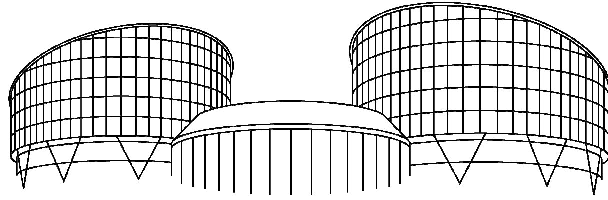

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38813/08
by A.M. and Others
against Sweden

The European Court of Human Rights (Third Section), sitting on 16 June 2009 as a Chamber composed of:
Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar*,
Having regard to the above application lodged on 14 August 2008,
Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.
Having deliberated, decides as follows:

THE FACTS

The applicants, a family of four, are Russian nationals who were born in 1965, 1965, 1991 and 1996, respectively, and are currently in Sweden.

A. The circumstances of the case

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

The first applicant arrived in Sweden and applied for asylum and a residence permit on 15 October 2004. Before the Migration Board (*Migrationsverket*), he claimed that he had been a major in the Russian army and had witnessed how other officers were involved in illicit smuggling of weapons. He had reported it to his superiors with the result that he had been assaulted and threatened but no investigation had been instituted. A colonel, who had been involved in the smuggling, had threatened to kill the first applicant or have him committed to a psychiatric clinic. To protect his family, he had divorced his wife and moved out of their common home. In October 2003 he had resigned from the military and had commenced a civil employment. About one year later the colonel had contacted him and had wanted him to take part in some form of illegal activity failing which he would be killed. Out of fear, the first applicant had left the country. He submitted a copy of a referral to a psychiatric clinic for forced hospitalisation, dated 10 April 2003, and a medical certificate stating that he had been hospitalised because of concussion and was exempt from work for 15 days, dated 29 April 2003.

On 30 December 2004 the other applicants came to Sweden and joined the first applicant's request for asylum and residence permits. The second applicant stated that she had chosen to remain in Russia with the children when the first applicant left the country as she had considered that his problems did not concern them. However, in October 2004, the colonel had come to their home and had threatened her and had searched their home and, a few days later, three men had come to their home and had assaulted her. The men had said that they had been sent by the colonel. The second applicant claimed that she and the children had received more threats, by telephone calls and anonymous letters, and had therefore also decided to leave the country. Because of the assault, she was suffering from anxiety and depression.

The children were also heard by the Migration Board and they stated that they felt fine, that they had not had any problems in their home country and that they did not know why they had come to Sweden.

On 9 May 2006 the Migration Board rejected the applicants' request. It found that the family's problems emanated from individual persons and not from the Russian authorities and that the family therefore should have exhausted all means to seek protection from the authorities against the aggressors. As they had failed to do so, they had not shown that they were in need of protection in Sweden. The Board found no other grounds on which to grant the family leave to remain in Sweden, even having regard to the fact that the case involved two children.

The applicants appealed to the Migration Court (*Migrationsdomstolen*), maintaining their claims and adding that the first applicant had reported the smuggling to several authorities within the military in his section and region. A review of the weapons in the unit, carried out on the basis of his report, had not shown any irregularities but he had been threatened with court martial for slander. Consequently, since his reports had led to nothing except threats against himself and his family, it was clear that the authorities protected each other and that the applicants could not count on help or protection from the Russian authorities. Moreover, the first applicant alleged that he had also received several summonses to appear before the police. These had been sent to his address in Russia, proving that some persons were still looking for him and that the family would not be safe in Russia. He submitted three summonses in which he was called to appear before the police on 6 April 2005, 26 April 2005 and 16 December 2005, respectively. He stated that these had been sent to him by the second applicant's sister in Russia.

The second applicant also submitted a medical certificate, dated 9 January 2008, by A. Braun, psychologist, and T. Wågberg, psychiatrist and chief physician, at the Psychiatric Clinic in Sundsvall. The certificate stated that the second applicant was suffering from Post Traumatic Stress Disorder (PTSD) following an assault in October 2004. She was taking antidepressants and consulted a psychologist on a regular basis which had improved her condition. It further noted that she was doing an internship at a hospital as a paediatrician (her profession in Russia) which was going well.

On 29 May 2008 the Migration Court rejected the appeal. It first seriously questioned the authenticity of the summonses invoked as they were only copies and lacked a case number. Moreover, one stated that the first applicant was called as a witness and the others did not state why he was called. None of the summonses mentioned that he was suspected of having committed any crime. Furthermore, the court observed that the family had not reported the threats to the authorities and that the second applicant had not reported the assault. Thus, they had not made probable that the Russian authorities neither could nor would help or protect them against those individuals threatening them. Consequently, the court concluded that the applicants were not in need of protection in Sweden. Moreover, it considered that the second applicant's health problems were not so serious that she could be granted a residence permit on this ground. Even having regard to all the circumstances of the case, the court found that the applicants could not be granted leave to remain in Sweden.

Upon further appeal, the Migration Court of Appeal (*Migrationsöverdomstolen*), on 24 September 2008, refused leave to appeal.

The applicants were then called to a meeting with the Migration Board on 23 October 2008 to prepare for their return to Russia.

B. Relevant domestic law

The basic provisions mainly applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the 2005 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as "the 2005 Act") which replaced, on 31 March 2006, the old Aliens Act (*Utlänningslagen*, 1989:529). Both the old Aliens Act and the 2005 Act define the conditions under which an alien can be deported or expelled from the country, as well as the procedures relating to the enforcement of such decisions.

Chapter 5, Section 1, of the 2005 Act stipulates that an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden. According to Chapter 4, Section 1, of the 2005 Act, the term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, Section 2, of the 2005 Act).

Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) as to allow him or her to remain in Sweden (Chapter 5, section 6 of the 2005 Act). During this assessment, special consideration should be given to, *inter alia*, the alien's state of health. In the preparatory works to this provision (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or 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 12, Section 1, of the 2005 Act). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, Section 2, of the 2005 Act).

Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This applies, under Chapter 12, Section 18, of the 2005 Act, where new circumstances have emerged that mean there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced. If a residence permit cannot be granted under this provision, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the 2005 Act, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not doing so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, Section 19, of the 2005 Act).

Under the 2005 Act, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances; the Migration Board, the Migration Court and the Migration Court of Appeal (Chapter 14, Section 3, and Chapter 16, Section 9, of the 2005 Act).

C. Regulation on residence registration in the Russian Federation

According to Article 27 of the Constitution of the Russian Federation of 12 December 1993 everyone lawfully within the territory of the Russian Federation has the right to move freely and choose his or her place of stay or residence. Moreover, the Law on the right of Russian citizens to liberty of movement and freedom to choose the place of temporary and permanent residence within the Russian Federation (no. 5242-I, adopted on 25 June 1993, hereafter "the 1993 Law") guarantees the right for Russian citizens to liberty of movement and freedom to choose their place of residence but requires a person to apply for residence registration at a new address within seven days of moving (Sections 1, 3 and 7). This is done by submitting an identity document, an application form and a document showing the legal basis for residence at the indicated address, such as a rent contract or the consent of the flat-owner (Section 9 of the Regulations for registration of temporary and permanent residence of Russian citizens, no. 713, of 17 July 1995). For more details, please, see *Tatishvili v. Russia* (no. 1509/02, §§ 29-31, ECHR 2007-...).

Furthermore, Section 31 of the 1993 Law stipulates that cancellation of a registration at a previous place of residence is carried out by the relevant bodies, either upon a citizen's application for a registration at a new place of residence or upon his application for cancellation of registration at the previous place of residence. If by the time of registration at a new place of residence, he or she has not cancelled the registration at the previous place of residence, the registration authority (at the new place of residence) is under an obligation to notify, within three days, the registration authority at the person's previous place of residence so that it can be cancelled.

COMPLAINTS

The applicants complained under Article 3 of the Convention that, if they were to be deported from Sweden to Russia, they would be persecuted, ill-treated and maybe even killed because the first applicant had unveiled irregularities within the military and those involved wanted revenge. The applicants further alleged that they had integrated well into Swedish society and that a forced return to Russia would destroy their social and family life in breach of Article 8. Moreover, they complained under Article 6 of the Convention that they had been denied an oral hearing before the Migration Court and that the proceedings were unfair. They also invoked Article 1 of Protocol No. 7 to the Convention.

THE LAW

The applicants complained under Article 3 of the Convention that they would risk being persecuted and ill-treated if returned to their home country. This provision reads:

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

They stressed that they were still sought in Russia and that they would not be able to settle anywhere in the Russian Federation since, due to the compulsory registration of residence, the authorities and the military persons looking for them would quickly learn about their whereabouts. Moreover, they would first be obliged to go to their home town to cancel their registration before being able to register somewhere else and they would then be apprehended.

The Court reiterates 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 deported, 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, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

In so far as the allegation of threats and assaults by the colonel and other individuals is concerned, the Court observes that the applicants never reported these incidents to the Russian authorities or requested their protection. The first applicant's claim that he reported the illicit smuggling of weapons to the military authorities without them investigating the matter, does not, in the Court's opinion, automatically mean that the civil authorities would not intervene to protect the applicants from criminals or investigate ordinary crimes, such as threats and assaults, directed against the applicants. In any event, the Court notes that, according to the first applicant, a review of the weapons in his military unit had in fact been carried out following his report but that it had shown no irregularities, indicating that military authorities had followed up on his report.

Moreover, as regards the summonses, the Court, like the Swedish authorities, is doubtful about their authenticity. However, even assuming that they are genuine, the Court notes that they do not indicate that the first applicant is suspected of having committed any crime or that he is sought by the Russian authorities. From the first summons it would appear that he is called as a witness and the two others do not give any indication whatsoever as to the reason for his being summoned. Furthermore, all three summonses are from 2005 and it does not appear from the case file that the first applicant has received any summonses since. Thus, the Court finds that the applicants have failed to show that the first applicant is sought by the Russian authorities or that any of them would risk persecution or ill-treatment by the authorities in their home country. It further considers that they would be able to benefit from the protection of the Russian authorities against threats from individuals. In this respect, the Court attaches importance to the fact that the case concerns deportation to a High Contracting Party to the European Convention on Human Rights, which has undertaken to secure the fundamental rights guaranteed under its provisions (see, among others, *Tomic v. the United Kingdom* (dec.), no. 17837/03, 14 October 2003 and *Goncharova and Alekseytsev v. Sweden* (dec.), no 31246/06, 3 May 2007).

Lastly, the Court considers that, if the applicants are not willing to return to their home town, they could settle in any other part of the country. Here, it has regard to its findings above and also notes that it appears from Section 31 of the 1993 Law that the applicants would not be obliged to

return to their home town to cancel their previous registration before settling in a new place (see above under Regulation on residence registration in the Russian Federation). Thus, they would be able to settle in a new place of residence immediately upon return to Russia and register there.

Having regard to all of the above, the Court finds that it has not been established that there are substantial grounds for believing that the applicants would face a real risk of being persecuted or subjected to treatment contrary to Article 3 of the Convention if deported to Russia.

It follows that this complaint 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 applicants further complained under Article 8 of the Convention that, if they were deported to Russia, their social and family life would be shattered as they had integrated well into Swedish society. This provision reads in so far as relevant:

> "Everyone has the right to respect for his private and family life, his home and his correspondence. ..."

The Court observes from the outset that the applicants will be deported together so there is no question of separating the family members from each other. Moreover, the second applicant is a paediatrician and has worked as such in Sweden and the first applicant resigned from the military in October 2003 and then held a civil employment until he left for Sweden. Against this background, the Court can see no reason why they would not be able to find work in their home country. Furthermore, although it recognises that the family has been in Sweden for more than four years, during which time they have adapted to Swedish society, the Court notes that since their arrival in Sweden they have known that they might not be allowed to remain and that they have never held Swedish residence permits. On the contrary, their requests for leave to remain were first rejected by the Migration Board and, upon appeal, by the migration courts. Hence, since 24 September 2008, when the Migration Court of Appeal refused leave to appeal and the deportation order against the applicants gained legal force, they have been under an obligation to leave Sweden.

In these circumstances, and having regard to the fact that the applicants are Russian nationals and have lived all their lives in Russia, except for the last four years, the Court considers that, if they were to be deported from Sweden to Russia, there would be no violation of Article 8 of the Convention. This complaint is therefore also manifestly ill-founded and must be rejected in accordance with Articles 35 §§ 3 and 4 of the Convention.

3. Turning to the applicants' complaint under Article 6 of the Convention, that they were not granted an oral hearing before the Migration Court and that the proceedings were unfair, the Court notes that this

provision does not apply to deportation proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

4. Lastly, the Court notes that the applicants have referred to Article 1 of Protocol No. 7 to the Convention. However, this provision only applies to "aliens lawfully resident in the territory of a State" and, in the present case, the applicants have not been granted residence permits in Sweden and thus are not, and never have been, lawfully residing in Sweden.

Consequently, this provision is not applicable in the instant case and the complaint must be rejected for being incompatible *ratione materiae* in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President