



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

FIFTH SECTION

CASE OF NACIC AND OTHERS v. SWEDEN

(Application no. 16567/10)

JUDGMENT

STRASBOURG

15 May 2012

FINAL

24/09/2012

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

In the case of Nacic and Others v. Sweden,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Mark Villiger,

Ann Power-Forde,

Ganna Yudkivska,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 16567/10) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Sladjan Nacic and Mrs Jelena Nacic, a married couple, and their sons Alexander and Milan, Sladjan Nacic and (“the applicants”), on 18 March 2010.

2. The applicants were represented by Mr S. de Geer, a lawyer practising in Stockholm. The Swedish Government (“the Government”) were represented by their Agent, Ms C. Hellner, of the Ministry for Foreign Affairs.

3. The applicants complained that deportation of the first, second and fourth applicants to Kosovo or Serbia would be in violation of Articles 3 and 8 of the Convention.

4. On 26 March 2010 the President of the Third Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to deport the first, second and fourth applicants until further notice.

5. On 14 October 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the rules of Court) and the above application was assigned to the newly composed Fifth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant is Mr Sladjan Nacic born in 1969, the second applicant is Mrs Jelena Nacic born in 1971, and the third and fourth applicants are their sons, born in 1991 and 1994. They are currently in Sweden.

A. Background and proceedings before the national authorities

8. The applicants are of Roma descent and lived in the village of Kosovo Polje. Following the outbreak of war in 1999, the first applicant refused to participate in the fighting and hid from the armed forces. Due to this, the other applicants were subjected to threats and beatings by Serbian military. Finally, they were driven out of their home by Albanian militia. They fled by train to Suvi Do, another village in Kosovo. On their way, they lost a bag containing their passports and identification papers. They hid at a friend's home, where they remained completely isolated from the world until they travelled to Sweden in 2006. They had felt harassed in Kosovo because of their being Roma, but they had not been subjected to any persecution, allegedly due to their isolation. They applied for asylum and permanent residence permits on arrival.

9. On 13 March 2008 the Migration Board (*Migrationsverket*) rejected their applications. First, the Board found that the applicants had not proved their identity. By submitting an UNMIK certificate on their residency in Kosovo Polje, they had made it plausible that they were from Kosovo or Serbia. However, the Board found that neither the general situation in Kosovo nor that in Serbia was such that it in itself constituted grounds for granting asylum. Also, the Board found that the applicants were not to be considered as refugees or as in need of any other specific protection. In regard to the applicants' Roma ethnicity, the Board noted that the first applicant's mother was Serb, that none of the family members spoke Romani or had any contact with other Roma. In Kosovo, they had lived in Serb areas and had only socialised with Serbs. In the Board's view, it was difficult to conclude in these circumstances that the applicants would be seen as Roma upon return. Noting, furthermore, that they had not been subjected to any persecution because of their ethnicity previously, the Board concluded that they had failed to show that there was such a risk upon return.

10. The Board went on to assess whether the applicants' personal situation could constitute a ground for granting residence permits. The first,

second and third applicants submitted that they suffered from medical problems.

11. The first applicant claimed that he was hypertonic. The Board found that this was a common medical condition and that he would not be subject to any medical risk if he were to return to Kosovo or Serbia.

12. The second applicant claimed that she suffered from psychological problems and submitted a certificate issued by a nurse on 24 January 2008 and extracts from her medical records covering the period from 12 April to 17 December 2007. The Board found that the certificate had not been issued in accordance with Swedish regulations and did not contain any prognosis. Therefore, it was not able to assess fully the gravity of her condition or what type of care she needed. Nevertheless, it found that her condition was not life-threatening and thus could not constitute a ground for granting a residence permit.

13. The third applicant claimed that he also suffered from psychological problems and submitted a medical certificate issued by a senior physician on 25 January 2008. The Board found that the medical certificate did not contain any diagnosis and that it therefore could not assess whether or not the applicant could receive appropriate medical care in Kosovo or Serbia. The Board noted that treatment for depression was offered both in Kosovo and Serbia. It further noted that the applicant's health had not improved after he had received treatment in Sweden and that his condition would probably only improve if he were in a more secure and stable environment.

14. The applicants appealed to the Migration Court (*Migrationsdomstolen*) in Malmö where they held to their earlier submissions and added the following. The whole family moved to a children's home in July 2008, when the authorities decided that the parents did not have the ability to take care of their children under the existing circumstances. The applicants also submitted several medical certificates regarding the first, second and third applicants. According to the certificates regarding the first and second applicants, there was a risk that they might commit suicide if they were to be expelled from Sweden. Regarding the second applicant, it was stated that she had earlier attempted suicide and that she showed clear signs of post-traumatic stress disorder (PTSD).

15. According to the certificate regarding the third applicant, issued on 27 September 2008 by Ann-Marie Nyberg, specialist in youth psychiatry, he was in a very bad state on arrival in Sweden. He was depressed and could hardly interact with other persons. During the spring of 2007, he was in contact with the Children and Youth Psychiatric Care Unit (*Barn- och ungdomspsykiatri*) in Lindesberg, which found that he suffered from depression. His condition improved when he started school and began to play football and also had a contact person assigned. However, after the Migration Board's decision in March 2008, his depression became worse again. He isolated himself at home and became apathetic. In June 2008, he

attempted suicide by overdose of anti-depressants. He was committed to hospital, but discharged after one day. When the family arrived at the children's home in July 2008, he was in very poor condition, refused to eat solid food and stayed in bed most of the time. There would be a serious risk of another suicide attempt if he were to be expelled from Sweden.

16. On 1 December 2008 the Migration Court rejected the appeal, upholding the Board's reasoning and conclusion, adding the following. The third applicant would soon be 18 years old. Although he suffered from severe depressive devitalisation, it could not be assumed that his psychosocial development would be damaged if he were to be expelled from Sweden. Also, psychiatric care was available in both Kosovo and Serbia, at least for those who could pay. Therefore, neither the third applicant's health nor his personal situation were enough to justify granting him a residence permit. This reasoning also applied to the other applicants, who were all in better health. Two of the lay judges delivered a dissenting opinion finding that the third applicant's health constituted a sufficient reason to grant him a residence permit. Applying the principle of respect for family life, they also found that the rest of the family should be granted a right to stay.

17. The applicants proceeded to the Migration Court of Appeal (*Migrationsöverdomstolen*) and submitted that they had been subjected to persecution in Kosovo due to their ethnicity and that this had caused their health problems. Their possibilities to receive proper care if sent back were limited, especially regarding the third applicant. Also, they would not have access to the health care system due to their ethnicity. Their health had deteriorated, as allegedly shown by several medical certificates submitted.

18. On 23 November 2009 the Migration Court of Appeal delivered its judgment. Regarding the third applicant, the court found that the medical certificates showed that he suffered from severe mental illness, that he was unlikely to get better in the foreseeable future and that the necessary treatment presupposed that he was in a safe, secure and stable environment. Furthermore, it found that health care was available in both Kosovo and Serbia, but that the applicant's health issues had arisen due to events taking place there. Considering all this, the court quashed the lower court's judgment and granted him a permanent residence permit. Regarding the other applicants, it upheld the lower court's reasoning and decision.

19. Two dissenting opinions were attached to the appellate court's judgment. In the first, one of the judges held that the third applicant had recently turned 18 years old, that he therefore should be regarded as an adult and that his circumstances should be assessed separately from the other applicants. Taking this into account, and also the fact that proper health care would be available to him in Kosovo or Serbia, the judge found that he had no right to remain in Sweden. He should therefore be expelled together with the other applicants.

20. In the second dissenting opinion, another judge held that the medical certificates clearly showed that the first, second and third applicants in particular suffered from severe mental illness. The documents available also showed that the condition for the third applicant's well-being was a safe, secure and stable environment. Although he had turned 18, the family's situation had to be taken as a whole. Therefore, all of the applicants should be granted permanent residence permits.

21. On 5 February 2010 the applicants lodged a new request for residence permits on the basis that there were impediments to the enforcement of their deportation order. They submitted new medical certificates and argued that their conditions had worsened. On 24 February 2010 the Migration Board rejected the request as it found that the applicants had invoked no new circumstances of importance and that there were no impediments to the enforcement of the first, second and fourth applicants' deportation order. Moreover, as the third applicant had reached the age of majority, they could no longer be granted residence permits on account of family ties to him.

B. Events during the proceedings before the Court

22. On 18 March 2010 the applicants requested the Court to indicate to the Swedish Government under Rule 39 of the Rules of Court a suspension of the first, second and fourth applicants' deportation to Kosovo or Serbia.

23. On 23 March 2010, the applicants submitted new medical certificates concerning the first, the second and the third applicants. The certificates were issued jointly by Ann-Marie Nyberg, specialist in youth psychiatry, Anna-Karin Klenell-Hjerm, psychologist and psychotherapist, and Teija Jyrinki Kärkkäinen, trained social worker and psychotherapist and were dated December 2009.

The medical certificate regarding the first applicant stated that he suffered from grave depression, insomnia and eating disorders. He had suicidal tendencies, but had not made any suicide attempts out of concern for his children. The diagnosis was grave depression and complex PTSD. According to the medical certificate regarding the second applicant, her condition was serious and possibly fatal and she would not be able to cope with a separation from her son. The prognosis was that all treatment presupposed a safe, secure and stable environment. She was diagnosed with grave depression, depressive devitalisation and complex PTSD. The medical certificate regarding the third applicant stated that he was in need of professional therapy to be able to deal with his traumatic experiences. It was not possible for him to cope without the support of his family. If his parents and his brother were to be returned to Kosovo or Serbia, there was a grave risk that his depression would become worse and that his rehabilitation

would be compromised. He was diagnosed with grave depression, depressive devitalisation and complex PTSD.

24. On 16 June 2011, the applicants submitted new medical certificates issued by Ann-Marie Nyberg and dated June 2011. According to these, the first applicant had been feeling slightly better since the family had moved from the children's home to an apartment in Trollhättan in December 2010. However, he still suffered from feelings of futility and despair. The second applicant had been feeling better since the Court's decision not to deport them until further notice. However, she had recently been feeling worse again due to her fear of a possible deportation. She still suffered from severe depression and PTSD and was worried about the third applicant's health. The third applicant had gradually been feeling better since he had been granted a residence permit. However, his positive development had been halted by the threat of disruption of the family and he showed clear signs of falling into depression again. The fourth applicant had, due to his young age, been spared the traumatic experiences in Kosovo. However, according to the medical certificate, a disruption of the family could be expected to cause him a severe trauma.

II. RELEVANT DOMESTIC LAW

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 Aliens Act (*Utlänningslagen*, 2005:716 – hereafter referred to as “the Aliens Act”), as amended on 1 January 2010. The following refers to the Aliens Act in force at the relevant time.

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 Aliens 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, 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*) to allow him or her to remain in Sweden (Chapter 5, section 6 of the Aliens Act).

28. 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 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 Aliens 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 Aliens 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 Aliens Act).

30. It should also be noted that Chapter 1, Section 2 of the Aliens Act defines a child as a person under 18 years of age.

31. 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).

III. INFORMATION ABOUT KOSOVO AND SERBIA

32. The U.S. Department of State 2010 Country Reports on Human Rights Practices, states, *inter alia*, the following regarding the situation in Kosovo:

“Institutional and societal discrimination persisted against Kosovo Serb, Roma, Ashkali, and Egyptian communities in employment, education, social services, language use, freedom of movement, the right to return, and other basic rights. Members of the Kosovo Bosniak and Gorani communities also complained of discrimination, while Kosovo Croat and Kosovo Montenegrin communities were nominally acknowledged through appointment of their representatives to the Kosovo president’s Communities’ Consultative Council. Kosovo Bosniak leaders continued to complain that many of their community members continued to depart the country as a result of discrimination and, increasingly, an absence of economic opportunities. Members of the Roma, Ashkali, and Egyptian communities were subject to pervasive social and economic discrimination; often lacked access to basic hygiene, medical care, and education; and were heavily dependent on humanitarian aid for survival. Reports of violence and other crimes directed at minorities and their property persisted. There were clashes between groups of Kosovo Albanians and Kosovo Serbs during the year.”

33. The International Organisation for Migration’s report “Returning to Kosovo, country information” from 1 December 2009 provides the following:

“The public health care system in Kosovo is still in a phase of post-war reconstruction. The rehabilitation of the mental health system is one of the priorities of the MoH [...]. However, the system faces many challenges. The number of mental health professionals is very limited and the present educational system for mental health is underdeveloped. Existing institutions also have limited access modern know-how in psychiatry. Nevertheless, there is a favourable environment for accelerating reforms, supported by the Mental Health Strategy 2008-2011 of the MoH.

The mental health needs of the severely traumatised population are very high but there is only one psychiatrist for 90,000 inhabitants and one mental health worker for 40,000 inhabitants. There are only five clinical psychologists and a small number of social workers. The psychiatric treatment provided is biologically-oriented, using pharmaceuticals and hospitalisation as the main, if not the only, tools.

This sector suffers also from the destruction of medical equipment during and since the conflict in 1999. Treatment of post-traumatic stress disorder (PTSD), which became a matter of the greatest importance after the wars in Yugoslavia and the turmoil in Kosovo in March 2004, is in desperate need of improvement. Some calculations suggest that 140,000 to 200,000 people (an estimated 7-10% of the population) are suffering from PTSD. The mental health care system in Kosovo simply does not have sufficient resources of people or facilities to respond to the need for treatment for mental health disorders.

Because of the lack of clinical psychologists and psychiatrists, there is almost no time for psychotherapy. The extreme lack of beds for chronically mentally ill people, and the lack of forensic psychiatry services aggravate the problem. There is only one child psychiatrist in the public health service to provide adolescent mental health services for a population that is overall very young. Drug addiction is also a growing

problem without an adequate solution because of the lack of specialised professionals and institutions.

However, with international support, new facilities, called “Houses of Integration”, have been opened in Gjakovë/Djakovica, Gjilan/Gnjilane, Prizren, Mitrovicë/a and Drenas/Gllogovac. These facilities offer protected apartments for people with minor mental health problems, as well as therapeutic and psycho-social support. In 2006 the new Intensive Care Psychiatric Unit (ICPU) of the UCC in Prishtinë/Priština became operational. This facility is intended to offer psychiatric treatment to people with severe mental health problems. The Swiss Red Cross and the Psychiatric University of Basel (Switzerland) will provide training support to the ICPU.

Community Mental Health Centres offer community-based outpatient mental health services and can be found in the following cities: Gjakovë/Djakovica, Mitrovicë/a, Ferizaj/Uroševac, Prizren, Pejë/Peć, Prishtinë/Priština, Gjilan/Gnjilane

There are neuropsychiatry wards at general hospitals for acute psychiatry in: Prizren, Pejë/Peć, Gjakovë/Djakovica, Mitrovicë/a, Gjilan/Gnjilane, Prishtinë/Priština. In Prishtinë/Priština the neuropsychiatry ward is at the UCC. The ward in Prishtinë/Priština provides 75 acute psychiatric beds, while wards in other regions provide around 16 beds for psychiatric patients. In addition, there are special institutions (SSI) in Prishtinë/Priština and Shtime/Štimlje. These institutions come under the mandate of the Ministry of Labour and Social Welfare (MLSW). They were intended to provide services to a specific population with severe learning difficulties during the previous regime but they ended up accommodating about 70 people with psychiatric problems. The mental health services, through the programme of protected apartments, are supporting the de-institutionalisation of patients in Gjilan/Gnjilane and Gjakovë/Djakovica, which are designed for the rehabilitation of long-term psychiatric patients. The MLSW has its own programme to improve the quality of life in the institutions.”

34. The Non-Governmental Organisation Praxis report “Access to rights and integration of returnees on the basis of readmission agreements, analysis of the main problems and obstacles” provides, *inter alia*, the following regarding the health care for Roma in Serbia:

“Health care

In order for a person in the Republic of Serbia to exercise the right to health care, he/she needs to be registered in the system of mandatory health insurance and to possess a health booklet. In addition to the proof of insurance (employment contract, decision on the right to pension, etc.), one needs to present an ID card or a birth certificate (for minors) in order to register for insurance and issuance of a health booklet. The request is submitted at the branch office of the Republic Institute for Health Insurance (RIHI) as per place of permanent/temporary residence. The Law on Health Insurance identifies Roma, who do not have a registered permanent/temporary residence in Serbia, as a category of persons for whom contributions are paid from the budget of the Republic. However, the Rulebook on the Method and Procedure of Exercise of Rights from Mandatory Health Insurance in effect until July 2010 stipulated that when applying for registration to health insurance, Roma must give a statement on belonging to this population, and the proof of temporary residence registration in addition to it.

As the said regulation was in contravention of the Law on Health Insurance, Praxis sent a request to the Constitutional Court to assess the legality of this regulation. In

July 2010, the Rulebook on Amendments to the Rulebook on the Method and Procedure of Exercise of Rights from Mandatory Health Insurance stipulating that the Roma who do not have permanent/temporary residence registered on the territory of the municipality they truly live in, may register health insurance by giving only a statement about the address at which they truly live in addition to the statement on belonging to the Roma minority. The implementation of these changes in the Rulebook was not uniform. Partly due to inadequate levels of information of employees in RIHI branch offices throughout Serbia, partly due to resistance to the concrete novelties and lack of sensitivity, the branch offices in certain municipalities refused to enable Roma to exercise the right to health insurance and issue health booklets under the above stated conditions. On behalf of its clients, Praxis intervened repeatedly and pointed to the changed regulations, managing to have its clients registered. Also, as the impossibility to register permanent residence makes obtaining ID cards impossible, the RIHI branch offices request that Roma submit at least birth certificates instead of ID cards. Returnees on the basis of the readmission agreements with travel documents are allowed only access to urgent medical care for which the Republic budget funds are allocated, until regulation of the status of an insured person or until the expiry of the validity of the travel document. Returnees who fail to obtain ID cards or birth certificates for children born within the period of validity of the travel document (e.g. re-registration into registry books or registration in birth registry book abroad was not done) will remain outside the health care system. Only exceptionally will some RIHI branch offices issue health booklets to undocumented persons and establish a provisional citizen's unique personal number."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicants complained that they all suffered from mental health problems and that deportation of the first, second and fourth applicants to Kosovo or Serbia would amount to treatment in violation of Article 3 of the Convention both in respect of the third applicant's health, since to separate him from the rest of the family would jeopardise his chances of getting well, and also in respect of the other applicants' health.

Article 3 of the Convention reads, in its relevant parts, as follows:

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

A. Admissibility

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

B. Merits

1. The submissions of the parties

(a) The applicants

37. The applicants maintained that they all suffered from mental health problems caused by traumatic experiences in Kosovo.

38. They also stressed the difficulties for them to obtain adequate care in Kosovo and Serbia because of the ongoing discrimination against Roma. Furthermore, registration by the authorities, which presupposed a house or apartment contract, was required in order to be eligible for health care. In the applicants' opinion this implied that in practice it would be very hard for them to obtain health care in Kosovo and Serbia. However, they made clear that they did not claim that the actual removal procedure would be in breach of Article 3 of the Convention.

39. The applicants further submitted that their mental health had generally improved since the Court had decided to grant their request under Rule 39 of the Rules of Court. The observations by the Government, had, however, halted this positive development. The third applicant seemed to be falling back into depression and the first, second and fourth applicants felt a renewed threat of the family being split up.

(b) The Government

40. The Government stressed that the issue of whether the first, second and fourth applicants' mental health should entitle them to residence permits on grounds of exceptionally distressing circumstances (Chapter 5, Section 6 of the Aliens Act) had been considered by the domestic authorities. In their view, the concept of exceptionally distressing circumstances offered a wider protection than Article 3 of the Convention.

41. They observed that the applicants claimed to have been traumatised in their country of origin due to events that took place in 1999. However, after their arrival in Sweden in 2006, their state of health had deteriorated in spite of access to extensive and continued care.

42. The Government further emphasised that one of the main considerations when planning the enforcement of a deportation order in cases where the rejected asylum seeker suffered from ill-health was to make sure that his or her condition did not deteriorate as a consequence of the enforcement. This implied for example that a deportation order would not be enforced unless the responsible authority deemed that the medical condition of the individual so permitted. Provided that the individual in question consented, the responsible authority might arrange for the alien to be met and taken care of by medical staff upon arrival and for medical records and other medical documentation to be sent in advance so that proper care can be organised.

43. They further noted that the first and the second applicants' mental health had been problematic in 2009. However, in December 2010 they had left the children's home on their own initiative and moved in with the third applicant in his apartment in Trollhättan. In the Government's opinion this indicated that the first and second applicants were no longer in need of continued care and treatment. Furthermore, according to the medical certificates, the applicants' mental ill-health was rather related to their uncertain situation and the prospect of being expelled, than to traumatic experiences in their country of origin.

44. In the Government's opinion, the risk that the first, second and fourth applicants' health would deteriorate if they were returned to Serbia or Kosovo, was to a large extent speculative. They further stressed that adequate health care was available in Kosovo and Serbia.

45. The Government thus concluded that the applicants' state of health could not be considered serious enough to make an enforcement of the expulsion order contrary to the standards of Article 3 of the Convention.

46. In conclusion, the Government maintained that there were no substantial grounds for believing that Article 3 of the Convention would be violated if the applicants were returned to Kosovo or Serbia.

2. *The Court's assessment*

(a) **General principles**

47. The 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 (See, *inter alia*, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI).

48. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, 28 February 2008).

49. Aliens who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is

suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see, *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

(b) The applicants' case

50. Turning to the circumstances of the present case, the Court has to determine whether a deportation of the first, second and fourth applicants would amount to treatment in violation of Article 3 of the Convention; both in respect of their health and in respect of the third applicant's health. The question is thus whether the applicants' case is so exceptional that humanitarian grounds against the removal of the first, second and fourth applicants are compelling.

51. The Court first notes that the applicants were heard by the Migration Board and that the first applicant was heard before the Migration Court. Furthermore, since the Migration Court of Appeal granted leave to appeal, their claims were carefully examined by three instances which delivered decisions containing extensive reasons for their conclusions. In this regard, the Court also takes note of the argument put forward by the Government that the fact that the Migration Court of Appeal granted the third applicant a residence permit even though it considered that he could receive adequate care in Kosovo and Serbia, suggests that "exceptionally distressing circumstances" in the Aliens Act – at least as applied in the present case – provides more extensive protection than Article 3 of the Convention.

52. According to the submitted medical certificates, the applicants' state of health had improved after the Court's decision not to deport them until further notice. This positive development had, however, allegedly been halted when they received the observations by the Government. In the Court's opinion, this indicates that the applicants' state of health is to a large degree connected to the situation in which they find themselves at the moment, where the first, second and fourth applicants face a risk of being expelled from Sweden.

53. The Court further notes that the applicants left the Oasen treatment centre in 2010 and there is no information about any of them currently undergoing psychiatric or other treatment. The Court further observes that the medical certificates mainly contain descriptions of how the applicants themselves feel and that only the second applicant has a medical diagnosis (PTSD and severe depression). The third applicant is now 21 years old and appears to live a relatively normal life. Even if there inevitably is a risk that his mental health might deteriorate if the other applicants are deported, such risk is speculative rather than real and concrete. In this regard the Court also refers to its finding under Article 8 (see below paragraphs 77-86).

54. The Court further considers that there are no elements either indicating that the State will not react to a concrete threat as far as possible or that the State will enforce the deportation order if it is medically impossible for the applicants to travel to their home country. The Court also notes that medical treatment is available in Kosovo and Serbia. The fact that the applicants' circumstances would be less favourable than those they enjoy in Sweden cannot be regarded as decisive from the point of view of Article 3 (see *Bensaid v. the United Kingdom*, no. 44599/98, § 38, ECHR 2001-I; *Salkic and others v. Sweden* (dec.), no. 7702/04, 29 June 2004; and *Al-Zawatia v. Sweden* (dec.) no. 50068/08, 22 June 2010).

55. Accordingly, having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for possible harm, in the Court's view, the present case does not disclose very exceptional circumstances.

56. Having regard to all of the above, the Court concludes that the applicants have not established that there are substantial grounds for believing that a deportation of the first, second and fourth applicants would amount to treatment in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. The applicants complained that the Migration Court of Appeal's decision not to grant the first, second and fourth applicants residence permits was in breach of Article 8 of the Convention. They argued that although the third applicant was to be considered legally an adult, his health and development were at such a stage that he still had a right to respect for family life with his parents.

Article 8 of the Convention reads as follows:

"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."

58. The Government contested the claim.

A. Admissibility

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

B. Merits

1. The submissions of the parties

(a) The applicants

60. The applicants maintained that their right to family life would be violated if the first, the second and the fourth applicants were to be deported to Kosovo or Serbia. They held that the fact that the third applicant had turned 18 years old before the final domestic decision had been taken had not had any effect on their family life; they had lived together throughout the proceedings and still did.

61. In the applicants' view, a deportation of the first, second and fourth applicants would be in violation of the Convention and hence would not be in accordance with national law since the Convention was part of national law since 1 January 1995.

62. The applicants further argued that the interference would not serve a legitimate aim since the economic well-being of Sweden could not be considered to justify deporting them.

63. They also stressed the difficulties for them to obtain adequate care in Kosovo and Serbia because of the ongoing discrimination against Roma. Furthermore, registration by the authorities, which presupposed a house or apartment contract, was required in order to be eligible for health care. In the applicants' opinion this implied that it was in practice very hard for them to obtain health care in Kosovo and Serbia.

(b) The Government

64. The Government held that the first issue to be considered was whether the applicants had a family life in Sweden within the meaning of Article 8 of the Convention and, if so, whether deportation of the first, second and fourth applicants would amount to an interference with the applicants' right to respect for their family life.

65. They argued that the fact that the third applicant had turned 18 years old during the national proceedings suggested that the ties between him and the other applicants had been broken for the purpose of Article 8. However, it acknowledged that the Court's case-law indicated that the applicants' family life had remained intact in spite of this fact.

66. They further stressed that the present case did not relate to settled immigrants but to individuals seeking asylum. Thus, the applicants were aware that they ran a risk of having their asylum application rejected and of being expelled together or separately, provided that it was compatible with domestic law and applicable international standards.

67. The Government further argued that the third applicant had been exceptionally granted a residence permit because, at the time of the Migration Court of Appeal's judgment, he was suffering from severe mental

illness that was unlikely to improve in the foreseeable future and required treatment in a safe, secure and stable environment. The health of the other applicants was, however, not considered to be such that they were in need of treatment in Sweden.

68. They argued that although the third applicant's health situation had been considered difficult enough for application of Chapter 5, section 6 of the Aliens Act, it did not disclose such exceptional circumstances that Sweden was under an obligation under Article 3 to refrain from expelling him. Furthermore, both the Migration Court of Appeal and the Migration Court had considered that the third applicant could receive adequate care in his country of origin. In the Government's opinion it could therefore be argued that the separation, which *de facto* would occur if the first, second and fourth applicants were returned to Kosovo or Serbia, should not be considered an interference with their family life within the meaning of the Convention, in particular taking into account that the third applicant had reached the age of majority. In their view, if a Contracting State provides more extended protection than suggested by Article 3 of the Convention and grants residence permits to aliens with severe health problems so that they can benefit from appropriate care, it would be unreasonable to impose an obligation on them under Article 8 to allow family members – who have no legitimate right of their own to remain – to stay in the country.

69. The Government further held that if the Court were to find that there had been an interference with the applicants' right to respect for their family life, it was evident that the expulsion orders against the first, second and fourth applicants were in accordance with law within the meaning of Article 8 § 2 of the Convention. They further argued that the regulation in the Aliens Act served the legitimate aim of protecting the economic well-being of Sweden and preventing disorder.

70. As to whether the interference was necessary in a democratic society, the Government argued that, according to the submitted medical certificates, the applicants' current state of health was treatable and, in that context, transient. They pointed out that the third applicant, and subsequently the other applicants, had moved from the children's home where they had lived and received treatment for approximately two and a half years. In the Government's opinion there was thus nothing to indicate that the applicants could not eventually be reunited in Serbia or Kosovo, if they so wished. Furthermore, since none of the applicants suffered from a permanent disease or functional disorder which would prevent them from travelling in the future, there were, in the long term, no health reasons to prevent them from visiting each other. They further argued that there were no practical obstacles for the applicants to visit each other in the respective countries. Hence, in the Government's view, the applicants were not prevented from maintaining their social relations as a family merely because one family member had been granted a residence permit in Sweden.

71. The Government also referred to the argument in paragraph 68 above that it would be unreasonable to impose on a Contracting State, which provides more extended protection than suggested by Article 3 of the Convention, an obligation under Article 8 to refrain from removing family members who do not have the right - either under domestic law or according to the Court's established case-law under Article 3 of the Convention - to remain in the country. In this regard, the Government emphasised that the applicant, who was born on 6 February 1991, was now 21 years old and that his health might improve over time. In the meantime there were several ways for the applicants to keep in contact.

72. They concluded that, taking into account the margin of appreciation afforded to States under Article 8 § 2, the impugned measure had succeeded in striking a fair balance between the personal interests of the applicants as regards their family life on the one hand and the public interest in ensuring an effective implementation of immigration control on the other. Accordingly, they contended that the alleged interference with the applicants' family life was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

2. The Court's assessment

(a) Interference with the applicants' rights under Article 8 § 1 of the Convention

73. In the Court's case-law relating to expulsion and extradition measures, the main emphasis has consistently been placed on the "family life" aspect, which has been interpreted as encompassing the effective "family life" established in the territory of a Contracting State by aliens lawfully resident there, it being understood that "family life" in this sense is normally limited to the core family (see, *mutatis mutandis*, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 21, § 45; see also, *X v. Germany*, no. 3110/67, Commission decision of 19 July 1968, Collection of decisions 27, pp. 77-96). The Court has, however, also held that the Convention includes no right, as such, to establish one's family life in a particular country (see, *inter alia*, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 68; *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 174-75, § 38; and *Boultif v. Switzerland*, no. 54273/00, § 39, ECHR 2001-IX).

74. The Court further observes that the case-law has consistently treated the expulsion of long-term residents under the head of "private life" as well as that of "family life", some importance being attached in this context to the degree of social integration of the persons concerned (see, for example, *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 88-89, §§ 42-45). Moreover, the Court has recognised that Article 8 applies to the

exclusion of displaced persons from their homes (see *Cyprus v. Turkey* [GC], no. 25781/94, § 175, ECHR 2001-IV).

75. The question in the present case is whether, in view of the circumstances, the applicants still had a family life in Sweden within the meaning of Article 8 of the Convention after the third applicant had reached the age of majority and, if so, whether the Migration Court of Appeal's decision to deport the first, second and fourth applicants amounted to an unjustified interference with this right.

76. The Court notes that the applicants have lived together as a family ever since arriving in Sweden in 2006 and that they presumably lived together in Kosovo before that. The fact that the third applicant reached the age of majority during the domestic proceedings did not change the fact that he was still a dependent member of the applicant family, in particular considering his state of health. In these circumstances the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention even after the third applicant had reached the age of majority. It further finds that the impugned decision to remove the first, second and fourth applicants from Sweden interfered with the applicants' right to family life.

(b) Justification of the interference

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

78. According to the established case-law of the Court, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II).

79. The Court notes that the Migration Court of Appeal relied on Chapter 5, section 6, of the Aliens Act and concluded that there were particularly distressing circumstances to allow the third applicant to remain in Sweden. It further observes that pursuant to the Aliens Act, the third applicant was to be considered as an adult (see paragraph 31) and, therefore, the appellate court considered his application separately from the other applicants. In these circumstances, the Court finds that the impugned interference was sufficiently clear and foreseeable and thus "prescribed by law" within the meaning of the Convention. The Court further accepts that the legitimate aim pursued was to ensure an effective implementation of immigration control and hence to preserve the economic well-being of Sweden, within the meaning of paragraph 2 of Article 8.

80. A measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as being “necessary in a democratic society” if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national authorities enjoy a certain margin of appreciation in this matter. The Court’s task consists of ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual’s rights protected by the Convention on the one hand and the community’s interests on the other.

81. The Court reiterates that 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*, 19 February 1996, § 38, *Reports* 1996-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 to 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 *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000).

82. The Court first notes that the applicants were heard by the Migration Board, the Migration Court and the Migration Court of Appeal, that their claims were carefully examined and that the Swedish authorities delivered decisions containing extensive reasons for their conclusions.

83. The Court further notes that both the Migration Court and the Migration Court of Appeal came to the conclusion that the third applicant could receive adequate medical care in Kosovo and Serbia. In this connection, the Court observes that mental health care is available in Kosovo and Serbia; albeit still under reconstruction and not of the same standard as in Sweden.

84. The third applicant is now 21 years old and has lived in Sweden with the other applicants since 2006. According to the most recent medical certificate, dated June 2011, he had begun to feel better since being granted a residence permit. He had left the treatment centre and moved to an apartment. He had also begun studies at a college for adults. However, his positive development had been halted by the threat of disruption of the family and he had showed signs of falling back into depression. While acknowledging that this information is worrying, the Court finds that it has to be taken into account that the medical certificate mainly contains a description of how the applicant himself feels and that it neither suggests

that he currently has a medical condition, nor that he is undergoing psychiatric or other treatment. In the Court's opinion, the medical certificate also indicates that his state of health is connected to a large extent to the situation he is in at the moment. Furthermore, as far as the Court is informed, there has been no further deterioration of his health since June 2011.

85. Notwithstanding the Migration Court of Appeal's assessment of the third applicant's mental health state in November 2009, the Court agrees with the Government that his current state of health cannot be seen as creating an impediment for him to reunite with the other applicants in their country of origin. Moreover, if necessary, he could receive medical care in Kosovo and Serbia. Against this background and taking into account the applicants' relatively limited ties to Sweden, the Court does not find that there are any insurmountable obstacles for the applicants to live together as a family in their country of origin.

86. The Court further has regard to the applicants' Roma ethnicity. It notes that the applicants have made reference to the general difficulties for Roma in Kosovo and Serbia, including their access to medical care. However, it finds that the general situation in Kosovo and Serbia is not sufficient to conclude that people of Roma ethnicity cannot be sent there. In regard to the applicants' personal situation, the Court notes that, while in Kosovo, they lived in Serb areas and had no contact with other Roma and that they do not speak Romani. Furthermore, between 1999 and their travel to Sweden in 2006, they were apparently not subjected to any act that could be described as discrimination or persecution. In conclusion, the Court does not find that the applicants' Roma ethnicity would have such consequences that their rights under the Convention would be disrespected if they were deported to Kosovo or Serbia.

87. Having regard to all the circumstances and taking into account the margin of appreciation afforded to States under Article 8 § 2 of the Convention, the Court considers that the Swedish authorities did not fail to strike a fair balance between the personal interests of the applicants as regards their family life on the one hand and to ensure an effective implementation of immigration control and hence to preserve the economic well-being of Sweden on the other.

88. Accordingly, there has been no violation of Article 8 of the Convention.

III. RULE 39 OF THE RULES OF COURT

89. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand

Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

90. It considers that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention (see *F.H. v. Sweden*, no. 32621/06, § 107, 20 January 2009).

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;
2. *Holds* unanimously that there has been no violation of Article 3 of the Convention;
3. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention;
4. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the first, second and fourth applicants until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 15 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Spielmann and Power-Forde is annexed to this judgment.

D.S.
C.W.

PARTIALLY DISSENTING OPINION OF JUDGES SPIELMANN AND POWER-FORDE

1. We voted against the finding that there has been no violation of Article 8 of the Convention.

2. Despite their traumatic experiences following the outbreak of war in Kosovo in 1999, the applicants have, under tremendously difficult circumstances, managed to maintain their essential bond as a family unit. They are of Roma ethnicity and have the added vulnerability of mental health problems, with two of them having a history of attempted suicide.

3. The Government did not dispute that the state of health of all the applicants causes grave concern and has even deteriorated after 2006 (paragraph 40). The Migration Court of Appeal accepted that there were particularly distressing circumstances to allow the third applicant to remain in Sweden (paragraphs 18 and 78). Like the dissenting judge in the Migration Court of Appeal (paragraph 20), we are of the opinion that the family's situation had to be taken as a whole. It would be both unrealistic and a disproportionate interference in their family life to expect the third applicant, in his vulnerable state of health, to fend for himself in Sweden while his entire support structure is taken from him or to expect the rest of his family to leave him there and to return to an (as yet) unknown destination to live in the most precarious of conditions.

4. All the applicants claim that the decision not to grant residence permits to the first, second and fourth applicants was in breach of Article 8 of the Convention. In particular, they claim that their family life would be violated if all but the third applicant were to be deported to either Kosovo or Serbia.

5. In our view, the uncertainty concerning the country of destination makes it difficult for all the authorities concerned, including the Court, to appraise the potential impact of the impugned deportation order upon family life and, hence, the proportionality of the interference. Be that as it may, the situation of Roma in both Kosovo and Serbia is highly problematic. This results, clearly, from paragraphs 32 to 34 of the judgment which quotes extensively from reports of independent international bodies that monitor the situation 'on the ground'.¹ These reports confirm 'pervasive' institutional and societal discrimination against Roma in Kosovo in the areas of education, social services and other basic rights. They lack access to basic hygiene and medical care and are heavily dependent on

¹ The U.S. Department of State 2010 Country Reports of Human Rights Practices, the International Organisation for Migration's report "Returning to Kosovo, country information" (1 December 2009) and the Non-Governmental Organisation Praxis report "Access to rights and integration of returnees on the basis of readmission agreements."

humanitarian aid for survival. The reports reveal the availability of one psychiatrist per 90,000 inhabitants and they note that the mental health needs of this severely traumatised population are very high.

6. The situation in Serbia is no less reassuring. To exercise the right to access health care, registration within the system is necessary. Registration, essentially, requires a permanent place of residence without which the obtaining of ID cards becomes impossible. Being without a home, the applicants in this case are likely to face insurmountable difficulties in attempting to access social security benefits.

7. It is against this background that we are of the opinion that the interference cannot, in the particular circumstances of this case, be regarded as complying with the proportionality principle. The reasoning set out in paragraphs 82-85 of the judgment is not convincing. We are, therefore, unable to follow the majority view which finds that the applicants' Roma ethnicity would not have such consequences that their rights under the Convention would be disrespected if they were to be deported to Kosovo or Serbia.