



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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 28570/03
by Esmail NAJAFI
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 6 July 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr J. CASADEVALL,

Mr S. PAVLOVSCHI,

Mr J. BORREGO BORREGO,

Mrs E. FURA-SANDSTRÖM,

Ms L. MIJOVIĆ, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 27 August 2003,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Esmail Najafi, is an Iranian national who was born in 1960. He was represented before the Court by Ms M. Novosel Nyström, a lawyer practising in Stockholm. The respondent Government were represented by Ms I. Kalmerborn, Ministry for Foreign Affairs.

A. The circumstances of the case

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

1. The period between 1977 and 1997

The applicant arrived in Sweden for the first time in February 1977 to visit his brother, who was studying in Sweden. Having failed to demonstrate that his brother was able to provide economic guarantees for his subsistence and return travel, he was expelled from the country. A few weeks later, on 8 March 1977, the applicant again entered Sweden and applied for a residence permit in order to study in the country. On 7 June 1977 his application was rejected by the National Immigration Board (*Invandrarverket*). Apparently, he thereafter remained in the country illegally. In February 1978 he again applied for a residence permit as a foreign student, submitting that he had been admitted to the Stockholm Technical Institute. On 24 April 1978 he was, on this basis, given a temporary residence permit, effective until 23 October 1978.

In the autumn of 1978 the applicant returned to Iran. After re-entering Sweden in March 1979 he remained there without permission until he again returned to Iran sometime during the autumn of 1979. Between 1979 and 1982 he did his military service in Iran. He remained in Iran until 1984.

In February 1984 the applicant was granted an entry visa to Sweden to visit his brother. In July the same year he married a Swedish citizen whom he had first met during his initial period of residence in Sweden, and in November he was granted a six-month temporary residence permit based on this relationship. Shortly before the expiry of this permit he again returned to Iran in April 1985 and remained there, without his wife, until March 1987. The applicant has submitted that he remained in Iran on account of family problems there and that he was in continuous contact with his wife through telephone calls. After coming back to Sweden, where now also his parents and his three brothers were living, he was granted a permanent residence permit in June 1988.

In January 1989 and November 1993, respectively, two sons were born to the applicant and his wife. The sons are both Swedish citizens. In 1995 the couple divorced. Between 1988 and 1997 the applicant made several journeys to Iran, the longest of which lasted for six weeks. At visits made to

Iran in 1995 and 1996 he apparently told relatives that he was considering a permanent return to his native country.

In the course of the police investigation into the narcotics offences of which he was subsequently convicted, the applicant stated that before he came under suspicion he had in principle moved back to Iran. He had rented an apartment there for a year, and his intention was to go to Iran for two periods every year and to remain for five months each time. The remaining two months he intended to spend in Sweden in order to see his children. The applicant further stated that he had better job opportunities in Iran, as well as contacts with persons who could help him. He also had a higher standard of living in that country than in Sweden. The applicant's views in this respect were confirmed at his trial, during which he stated, *inter alia*, that his intention was to move back to Iran.

2. Criminal proceedings

During his different periods of residence in Sweden the applicant has been convicted of several criminal offences. Thus, in April 1979 he was found guilty of, *inter alia*, making unlawful threats and was given a suspended sentence and ordered to pay a fine. In 1994 he was convicted of driving without a driver's licence and engaging in unlawful commercial traffic and sentenced to four months' imprisonment. In 1995 he was convicted of robbery and of carrying knives in a public place and sentenced to imprisonment for one year and three months. He was released on probation in October 1995.

On 4 April 1997 the District Court (*tingsrätten*) of Sollentuna convicted the applicant and three co-accused of aggravated narcotics offences involving the transportation from Thailand and attempted importation into Sweden of about two kilograms of heroin in December 1996. The applicant was sentenced to ten years' imprisonment. Moreover, the court considered that the offences were of such a character that each of the accused should be expelled from Sweden with life-long bans on their return.

In his appeal against that judgment, the applicant, in regard to the question of expulsion, relied on his links to Swedish society and also submitted that there was a risk that he would be punished again in Iran for the narcotics offences of which he had already been convicted in Sweden.

On 13 June 1997 the Svea Court of Appeal (*Svea hovrätt*) upheld the District Court's judgment in its entirety.

The applicant sought leave to appeal against the appellate court's judgment. He again referred to his strong links to Swedish society, including his long period of residence in the country, his close relationship with his two young children, and the fact that both his parents and his three brothers were residing in the country. He also invoked a letter from his former wife, in which she stated, *inter alia*, that it would be impossible for

her to finance any future visits to Iran and that the applicant's expulsion would therefore be tantamount to depriving the children of their father.

On 18 July 1997 the Supreme Court (*Högsta domstolen*) refused the applicant leave to appeal. He started to serve his prison sentence on the same day.

The applicant's children visited the applicant in prison for the first time in April 1999. During his time in prison he met the children on a total of 36 occasions.

3. Requests for the expulsion order to be revoked

During the applicant's time in prison, three petitions have been made to the Government for a revocation of the expulsion order. They were rejected by decisions of 9 August 2001, 15 August 2002 and 24 April 2003 respectively.

In support of his first request, the applicant submitted that he had no significant link to Iran and that his expulsion to that country would cause detriment to his children who were unable to accompany him. He also noted that his youngest son was receiving therapy at a child psychiatric clinic for the problems he was experiencing as a consequence of the expulsion.

In support of his third request, made in January 2003, the applicant added that, following his divorce in 1995, he had maintained a good relationship with his former wife and his children and had visited them several times a week, and that they regularly came to visit him in prison. The youngest son had experienced the greatest problems as a result of the applicant's absence and he was therefore regularly seeing a psychologist.

4. Further developments

On 17 October 2003 the applicant was released from prison on probation. By a decision of the Stockholm police authority he was placed in detention on the same day pursuant to chapter 6, sections 2 and 9 of the Aliens Act (*Utlänningslagen*, 1989:529), *inter alia* on the ground that there was reason to believe that he would otherwise abscond. On 29 October 2003 the County Administrative Court (*länsrätten*) in Stockholm upheld the detention order.

By a judgment of 17 November 2003 the District Court of Stockholm, at the request of the applicant and his former wife, ordered that they should have joint custody of their children. Previously, the former wife had had sole custody.

On 25 February 2004 the order for the applicant's expulsion was enforced and the applicant deported to Iran.

In an opinion of 24 March 2004 Ms Helena Bering, a qualified psychologist and psychotherapist at the Stockholm education administration stated, *inter alia*, the following. At a meeting with the two sons and their mother, the eldest son, who was aware of the applicant's deportation, had

said that he was depressed and found the whole situation hopeless. The youngest son had not been informed of the deportation, as the family feared that he would not be able to bear the pain. He had refused to attend school and was generally unhappy and afraid. He stated that he would commit suicide if his father were to be expelled to Iran.

B. Relevant domestic law

Pursuant to chapter 1, section 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 (*Utlänningslagen*, 1989:529). 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. Firstly, he must be convicted of a crime that is punishable by imprisonment. Secondly, he may only be expelled if he is in fact sentenced to a more severe punishment than a fine and if (1) it may be assumed, on account of the nature of the crime and other circumstances, that he will continue his criminal activities 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 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 his links to Swedish society. In so doing, the court shall pay particular attention to the living conditions and family circumstances of the alien and the length of time he has resided in Sweden. There must be a reasonable proportionality between the offence and the resulting consequences, and the stronger the links are between the alien and Sweden the more serious the offence must be in order to justify his expulsion. Thus, an alien who has been a holder of a permanent residence permit for at least four years when proceedings are initiated against him, or who at that time has been residing in Sweden for at least five years, may not be expelled unless there are exceptional reasons for his expulsion. As regards aliens who are considered to be refugees, special rules apply.

COMPLAINT

The applicant complained under Article 8 of the Convention about his expulsion. He referred to the fact that he had lived in Sweden continuously since 1988 and that he had two under-age sons who were Swedish nationals.

THE LAW

The applicant complained that his expulsion violated his right to respect for his family life. He relied on Article 8 of the Convention, which provides the following:

“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.”

The respondent Government submitted that the application should be declared inadmissible for failure to comply with the six-month rule. They argued that it had not been shown that the personal circumstances of either the applicant or his children had significantly changed since the conclusion of the criminal proceedings against him and that the essential elements of what constituted the subject-matter of his application to the Court had been invoked during the appellate proceedings before the Swedish courts. It was also this complaint that had constituted the gist of the applicant’s two requests to the Government for the revocation of the expulsion order. Noting that in principle only new circumstances not examined by the courts in the criminal proceedings are taken into account by the Government in evaluating such requests, the Government therefore contended that the requests could not be considered remedies for the purposes of the admissibility requirements of the Convention. As a consequence, the starting point for the six-month time-limit was 18 July 1997, the date when the Supreme Court rejected the applicant’s request for leave to appeal in the criminal proceedings.

In any event, the Government maintained that the application was manifestly ill-founded. Having regard to the fact that the applicant was a father of two minor children residing in Sweden with whom he had remained in contact after his divorce, the Government did not dispute that the enforcement of the applicant’s expulsion amounted to an interference with his right to respect for his family life. They submitted, however, that that interference was “in accordance with the law”, pursued legitimate aims and was “necessary in a democratic society” to achieve the aims concerned.

As regards the latter condition, the Government stated, *inter alia*, that, on account of prolonged stays in Iran during the first ten-year period after his first arrival in Sweden, the applicant had, at the time when the order for his expulsion acquired legal force in July 1997, been lawfully residing in Sweden for a continuous period of no more than ten years. The following period of residence in Sweden could not be afforded any weight as it had

been no more than a necessary consequence of his serving a term of imprisonment in the country. Moreover, due to his repeated periods of residence in Iran, the applicant had maintained close links to that country.

In regard to the applicant's relationship with his children, the Government, while not wishing to underestimate the restraints imposed by the expulsion, submitted that he was not prevented from maintaining the relationship via letters, telephone and other similar means. In the Government's opinion, the applicant had further failed to substantiate his assertion that it would be practically impossible for his children to visit him in Iran or in a third country.

Notwithstanding the impact of the applicant's expulsion on his family life, the Government submitted that the expulsion was justified by the fact that the applicant had committed offences of enormous gravity. They emphasised that he had been convicted of criminal offences of a serious character on four separate occasions, most importantly the offences for which he was ordered to be expelled from Sweden. Distinguishing the applicant's case from the case of *Amrollahi v. Denmark* (no. 56811/00, 11 July 2002, unreported), the Government pointed out that Amrollahi had no previous convictions when he was convicted of a crime involving a considerably lower amount of heroin and sentenced to a much less severe sentence than the applicant in the present case.

The applicant submitted that the starting point for the purposes of the six-month time-limit should be considered to be 24 April 2003, the date of the Government's last decision not to revoke the expulsion order. As the present application had been lodged with the Court on 27 August 2003, the applicant had complied with the six-month rule.

As to the merits of the case, the applicant, while not contesting that the order for his expulsion was in accordance with Swedish law, maintained that it was not proportional to the aims pursued, as his children's need of their father carried greater weight than the interest of the Swedish state to combat crime. He submitted that, whereas he had maintained contacts with his native country and had visited it regularly, he was needed in Sweden to give his sons the care and comfort they needed from both parents.

He had always had a good contact with his children and he had met them frequently and regularly, save for a period of two years between 1997 and 1999 when he and his former wife had agreed to conceal for them the fact that he was in prison and instead told them that he was working abroad. Still, he had retained contact with them by telephone during that period. The applicant submitted that his children had already suffered a great deal from the situation and that their development would be disturbed if they could not retain regular contact with their father. Contacts between him and his children by letters, telephone calls and similar means would not be sufficient and regular trips abroad were not possible for economic and social reasons. If the applicant should not be resident in Sweden, meetings

between him and the children would be very sporadic. The eldest son had visited Iran on one occasion as a baby; otherwise, the children had never been to Iran and they did not speak Farsi. Moreover, in a few years the children would be unable to visit Iran as they would be considered as Iranian citizens and be forced to perform military service in that country. The applicant also pointed out that his parents and siblings were permanently residing in Sweden.

While acknowledging the Government's conclusions in comparing the applicant's case with the case of *Amrollahi v. Denmark* (cited above), the applicant submitted that all circumstances have to be taken into account and contended that, in view of his personal circumstances, the arguments against expulsion carried more weight in his case.

The Court first notes that the Government made an objection as to the admissibility of the application on the ground that the six-month time-limit set out in Article 35 § 1 of the Convention had not been complied with. The Court, however, considers that it need not resolve this issue as the application is, in any event, inadmissible for the following reasons.

The Court observes that it was common ground between the parties that the expulsion order against the applicant constituted an interference with the applicant's right to respect for his family life, as guaranteed by Article 8 § 1 of the Convention and that the interference was in accordance with Swedish law. Furthermore, the applicant did not contest that it pursued legitimate aims 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 no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. 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 § 1 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; and *Jakupovic v. Austria*, no. 36757/97, § 25, 6 February 2003, unreported).

Accordingly, the Court's task consists in ascertaining whether the expulsion order in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the interests of public safety and the prevention of disorder and crime, on the other.

The Court notes that the applicant arrived in Sweden for the first time in February 1977. However, during the following ten years, he stayed mostly in Iran and apparently resided legally in Sweden only during two periods, one for about six months in 1978 and another for slightly more than a year between February 1984 and April 1985. He returned to Sweden in March 1987, whereupon he was continuously residing in the country until he was expelled in February 2004. However, as from April 1997 his continued presence in Sweden was due to his serving a prison sentence and – following his probationary release in October 2003 – being detained awaiting expulsion.

In July 1984 the applicant married a Swedish citizen, whom he later divorced in 1995. The couple has two sons, now aged 15 and 10 respectively, who are both Swedish citizens. The applicant has maintained contact with them and – save for a period of two years between 1997 and 1999 – he continued to meet them also when he was imprisoned. According to the applicant and his former wife, he has a close relationship with the children, who remain in Sweden. Also the applicant's parents and his three brothers are living in Sweden.

In view of these circumstances, it is clear that the applicant has strong links to Sweden.

The Court finds that the applicant also has strong links to Iran, his native country. He has retained his Iranian citizenship and has resided in that country for long periods of time, not only during the ten-year period after his first arrival in Sweden but also later, although his visits to Iran between 1987 and 1997 were of a shorter duration than before. In this context, it should be noted that the applicant, during the police investigation in 1997, stated that before he came under suspicion he had in principle moved back to Iran and that he intended to go to Iran for two periods every year and to remain for five months each time. The remaining two months he intended to spend in Sweden in order to see his children. He further stated that he had better job opportunities in Iran, as well as contacts with persons who could help him.

While it thus appears that the applicant himself would have no difficulties in settling in Iran, the Court acknowledges that his expulsion would greatly affect his relationship with his children. The applicant's former wife, the mother of the children, cannot be expected to settle in Iran and it might be difficult, economically and otherwise, for the children to make frequent visits to that country. As stated by the applicant before the Court, meetings between him and the children are likely to be sporadic if he

remains in Iran. Thus, there is no doubt that his expulsion from Sweden has serious implications for his family life.

These implications will have to be balanced against the crimes of which the applicant has been convicted. In this respect, the Court notes firstly that he has been convicted for criminal offences in Sweden not only once but on four occasions. Before the conviction which led to his expulsion being ordered he was convicted in 1979, 1994 and 1995. In 1979 he was given a suspended sentence and in 1994 and 1995 he was sentenced to prison terms of four months and one year and three months respectively. The Court notes that the 1995 conviction concerned, *inter alia*, the crime of robbery. Consequently, the applicant has been involved in serious criminal activities in Sweden for quite a period of time.

Most importantly, the conviction in 1997 concerned aggravated narcotics offences involving the transportation and attempted importation of about two kilograms of heroin. 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*, p. 92, § 54, and *Amrollahi v. Denmark*, § 37, both judgments cited above). The ten-year prison sentence imposed on the applicant and the large quantity of heroin involved show the very serious nature and gravity of the crime.

In determining whether the order for the applicant's expulsion in the circumstances struck a fair balance between the relevant interests, the Court is of the opinion that, while not overlooking the applicant's long residence in Sweden and the serious implications for his family life, his repeated criminal behaviour in general and the 1997 conviction for narcotics offences in particular are of such a serious nature that the expulsion order must be considered to have been justified. In other words, the Swedish authorities did not fail, within their margin of appreciation, to strike a fair balance between the relevant interests. Accordingly, the applicant's expulsion to Iran may reasonably be considered "necessary" within the meaning of Article 8 § 2 of the Convention for the purposes of public safety and the prevention of disorder and crime.

It follows that 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.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President