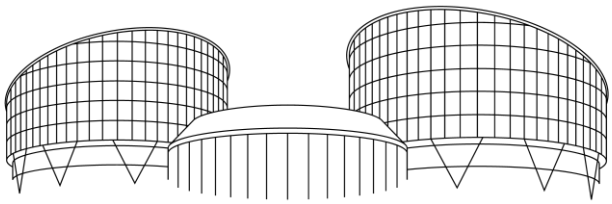

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 1722/10
Alem BIRAGA and others
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 3 April 2012 as a Chamber composed of:

Dean Spielmann, *President*,
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 12 January 2010,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Alem Biraga, and the second applicant, Yosef Kashsay Tekle, are Ethiopian nationals, born in 1976 and 1980, who live in Sweden. The third applicant, Abigail Kahsay, is their daughter, an Ethiopian national, born in Sweden in 2009. They are represented before the Court by Mr Bo Karlsson, a lawyer practising in Sollentuna.

2. The Swedish Government ("the Government") were represented by their Agent, Ms Gunilla Isaksson from the Ministry for Foreign Affairs.

3. On 1 February 2010 the President of the former Third Section decided, in the interest of the parties and the proper conduct of the proceedings, to indicate to the Government of Sweden, under Rule 39 of the Rules of Court that the first applicant should not be deported to Ethiopia for the duration of the proceedings before the Court.

4. The application was transferred to the Fifth Section of the Court, following the re-composition of the Court's sections on 1 February 2011.

A. The circumstances of the case

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

6. At some unknown time the first applicant entered Sweden and requested asylum. In support of her request she explained that she had been a member of the political party CUD (Coalition for Unity and Democracy) since 2005. Following the election in May 2005, a conflict arose between the Government party and the CUD. She was summoned by the police in June 2006 but did not appear, as she knew that three other members of the CUD had disappeared after being summoned by the police. She was summoned a second time and went into hiding with her sister. In December 2006 she fled the country. She travelled by plane from Addis Ababa to Sweden on a false passport.

7. On 27 May 2008 the Migration Board (*Migrationsverket*) refused the first applicant's request and ordered her deportation to Ethiopia. It noted that she had not proved her identity, but in assessing her request for asylum it assumed that she was from Ethiopia as she maintained. It found that the general situation in Ethiopia alone could not justify granting asylum. As to the applicant's personal situation, it questioned her credibility, notably because during the interviews she had shown little knowledge of the CUD and had given divergent information about where and with whom she had been hiding from June to December 2006. Moreover, noting that the applicant had not played a leading role within the party, the Board found it unlikely that she would be of interest to the police, especially more than one year after the election, and that, if she had been of such interest, the police had not come to find her at her sister's home. The Migration Board also noted that, according to international sources, many members of the CUD had in fact been arrested in connection with the election, but that almost all had been released in 2006. Those remaining were convicted in June 2007 and granted amnesty in August 2007. In these circumstances, the Migration Board did not find that the applicant had substantiated fulfilling the criteria for being granted asylum.

8. The first applicant appealed to the Migration Court (*Migrationsdomstolen*) and added that for one year and nine months she had had a relationship with the second applicant, an Ethiopian national, who had been granted a permanent residence permit in Sweden on 31 August 1998 in order to join his mother. On 18 April 2009 the first and the second applicants had a daughter, the third applicant, of whom the parents have joint custody.

9. On 24 August 2009, the Migration Court upheld the Migration Board's decision as to the request for asylum.

10. As to the first applicant's relationship with her partner and child, the Migration Court pointed out that by virtue of Chapter 5, Section 18 of the Aliens Act, an alien who wants a residence permit in Sweden must have applied for and been granted such a permit before entering the country. An application for a residence permit may not be granted after entry into Sweden except, among other grounds, if the alien has a very strong connection to a person residing in Sweden and it cannot reasonably be demanded that the alien travel to another country to hand in an application there. According to the preparatory work, a request to be exempted from the main rule should be refused if the alien's identity cannot be established and the alien does not have a right to protection in Sweden.

11. In the present case the Migration Court noted that the third applicant did not have a residence permit in Sweden at the relevant time, thus the first applicant could not invoke the strong connection to her child to obtain a residence permit there. As regards the first applicant's relationship with the second applicant, the Migration Court found on the one hand that it spoke in the first applicant's favour that the couple had a child together. On the other hand, it spoke against her that she had not pointed to any reasons why it could not reasonably be demanded that she return to her home country and hand in her application for a residence permit there. In conclusion the Migration Court did not find the conditions fulfilled to apply the said exception set out in Chapter 5, Section 18, of the Aliens Act.

12. Leave to appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*) was refused on 23 September 2009. The deportation order thus became enforceable.

13. By decision of 12 October 2009 the Migration Board granted the third applicant a permanent residence permit in Sweden on account of her ties to her father.

14. Subsequently, invoking Chapter 12, Section 18 of the Aliens Act the applicant maintained that there were impediments to her deportation because of her strong ties to her partner and her daughter.

15. By decision of 30 November 2009 the Migration Board refused to suspend the deportation order of the first applicant. It noted that Chapter 12, Section 18 of the Aliens Act was an extraordinary remedy and that the

invoked new circumstances could not constitute an impediment within the said provision.

16. On 1 July 2010 a new Act entered into force in Sweden amending Chapter 5, Section 18 and Chapter 12, Section 18 the Aliens Act (see relevant domestic law below).

17. Invoking the amended Chapter 12, Section 18 of the Aliens Act, again the first applicant maintained that there were new circumstances which amounted to an impediment to enforce the deportation order. In particular she submitted that the second applicant objected to her taking their daughter with her to Ethiopia to apply for family reunification. Moreover, the second applicant worked as a truck driver, which meant that he was away for long periods and therefore could not take care of their daughter in Sweden.

18. By decision of 4 October 2010 the Migration Board refused the application since the applicant had not presented her original passport and therefore had not fulfilled the conditions set out in Chapter 12, Section 18, of the Aliens Act.

19. Submitting a valid passport, the first applicant re-maintained that there were impediments to her deportation by virtue of Chapter 12, Section 18 of the Aliens Act.

20. By decision of 15 November 2010 the Migration Board disagreed. It commenced by examining whether it could be considered clear that a residence permit would have been granted the first applicant, if her application had been examined before her entry into Sweden.

21. Firstly, at the relevant time the first and the second applicants did not fulfil the conditions set out in Chapter 5, Section 3, of the Aliens Act according to which a residence permit could be granted to an alien who is the spouse of, or cohabiting partner, with someone who is residing in Sweden. It was recalled in this respect that the applicants were not married and they had not lived together before the first applicant entered Sweden.

22. Secondly, at the relevant time the first and the second applicant did not fulfil the conditions set out in Chapter 5, Section 3 a) of the Aliens Act, which stipulated that a residence permit could be granted to an alien who intended to marry or cohabit with someone who was legally residing in Sweden, if their relationship was serious and no special reasons spoke against granting such a residence permit. It was recalled in this respect that the applicants' relationship had only commenced in Sweden.

23. Accordingly, it could not be concluded that "it was clear that a residence permit would have been granted to the first applicant if the application had been examined before her entry into Sweden".

24. Thereafter, the Migration Board found that there were no new circumstances or impediments to the enforcement of the deportation order under Chapter 12, Section 18 of the Aliens Act. It pointed out though that

the implementation thereof had been suspended while the case was pending before the Court in accordance with the Rule 39 indication.

B. Relevant domestic law

1. The right of aliens to enter and to remain in Sweden

25. 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). It defines 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.

26. Chapter 5, Section 1, of the Aliens 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 Aliens Act).

27. Moreover, if a residence permit cannot be granted on the above grounds, a permit may nevertheless 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 Aliens 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 granting a residence permit.

28. 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 Aliens 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 Aliens Act).

29. 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 presented by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, Sections 1 and 2, of the Aliens Act, and these circumstances could not have been presented 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 Aliens Act).

30. The provisions on family reunification relating to a spouse, registered partner or cohabiting partner etc. of a person who is resident in Sweden are set out in Chapter 5, Section 3, of the Aliens Act and were given their present wording on 30 April 2006 in connection with the implementation of the EC Directive on the right to family reunification (Directive 2003/86/EC of 22 September 2003, hereinafter "the Family Reunification Directive"(see below).

31. Under Chapter 5, Section 3, first paragraph of the Act, unless otherwise provided in Sections 17-17b (about special grounds against granting a residence permit), a residence permit shall be granted to an alien who is a spouse or cohabiting partner (*sambo*) of someone who is resident in Sweden or who has been granted a residence permit to settle in Sweden, and under certain conditions to the alien’s minor children.

32. Under Chapter 5, Section 3 a) first paragraph of the Act a residence permit may be granted to an alien who intends to marry or become a cohabiting partner with someone who is legally residing in Sweden, if their relationship is serious and no special reasons speak against granting such a residence permit.

33. By virtue of Chapter 5, Section 18, of the Act, an alien who wants a residence permit in Sweden on account of family ties or serious relationships must have applied for and been granted such a permit before entering the country. An application for a residence permit may not, as a general rule, be approved after entry. However, exemptions from this rule can be made for example if the alien has strong ties to a person who is

resident in Sweden and it cannot reasonably be required that he or she travel to another country to submit an application there (Chapter 5, Section 18, second paragraph, point 5). An exemption may also be made if there are some other exceptional grounds (Chapter 5, Section 18, second paragraph, point 6). The requirement that, in principle, residence permits for family members have to be granted before entry into Sweden was introduced as one of a number of measures aimed at reducing the possibilities of obtaining a residence permit by means of marriages or relationships of convenience. Subsequently, the Swedish Government and Parliament have underlined on several occasions that the requirement that residence permits be obtained before entry into Sweden is an important part of measures to maintain regulated immigration. Moreover, the preparatory works to the Aliens Act state that it is important that aliens staying in Sweden illegally do not enjoy a better position than those who comply with decisions by the authorities to return to their country of origin in order to apply for a permit from there (Government Bill 1999/2000:43). The same requirement is found in Chapter III, Article 5, point 3 of the Family Reunification Directive (see below).

34. As regards the exemptions that can be made according to Chapter 5, Section 18, second paragraph, point 5 of the Aliens Act, the preparatory works to the provision (Government Bill 1999/2000:43, p. 55 et seq.) state that the main emphasis should be placed on the question of whether it is reasonable to require that the alien return to another country in order to submit an application there. Relevant elements, which may be favourable for the alien, may be whether he or she can be expected, after returning home, to encounter difficulties in obtaining a passport or exit permit and this is due to some form of harassment on the part of the authorities in the country of origin. It may also be whether the alien will be required to complete a long period of national service or service under unusually severe conditions. It may also be relevant whether the alien has to return to a country where there is no Swedish foreign representation and where major practical difficulties and considerable costs are associated with travelling to a neighbouring country to submit the application there. Relevant elements, which may count against the alien, may be that he or she is staying in the country illegally, that their identity is unclear or if there are strong ties to the country of origin.

35. Under the Aliens 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 Aliens Act).

2. Relevant provisions of the Aliens Act as of 1 July 2010

36. On 1 July 2010 Chapter 5, Section 18 was amended adding in the last paragraph “when assessing what is reasonable under the second

paragraph, point 5, particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted if the application had been examined before entry into Sweden". The wording was thus:

Chapter 5, Section 18

An alien who wants a residence permit in Sweden must have applied for and been granted such a permit before entering the country. An application for a residence permit may not be approved after entry. However, the rule given in the first paragraph does not apply if

1. the alien is entitled to a residence permit here as a refugee or other person in need of protection under Section 1 or can be granted a residence permit here pursuant to Chapter 21, Section 2, 3 or 4,

2. the alien should be granted a residence permit here pursuant to Section 6,

3. an application for a residence permit concerns extension of a temporary residence permit that has been granted to an alien with family ties pursuant to Section 3, first paragraph, point 1 or 2b or first paragraph, point 1 or 2b or Section 3a, first paragraph, point 1 or second paragraph,

4. the alien can be granted or has a temporary residence permit pursuant to Section 15,

5. the alien has strong ties, as defined in Section 3, first paragraph, points 1-4 or Section 3a, first paragraph, points 1-3 or second paragraph, to a person who is resident in Sweden and it cannot reasonably be required that the alien travel to another country to submit an application there,

6. an application for a residence permit concerns extension of a temporary residence permit that has been granted to an alien pursuant to Section 10 in a case referred to in Chapter 6, Section 2, first paragraph.

7. the alien can be granted a residence permit under Section 15a,

8. the alien has been granted a temporary residence permit for studies pursuant to Section 10 and has either completed studies equivalent to 30 higher education credits or has completed one academic term in the case of postgraduate education, or

9. there are some other exceptional grounds.

Furthermore, the rule given in the first paragraph does not apply if the alien has been granted a visa to visit an employer in Sweden or is exempt from the visa requirement if he or she is applying for a residence permit for work in a type of occupation in which there is great demand for labour. An additional requirement is that it would cause the employer inconvenience if the alien had to travel to another country to submit an application there or that there are some other special grounds. When assessing what is reasonable under the second paragraph, point 5, particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted if the application had been

examined before entry into Sweden. With regard to a residence permit for an alien who is to be refused entry or expelled in accordance with a judgment or order that has become final and non-appealable, the regulations in Section 15a, Chapter 8, Section 14 and Chapter 12, Sections 18-20 apply.

Chapter 12, Section 18

37. This provision was also amended on 1 July 2010 adding in the last paragraph "when assessing under the first paragraph, point 3 ... particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted ... if the application had been examined before entry into Sweden". The wording was thus:

If, in a case concerning the enforcement of a refusal-of-entry or expulsion order, new circumstances come to light that mean that

1. there is an impediment to enforcement under Section 1, 2 or 3,

2. there is reason to assume that the intended country of return will not be willing to accept the alien or

3. there are medical or other special grounds why the order should not be enforced, the Swedish Migration Board may grant a permanent residence permit if the impediment is of a lasting nature.

If there is only a temporary impediment to enforcement, the Board may grant a temporary permit. When assessing under the first paragraph, point 3, whether there are other special grounds why an order should not be enforced, particular attention shall be paid to the consequences for a child of being separated from its parent, if it is clear that a residence permit would have been granted on the grounds of strong ties under Chapter 5, Section 3, first paragraph, points 1-4, or Chapter 5, Section 3a, first paragraph, points 1-3, or second paragraph, if the application had been examined before entry into Sweden. The Swedish Migration Board may also order a stay of enforcement.

3. The process of application for family reunification from Addis Ababa

38. The Government submitted that according to information received from the Embassy of Sweden in Addis Ababa in September 2011, it would take approximately two months to process an application for a residence permit at the Embassy. The subsequent processing time by the Migration Board in Sweden would normally be less than eight months depending on whether the application needed to be supplemented or not. Cases involving children were given priority. The time from the filing of an application at the Embassy until a decision is reached should thus not be longer than ten months. The applicants disputed this information. Referring to e-mail correspondence between the Embassy and their representative from

February 2010, they maintained that it would take at least one year to have an application considered.

4. Family Reunification Directive

39. Council Directive, 2003/86/EC of 22 September 2003 on the right to family reunification, which applies to all EU Member States, except the United Kingdom, Denmark and Ireland, deals with the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. Its Chapter III, Article 5, which carries the heading "Submission and examination of the application", provides:

Article 5

1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents. If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary. When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides. By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged. In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended. Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.

5. When examining an application, the Member States shall have due regard to the best interests of minor children.

COMPLAINT

40. The applicants complained that the implementation of the Swedish authorities' decision to deport the first applicant would contravene Articles 3 and 8 of the Convention.

THE LAW

A. Article 8 of the Convention

41. The applicants maintained that an implementation of the order to deport the first applicant to Ethiopia in order for her to apply for family reunification from there, would lead to a separation of the family which would amount to a violation of Article 8 of the Convention, which read:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

42. At the outset, the Government pointed out that it has not been decided whether the first applicant is entitled to a residence permit based on family reunification in Sweden, and that an appeal against a decision thereon by the Migration Board lays to the Migration Court and the Migration Court of Appeal. What has been finally decided by the domestic authorities in the present case is that, in accordance with the general rule that an application for a residence permit based on family relations is to be submitted before the alien enters the country, the first applicant is obliged to return to Ethiopia and to apply from there for a residence permit in Sweden.

43. Such a process should take no longer than ten months and the decision does not entail that the first applicant and her child have to be separated or that the family have to be separated. The Government noted in that respect that the applicants have only claimed that the second applicant refuses to let their daughter travel with the first applicant to Ethiopia. They have not pointed to any concrete obstacles preventing them all from going to Ethiopia, thereby avoiding a separation. All the applicants are Ethiopian nationals; the first applicant lived in Ethiopia until she was thirty years old, the second applicant until he was seventeen or eighteen years old. The third applicant is still at such a young age that her wellbeing is rather linked to the contact with her parents than to the country in which she is living; and

there are no elements indicating that the applicants would be at risk of ill-treatment upon return to Ethiopia. Finally, even if the second and the third applicants do not follow the first applicant for the whole period in Ethiopia awaiting a decision on whether or not she can be granted a residence permit in Sweden, which should not exceed ten months, nothing prevents them from visiting the first applicant in Ethiopia. The applicants have not pointed to any insurmountable obstacles for them to go or to go together, nor are there any indications that either parent would not be able to take care of their child on their own.

44. The Government emphasized that the deportation of the first applicant would not necessarily entail a separation of the applicants at all. Thus, they found it questionable whether there was an interference. In any event, they stated that the procedural requirement that an alien must apply for and be granted a residence permit on grounds of family ties before entering a country is a common requirement in those EU Member States which are bound by the Family Reunification Directive. The requirement in the present case was in accordance with the law and pursued the legitimate aims of protecting the economic well-being of the country and preventing disorder. In addition, it was important that aliens who stay illegally in Sweden do not enjoy a better position than those who follow the authorities' rules and decisions. They also pointed out that the relationship between the first and the second applicants had commenced and developed at a time when they were aware that the first applicant's immigration status was such that the persistence of their family life in Sweden would be precarious from the outset. Moreover, there are exceptions from the main rule, namely where it cannot reasonably be required that the alien return to their country to apply from there. The decision thereon falls, in the Government's view, within the margin of appreciation of the domestic authorities. In the special circumstances of the present case, as set out above, the Government maintained that the decision was proportionate and necessary in a democratic society and that upholding the decision that the first applicant should return to Ethiopia in order to apply for a residence permit would not amount to a violation of the applicants' right to respect for their family life under Article 8 of the Convention.

45. The applicants maintained that the deportation of the first applicant would lead to separation of the family which contravened Article 8 of the Convention. In their view the separation of a mother and a nursing child could not be considered necessary in a democratic society.

46. They also submitted that it could not be concluded that the second and the third applicants could return to Ethiopia without any safety risk, and that in any event it would pose serious difficulties for them to return.

47. Finally, they submitted that the fact that other EU Member States may apply the same procedural rule did not mean that it was compatible with the Convention.

48. 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-....; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42).

49. Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38; and *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, ECHR 2006-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Rodrigues da Silva and Hoogkamer*, cited above, ibidem; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000).

50. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999; *Andrey Shebashov v. Latvia* (dec.), no. 50065/99, 9 November 2000). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Nunez v. Norway*, no. 55597/09, § 70, 28 June 2011 and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 68, Series A no. 94).

51. The Court is aware that, where Contracting States tolerate the presence of aliens in their territory while the latter await a decision on an application for a residence permit, an appeal against such a decision or a request to re-open such proceedings, this enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. However, as set out above, this does not entail that the authorities of the Contracting State involved are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their country. In this context a parallel may be drawn

with the situation where a person who, without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a *fait accompli*. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see *Darren Omoregie and Others v. Norway*, no. 265/07, § 64, 31 July 2008, *Roslina Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; *Yash Priya v. Denmark* (dec.) 13594/03; 6 July 2006; cf. *Rodrigues da Silva and Hoogkamer*, cited above, § 43).

52. What is at issue in the present case, however, is not a final decision by the Swedish authorities to grant or to refuse the first applicant a residence permit based on family reunification. No decision thereon has been taken yet.

53. The crucial issue is whether it would be in breach of Article 8 of the Convention if the Swedish authorities implement the order that the first applicant return to Ethiopia to apply for family reunification from there.

54. The Court notes in this respect that in accordance with Chapter III, Article 5, point 3 of the Family Reunification Directive which set out that by way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory, Sweden does allow for such a possibility under Chapter 5, Section 18, point 5, when the alien can point to reasons why it cannot reasonably be demanded that he or she travel to another country to submit an application there. In the present case, however, the Swedish authorities did not find that the applicants had pointed to such reasons.

55. The Court does not find it necessary to determine whether the impugned decision constitutes an interference with the applicants' exercise of their right to respect for family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation, since in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole, and in both contexts the State enjoys a certain margin of appreciation.

56. As to the further question whether the interference was justified under Article 8 § 2, the Court is satisfied that it had a legal basis in national law, and that it pursued the legitimate aims of preventing "disorder" and protecting the "economic well-being of the country". Indeed this seems undisputed. However, the question arises whether the interference was necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aims pursued (see, as a recent authority, *Üner v. the Netherlands* [GC], cited above, § 54).

57. In this assessment, the Court refers to the main decision taken thereon by the Migration Court on 29 August 2009, which became final on 23 September 2009 when leave to appeal to the Migration Court of Appeal

was refused. In its balancing test the Migration Court noted that the third applicant did not have a residence permit in Sweden at the relevant time, thus the first applicant could not invoke the strong connection to her child to obtain a residence permit there. As regards the first applicant's relationship with the second applicant, the Migration Court found on the one hand that it spoke in the first applicant's favour that the couple had a child together. On the other hand, it spoke against her that she had not pointed to any reasons why it could not reasonably be demanded that she return to her home country and hand in her application for a residence permit there. In conclusion, the Migration Court did not find the conditions fulfilled to apply the exception set out in Chapter 5, Section 18, of the Aliens Act. Accordingly, the first applicant could not apply for a family reunification from Sweden.

58. Moreover, the Court notes that the first applicant at no time has been granted lawful residence in Sweden (cf. *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 43, ECHR 2006-) and it is not in dispute that the applicants' family life was created at a time when they were aware that the first applicant's immigration status was such that the persistence of that family life within Sweden would from the outset be precarious.

59. In these circumstances it cannot be said that the Migration Court failed to strike a fair balance between the applicants' interests on the one hand and the States interest in ensuring effective immigration control on the other, or that the case contained such exceptional circumstances that the return of the first applicant to Ethiopia to apply for a residence permit from there would constitute a violation of Article 8.

60. Subsequently, the first applicant maintained that there were impediments to the enforcement of the deportation order due to her relationship with her cohabiting partner and her daughter in Sweden, which in her view amounted to "other special grounds" within the meaning of Chapter 12, Section 18 of the Aliens Act. The Court notes that the assessment thereof was made by the Migration Board in three subsequent decisions, which must be seen as supplementary to the Migration Court's decision of 29 August 2009.

61. The Migration Board's task was thus limited to asses whether new circumstances had emerged which could amount to an impediment to the enforcement of the deportation order within the meaning of Chapter 12, Section 18 of the Alien Acts. By decisions of 30 November 2009, 4 October and 15 November 2010 the Migration Board found that this was not the case and that therefore the first applicant had not fulfilled the criteria set out in the said provision.

62. When compared to the proceedings before the Migration Court, it appears that in the subsequent proceedings before the Migration Board, as new circumstances, the first applicant submitted that the second applicant objected to her taking their daughter with her to Ethiopia to apply for family

reunification. Moreover, the second applicant worked as a truck driver, which meant that he was away for long periods and therefore could not take care of their daughter in Sweden.

63. Before the Court, the applicants have added that the second and the third applicants could not accompany the first applicant to Ethiopia because that would pose serious difficulties and safety risks. The applicants have not developed or substantiated this argument any further. However, it is clear from the facts that the second applicant was granted a residence permit in Sweden on 31 August 1998 in order to join his mother, when he was eighteen years old. Moreover there are no elements in the case to show that before the domestic authorities the applicants have pointed to any real and concrete safety risk for the second and the third applicants to accompany the first applicant to Ethiopia.

64. In these circumstances, the Court finds no grounds for concluding that the Migration Board in its decisions of 30 November 2009, 4 October and 15 November 2010 failed to strike a fair balance between the applicants' interests on the one hand and the State's interest in controlling immigration on the other or that those decisions appeared at variance with Article 8 of the Convention.

65. It follows that this part of the application must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Article 3 of the Convention

66. The applicants also complained that an implementation of the order to deport the first applicant to Ethiopia in order for her to apply for family reunification from there would subject the third applicant to treatment contrary to Article 3, which reads as follows:

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

67. In the Government's view the applicants have not pointed to any insurmountable obstacles for the third applicant to join the first applicant and there are no indications that either parent would not be able to take care of their child on their own. Having regard thereto and to the minimum level of severity required under Article 3 of the Convention, the Government found no support in the Court's case-law for finding that deportation of the first applicant in the circumstances of the present case, or a possible separation of the first applicant and her daughter, which the applicants could choose to avoid or limit, would constitute a violation of the latter's rights under the said provision.

68. The Court reiterates that 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, 28 February 2008). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.

69. The present case differs in that the applicants maintained that the third applicant, namely the child born in April 2009, would be subjected to treatment contrary to Article 3 if the first applicant were returned to Ethiopia to apply for a residence permit from there, because that would entail a separation of the mother and her child.

70. The Court is aware that the separation at a very young age of a child from his or her mother may cause suffering and even irreparable damage. Nevertheless, referring to its settled case-law (see, among many authorities, *Nunez v. Norway*, cited above) it reiterates that issues concerning separation of children from their parents in deportation cases have so far been dealt with under Article 8 of the Convention.

71. Moreover, the applicants have failed to point to any elements in the present case which could attain the minimum level of severity needed to fall within the scope of Article 3.

72. It follows that this part of the application must likewise be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3(a) and 4 of the Convention. The application of Rule 39 of the Rules of Court thus comes to an end.

For these reasons, the Court by a majority

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President