, Lucky and Samantha, all Swedish nationals and born in 1970, 1992 and 1998 respectively, and his son from an earlier relation, Sadiki, who holds the same nationality as his father and was born in 1985. These four are living in Sweden while the first applicant is residing in Bukavu, in the Democratic Republic of Congo. They were represented before the Court by Mr S. Werner, a lawyer practising in Östersund (Sweden).

A. The circumstances of the case

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

1. The family's personal circumstances

The first applicant belongs to the Banyamulenge (ethnic Tutsis of Rwandan origin) and he was born and raised in the city of Bukavu in the eastern part of the Democratic Republic of Congo (hereinafter referred to as "the DRC"). In 1985 he fled to Tanzania because he was a member of an illegal political party in the DRC. In June 1987 he travelled to Libya to participate in military training but he returned to Tanzania at the end of 1988. In August 1989, he went to Sweden where, in April 1991, the Immigration Board (*Invandrarverket*) rejected his application for asylum but granted him a permanent residence permit based on "de facto" reasons due to the situation in the DRC (then Zaire) combined with the applicant's personal situation.

In September 1991 the first applicant married the second applicant in Tanzania, from where she originates and was living. She then travelled with him to Sweden where she was granted a permanent residence permit in November 1992. On 17 December 1992 their son, Lucky, was born and, on 16 June 1998, their daughter, Samantha, was born. These three have since been granted Swedish citizenship.

Moreover, in May 1996, the family was joined by the first applicant's son, Sadiki. He had lived in Tanzania with his mother and came to Sweden because his mother died.

According to the first and second applicants, they divorced just before the expulsion of the first applicant for practical reasons. They wanted to make it easier for the second applicant to live alone in Sweden with the children.

2. The criminal proceedings and the order of expulsion

On 9 June 1999, upon arrival at Arlanda Airport in Sweden, the first applicant was checked by customs officers and 591 grams of heroin was found in one of his bags. He was arrested and charged with an aggravated drugs crime (*grovt narkotika brott*) and the attempted aggravated smuggling of drugs (*försök till grov varusmuggling av narkotika*).

On 10 November 1999 the District Court (*tingsrätten*) of Norrköping convicted the first applicant as charged and sentenced him to six and a half years' imprisonment and expulsion from Sweden with a prohibition on returning before 1 January 2015. When deciding the six and a half years' imprisonment, the District Court took into account the detriment caused to the first applicant by the expulsion and reduced the normal prison sentence, which would have been eight years' imprisonment.

Concerning the expulsion, the District Court had requested the Immigration Board to submit its observations on the matter. The Board observed that the reasons invoked by the first applicant at the time when he was granted a permanent residence permit were not such that, according to the current practice, he would have been granted such a permit on humanitarian grounds. However, the Board found that it could not be excluded that, due to the situation in the DRC, there might be an impediment to the enforcement of an expulsion order.

The District Court considered that the first applicant had a strong connection to Sweden because of his family and the fact that he had resided there for some ten years by that time. However, it noted that he had been convicted of lesser offences on six previous occasions: unlawful driving in 1993, aggravated unlawful driving in 1994 and 1995, unlawful driving and aggravated drink-driving in 1996, shop-lifting in 1997 and the unlawful use of documents in 1998. Moreover, the present offence was of a very serious nature having regard to the amount of heroin and its dangerousness to individual abusers and society as a whole. In these circumstances, the court concluded that there were particular reasons for expelling the applicant with a prohibition on returning before 1 January 2015.

The first applicant appealed to the Göta Court of Appeal (*Göta hovrätt*), requesting that his prison sentence be reduced and the expulsion order repealed.

On 5 January 2000 the Court of Appeal upheld the lower court's judgment in full. With regard to the expulsion, it shared the District Court's reasoning, adding that the first applicant had not succeeded in establishing himself on the Swedish labour market or adjusting to Swedish society, despite his many years in the country. It also observed that he kept in contact with his relatives in Africa whom he had visited for five months during the spring of 1999.

The first applicant appealed to the Supreme Court (*Högsta domstolen*) which, on 4 February 2000, refused leave to appeal.

In 2002 the applicants requested the Swedish Government, through the Ministry of Justice, to revoke the expulsion order and let the first applicant stay in Sweden with his family. On 14 November 2002 the Government rejected the request on the grounds that there was neither any impediment against the enforcement of the expulsion nor any other special reason under the Aliens Act to revoke the expulsion order.

In March 2003 the applicants lodged a new application with the Government, requesting the revocation of the expulsion order. Primarily, the applicants invoked humanitarian grounds and Article 8 of the Convention, claiming that it would be inhuman to separate the family, in particular having regard to the children and their need for their father during their up-bringing. However, the first applicant also alleged that the very unstable situation in the DRC, and the fact that he belonged to a minority which was discriminated against, constituted impediments to his expulsion. With reference to the Court of Appeal's statement that he had visited relatives in Africa during five months in 1999, he stated that he had not visited the DRC since he came to Sweden in 1989, but that the visit had been to Tanzania.

On 23 September 2003, after a request by the Government, the Migration Board (*Migrationsverket*) submitted its observation regarding the matter. It considered that the situation in the DRC had significantly improved after a peace agreement with Rwanda in July 2002 and a deal between the Government and rebel groups in April 2003. Thus, the Board found that there was no general impediment to sending persons back to that country. It noted that the UNHCR shared this view. It further considered that, even with regard to first applicant's ethnicity, there was no personal impediment to enforcing the expulsion order against him.

The first applicant objected to the Migration Board's conclusions, stating that he had no relatives in Kinshasa and would not be able to support himself if sent there. He invoked a statement, dated 30 September 2003, by Mr T. Rideaus, an Information Officer at the Nordic Africa Institute (*Nordiska Afrikainstitutet*), in which Mr Rideaus stated that the situation in the DRC was still very unstable and that fundamental human rights were not guaranteed. Moreover, since the first applicant did not have any relatives in Kinshasa and did not speak the local language of the area, he would not be able to survive there and would face grave risks because he was Banyamulenge and this group was discriminated against and disliked in most parts of the country.

On 8 October 2003 the first applicant was conditionally released from prison but placed in detention awaiting expulsion.

On 16 October 2003 the Government rejected the request to have the expulsion order revoked, finding no reason to change their previous decision.

On the same day, 16 October 2003, the first applicant was expelled to the DRC. Apparently, he arrived in Kinshasa where he remained for some time before travelling to his home town, Bukavu, where relatives have been helping him. He regularly calls his three children, and his eldest son transfers money to him every month.

B. Relevant domestic law

Pursuant to Chapter 1, Article 8 of the Penal Code (*Brottsbalken*), a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a special consequence.

Provisions on expulsion on this ground are laid down in the Aliens Act. According to Chapter 4, section 7 of the Act, an alien may not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are satisfied. First, he or she must have been convicted of a crime that is punishable by imprisonment. Secondly, he or she may only be expelled if the sentence is more severe than a fine, and if (1) it may be assumed, on account of the nature of the crime and other circumstances, that he or she will continue committing crimes in Sweden, or (2) the offence, in view of the damage, danger or violation involved for private or public interests, is so serious that he or she ought not to be allowed to remain in the country.

Furthermore, under Chapter 4, section 10 of the Act, when considering whether or not an alien should be expelled, the court shall take into account the person's links to Swedish society. As regards aliens who are considered to be refugees and in need of protection in Sweden, they may be expelled only if they have committed a particularly serious crime and it would entail a serious danger for public order and safety to allow them to remain in Sweden. An alien with refugee status shall be considered as a refugee in need of protection in Sweden unless it is evident that he or she is no longer a refugee in such need.

Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to Chapter 8, section 1 of the Act, there is an absolute impediment to expelling an alien 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. Further, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

According to Chapter 7, section 16 of the Act, if the Government finds that a judgment or decision to expel a person on account of having committed a criminal offence cannot be executed or if there are otherwise special reasons not to enforce the decision, the Government may repeal, in

part or completely, the judgment or decision of the court. The Government may also, in accordance with Chapter 11, Article 13, of the Instrument of Government (*Regeringsformen*), pardon or reduce a penal sanction or other legal effect of a criminal act.

COMPLAINTS

The applicants complained under Article 8 of the Convention that the first applicant's expulsion from Sweden to the DRC violated their right to respect for their family life, since it effectively separated the family for many years to come. Moreover, when the first applicant was expelled, his eldest son was still a minor and thus left without a legal guardian. The first applicant also claimed that he would risk being tortured or killed in the DRC because he belongs to the Banyamulenge.

THE LAW

1. The first applicant complained that the expulsion from Sweden to the DRC exposed him to a grave risk of being tortured or killed in the DRC because of his ethnicity. The Court finds that this complaint should be examined under Article 3 of the Convention which provides:

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

The Court observes 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, the expulsion of an alien 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 in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

In the present case, the Court notes that, on 16 October 2003, the first applicant was expelled from Sweden to the DRC. Since the nature of the Contracting States' responsibility under Article 3, in cases of this kind, lies in the act of exposing an individual to the risk of ill-treatment, the existence of such a risk must be assessed primarily with reference to those facts which

were known or ought to have been known at the time of the expulsion. However, the Court is not precluded from having regard to information which comes to light subsequent to the expulsion (see, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, § 76).

The Court notes that the first applicant only invoked the general situation in the DRC and the fact that he belongs to an ethnic minority, the Banuyamulenge, as reasons for why he would face a risk of ill-treatment in the DRC. While aware of the occurrence of reports of continuous human rights violations in the DRC, including discrimination on the basis of ethnicity, the Court considers that the situation in general in the country is not such that it can be established, on this sole basis, that the first applicant faced a real risk of being ill-treated in the DRC in contravention of Article 3 of the Convention. In this respect, the Court has had regard to the fact that the applicant visited relatives in Tanzania during five months in 1999 and that, apparently, he is currently residing in Bukavu and keeps in contact with his children by telephone. Furthermore, neither the first applicant nor the other applicants have submitted any evidence, either before or after the expulsion of the first applicant, to substantiate his fears.

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. All the applicants complained that the expulsion of the first applicant violated their right to respect for their family life. They relied on Article 8 of the Convention, which provides insofar as relevant as follows:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, ..."

The applicants submitted that, since the second applicant and the two minor children were Swedish nationals, it was unreasonable to expel the first applicant or expect the family to travel with him to the DRC, in particular since the two younger children were born and raised in Sweden. Thus, the expulsion meant that the family would be separated for more than ten years until the first applicant could apply for re-entry into Sweden on 1 January 2015. In this respect the first and second applicants claimed that their divorce was a purely practical decision and did not reflect a personal wish to separate. Moreover, the first applicant's eldest son was still a minor at the time of his father's expulsion and thus left without a legal guardian.

The Court finds that the expulsion of the first applicant constituted an interference with the applicants' right to respect for their family life, as guaranteed by Article 8 § 1 of the Convention. The Court also finds that the interference had a legal basis in Swedish law, in particular Chapter 1, section 8 of the Penal Code, in conjunction with the relevant provisions of

the Aliens Act, and pursued a legitimate aim, namely the prevention of disorder or crime and the protection of health and morals, within the meaning of Article 8 § 2.

It remains to be determined whether the interference was "necessary in a democratic society".

The Court recalls that the Convention does not guarantee, as such, a right for an alien to enter or to reside in a particular country. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 of the Convention (see, among other authorities, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

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. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be 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 *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Boultif v. Switzerland*, judgment of 2 November 2001, *Reports* 2001-IX, p. 130, § 46; *Jakupovic v. Austria*, no. 36757/97, § 25, 6 February 2003, unreported).

Accordingly, the Court's task consists in ascertaining whether in the circumstances the expulsion order struck a fair balance between the relevant interests, namely the applicants' right to respect for their family life, on the one hand, and the prevention of disorder or crime and the protection of health and morals, on the other.

The Court notes that the first applicant resided in Sweden from his arrival there in August 1989 until his expulsion on 16 October 2003. However, as from June 1999, he was in detention, and his subsequent stay in Sweden was spent serving a prison sentence until the day of his expulsion. Furthermore, during his stay in Sweden, he was unemployed most of the time and he was convicted of lesser offences on six occasions between 1993 and 1998, thus demonstrating his difficulties in adjusting to Swedish life.

The first applicant's family connection to Sweden consists of the other applicants - his former wife and three children. They have no other relatives in Sweden. The two younger children were both born in Sweden and they and his former wife have obtained Swedish citizenship. However, both his former wife and his eldest son were born in Tanzania and lived there until they came to Sweden in 1992 and 1996, respectively. It would appear that their relatives are still in that country. Furthermore, the first applicant also

knows Tanzania from his stays there in the 1980s and from having met his former wife and married there. Moreover, he spent five months in Tanzania in early 1999, visiting relatives. The Court considers that, in these circumstances, it might be possible for the family to resettle in Tanzania or, in any event, for the rest of the family to occasionally visit the first applicant, whether he be in the DRC or in Tanzania. Finally, the Court observes that the first applicant is in regular contact with his children through telephone conversations, and that he can apply for a visa and/or a new residence permit to be allowed to re-enter Sweden from 1 January 2015. Thus, even though the first applicant's expulsion naturally had serious implications for his family life, they were not so extensive as to make the continuation of the relationship between the applicants impossible.

In this connection, the Court observes that the eldest son became 18 years old in December 2003 and thus is no longer a minor. The first applicant, his legal guardian, was expelled from Sweden two months before his 18th birthday but since the second applicant had been taking care of him in Sweden since the first applicant was imprisoned in June 1999, this circumstance cannot, in itself, be considered as an infringement of Article 8 of the Convention.

Moreover, in order to decide whether the interference was justified, the interests of the applicants in being together in Sweden have to be balanced against the public order interests of Sweden on account of the nature and the seriousness of the crimes of which the first applicant was convicted, namely an aggravated drugs crime and the attempted aggravated smuggling of drugs. In view of the devastating effects drugs have on people's lives, the Court understands why the authorities show great firmness to those who actively contribute to the spread of this scourge (see, among other authorities, *Dalia v. France*, cited above, p. 92, § 54, and *Amrollahi v. Denmark*, no. 56811/00, § 37, 11 July 2002). The eight-year prison sentence imposed on the first applicant, which was reduced to six and a half years by the national courts because of the detriment caused to him by the expulsion, and the rather large quantity of heroin involved, show the serious nature and gravity of the crime. It follows that the expulsion must be considered to have been justified by weighty public order interests.

In these circumstances, the Court finds that it cannot be considered to have been disproportionate to the legitimate aims of preventing disorder or crime, and protecting health and morals, to expel the first applicant (see, *Hussain and C. v. Norway*, (dec.) no. 36844/97, 4 May 2000, unreported, and *Najafi v. Sweden*, (dec.) no. 28570/03, 6 July 2004, unreported).

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

For these reasons, the Court by a majority

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President