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

FIFTH SECTION

DECISION

Application no. 48205/13
Guy BOLEK and others
against Sweden

The European Court of Human Rights (Fifth Section), sitting on 28 January 2014 as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Paul Lemmens,
Helena Jäderblom, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having regard to the above application lodged on 29 July 2013,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Mr Guy Bolek, was born in 1989 and the second applicant, Ms Therese Wengo, was born in 1986. The second applicant has a daughter, the third applicant, who was born in 2007. The son of the first and the second applicants, the fourth applicant, was born in May 2012; both parents are his guardians. All the applicants are Congolese nationals and are currently in Sweden. They are represented by Mr P. Varga, a lawyer practising in Stockholm.

A. The circumstances of the case

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

1. Background and proceedings before the Swedish authorities as regards the first applicant

3. The first applicant applied for asylum and a residence permit in Sweden on 11 July 2007. Before the Migration Board (*Migrationsverket*) he stated the following. He was born and raised in Kinshasa. He had been politically active in the Movement for the Liberation of the Congo (MLC) and had worked for the politician Jean-Pierre Bemba. He had received constant threats from supporters of Joseph Kabila. His father had been a colonel in Mobutu's army but had later joined Jean-Pierre Bemba's own militia. His father had died in an ambush by Joseph Kabila's soldiers in March 2007 in Kinshasa. On 27 March 2007 Kinshasa's governor had announced that everyone who had worked for Jean-Pierre Bemba would be killed and, on the same day, Joseph Kabila's soldiers had come to his home. His sister had been at home and she had been beaten by the soldiers. Following this, he had fled to Brazzaville and stayed there for two months. When he had returned to Kinshasa and his apartment, everything had been destroyed. He had heard soldiers coming for him but he had managed to flee. A child had found a passport which he had manipulated in order to be able to travel to Sweden.

4. On 18 June 2008 the Migration Board rejected the request. It found that the first applicant had not substantiated his identity. The Board then considered that his asylum story was marred by credibility issues. For example, he had been unable to state when the elections had been held in 2006. He had also been unaware of the fact that the MLC held several ministerial posts in the government. The Board found that the first applicant had failed to show that he risked persecution in the DRC because of his political activities and, consequently, he was not in need of protection in Sweden.

5. The first applicant appealed to the Migration Court (*Migrationsdomstolen*), maintaining his claims.

6. On 27 May 2009 the Migration Court rejected the appeal. On the same grounds as the Board, the court found that there were reasons to question the first applicant's statements regarding his political activities. The court also referred to relevant country information and observed that there was nothing to suggest that active members of the opposition risked ill-treatment by the authorities because of their political engagement. The court concluded that the first applicant had not substantiated that he risked persecution in the DRC because of his political activities and that he had not shown that he was in need of international protection.

7. It appears that the first applicant did not appeal to the Migration Court of Appeal (*Migrationsöverdomstolen*). Hence, the expulsion order became enforceable.

8. In September 2009 the first applicant requested the Migration Board to reconsider its previous decision, however without invoking any new

grounds. The Board rejected the request and, upon appeal, the Migration Court upheld the Board's decision in full. On 27 October 2009, the Migration Court of Appeal refused leave to appeal.

9. In January 2013 the first applicant again requested the Migration Board to reconsider its previous decisions. He relied on his ties to the second, third and fourth applicants and stated that he had met the second applicant on New Year's Eve 2010. They had moved in together in 2011 and the fourth applicant had been born in 2012. He had been responsible for the care of the fourth applicant since the second applicant suffered from mental health problems. In November 2011 he had also, to some extent, taken care of the third applicant when the second applicant had been in hospital.

10. On 28 January 2013 the Migration Board considered that no new circumstances had been presented which could justify granting the first applicant a residence permit. The Board found that the first applicant had not shown that his relationship with the second applicant was serious. Furthermore, it noted that he had not substantiated his identity. As regards the family ties invoked, the Board found that the situation for the second, third and fourth applicants was not such as to make the expulsion of the first applicant unreasonable. Thus, no grounds had emerged to stay the enforcement of the expulsion order. However, the Board reminded the first applicant of the possibility of having his application for a residence permit, based on family ties, examined at a Swedish mission abroad as well as the possibility to submit the application electronically and ask that it be given priority. In conclusion, the Board considered that there was no reason to deviate from the general rule that an application for a residence permit based on family ties was to be submitted before the alien enters the country. No appeal lay against the Board's decision.

11. On 25 February 2013 the first applicant submitted a certificate from Ekerö municipality, dated 19 February 2013, regarding the fourth applicant. It stated, *inter alia*, that the expulsion of the first applicant would affect adversely the ties between him and his son and that the second applicant would be unable to take care of their son on her own.

12. The Migration Board considered this as a request for reconsideration of the first applicant's case but found that no new circumstances had been presented which could justify granting him a residence permit. No appeal lay against the Board's decision.

13. Yet another request for reconsideration was rejected by the Migration Board on 8 May 2013.

2. Background and proceedings before the Swedish authorities as regards the second, the third and the fourth applicants

14. The second applicant applied for asylum and a residence permit in Sweden on 26 April 2005. Before the Migration Board she stated the

following. She was born in Kisangani. Her parents and siblings had been killed by Kabila's army in the summer of 1999. After having lived on the streets for six months, she had gone to Kinshasa where she had lived as a street child for three years. Subsequently, a man who had been a tenant at her family's home had taken her to his own family. She had lived with them until she had left the DRC. During this time, her mental health had deteriorated, partly due to her previous experiences, and partly due to her fear that she would be identified and killed by Kabila's soldiers. Soldiers used to come looking for her at this place five times a week for approximately two years.

15. On 22 November 2006 the Migration Board rejected the request. It first found that the second applicant had not substantiated her identity but considered it credible that she came from the DRC. Turning to the second applicant's individual claims, the Board noted that she had lived in Kinshasa from 2000 until 2005. The Board did not question that the second applicant's parents and siblings had been killed but found her fear of being identified as a witness to these acts greatly exaggerated. It observed that she had been thirteen years old at the time, that she had not been present when her family was killed and that she had subsequently stayed in the DRC for six years. Moreover, the Board did not consider it credible that soldiers had come looking for her five times a week for two years. In conclusion, the Board found that the second applicant had not substantiated that she was in need of international protection. There were no other grounds for granting her a residence permit in Sweden.

16. On 16 January 2008 the second applicant applied for asylum and a residence permit in Sweden for her daughter, the third applicant. The third applicant made no individual asylum claims. Her father, X, had a permanent residence permit in Sweden.

17. On 20 March 2008 the Migration Board rejected the request. It first noted that a paternity investigation had shown that X was not the third applicant's father. Instead, Y was found to be her father. He was a Congolese man whose asylum claims had been rejected by the Migration Board and the Migration Court. The Board then noted that the third applicant's asylum claims were the same as her mother's and that they had already been examined by the Board. The Board considered that there was no reason to deviate from the assessments made in the second applicant's case. There were no other grounds for granting the third applicant a residence permit in Sweden.

18. In an official note by the Migration Board, dated 10 October 2008, the following was stated. On 27 August 2008 the second applicant had been admitted to hospital for psychiatric care. Following this, the third applicant had been placed in foster care. On 2 October 2008 the second applicant had been discharged from hospital. She had moved to a social services home, where her ability to take care of the third applicant was being assessed. The

social services could not give information about when this assessment would be completed, but it was considered that the second applicant was unable, at that time, to take care of the third applicant without supervision.

19. The second applicant subsequently made several unsuccessful requests to the Migration Board for reconsideration of her case, during which she stated, *inter alia*, that she was suffering from recurring suicidal thoughts and that, if she were to be expelled to the DRC, it would amount to a return to a life of homelessness, persecution, torture and other inhuman treatment.

20. In May 2010 the second applicant again requested the Migration Board to reconsider her case. She maintained her previous claims and added that she had been admitted to hospital for long periods of time and that she was in need of round-the-clock care. It would not be possible to expel her to the DRC without giving her anaesthetics or strong sedatives, which constituted a permanent impediment to her and the third applicant's expulsion. The second applicant submitted several medical certificates concerning herself and the third applicant.

21. On 28 May 2010 the Migration Board decided to grant the second and the third applicants permanent residence permits in Sweden. The Board took into account the third applicant's health status and age and concluded that there were now impediments to expelling her to the DRC. Therefore, she and the second applicant were to be granted permanent residence permits.

22. On 6 September 2012 the Migration Board decided to grant the fourth applicant a permanent residence permit in Sweden on the basis of the ties to the second applicant.

B. Relevant domestic law

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

23. 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. See *Imamovic v. Sweden* ([dec.], no. 57633/10, 13 November 2012) for a substantive account of the relevant provisions of this Act.

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

24. On 1 July 2010 Chapter 5, Section 18, was amended by the following addition: "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." According to the preparatory works, this means that the alien should fulfil all requirements for a residence permit such as, *inter alia*, holding a valid passport, verified identity and strong family ties (Government Bill 2009/10:137, p. 17).

25. Chapter 12, Section 18, was also amended on 1 July 2010 by the following addition: "When assessing under the first paragraph, point 3, if there is another special reason for a decision not to be executed, 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."

COMPLAINT

26. The applicants complained that the expulsion of the first applicant from Sweden to the DRC would violate their right to family life under Article 8 of the Convention. In their view, it would entail the permanent dissolution of the family since it would be impossible for them to live together in the DRC.

THE LAW

27. The applicants complained that the removal of the first applicant to the DRC would contravene Article 8 of the Convention, which reads:

Article 8 (right to respect for private and family life)

"1. Everyone has the right to respect for his private and family life .....

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society 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."

28. The Court reiterates that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. The Contracting States have the right, as a matter of well-established rules of international law, including treaty obligations, in particular the Convention, to control the entry, residence or expulsion of aliens.

29. Furthermore, 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 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, among others, *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000; and *Rodrigues da Silva and Hoogkamer*, cited above, ibid.).

30. Turning to the present case, the Court notes at the outset that what is at issue in the present case is not a final decision by the Swedish authorities to grant or to refuse the first applicant a residence permit based on family ties. No decision thereon has yet been taken.

31. The matter to be considered is whether it would be in breach of Article 8 of the Convention if the Swedish authorities implemented the order that the first applicant return to the DRC to apply for family reunion from there.

32. In this respect, the Court considers that the applicants' situation amounted to family life within the meaning of Article 8 § 1 of the Convention. It further finds that the impugned decision to remove the first applicant from Sweden interfered with their right to family life.

33. As to the further question of whether the interference was justified under Article 8 § 2, the Court is satisfied that the decision to expel the first applicant was in accordance with Swedish law and pursued a legitimate aim, notably the economic well-being of the country and the effective implementation of immigration control. It remains for the Court to examine whether the expulsion order was necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

34. In this assessment, the Court first refers to the decision by the Migration Board, dated 28 January 2013, concerning the first applicant. In it, the Migration Board noted that the first applicant had not substantiated his identity. The Board stated that it was for him to make it probable that his relationship with the second applicant was serious. It considered that the relevant material did not show that this was the case. It then reminded the first applicant of the possibility to apply for family reunion from abroad (for example, at the Swedish Embassy in Kinshasa). Furthermore, the Migration Board informed him that he could submit electronically his application for a residence permit and request that it be given priority, thus speeding up the process. In conclusion, the Migration Board did not find reason to deviate from the general rule, set out in Chapter 5, Section 18, of the Aliens Act,

that an application for a residence permit based on family ties is to be submitted before the alien enters the country. Accordingly, the first applicant could not apply for family reunion in Sweden.

35. The Court reiterates that an 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. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional cases (see *Nunez v. Norway*, no. 55597/09, § 70, 28 June 2011).

36. In this respect, the Court notes that the first applicant has at no time been granted lawful residence in Sweden. Moreover, the applicants' family life was created after the first applicant's asylum request had been finally rejected by the Swedish migration authorities and there was an enforceable expulsion order against him. Thus, the first and second applicants knew already when they met that they would most probably not be able to establish and maintain their family life in Sweden.

37. Furthermore, the Court notes that the Migration Board and the Migration Court both found that the first and second applicants had not substantiated that they were in need of international protection. The second applicant had been granted a permanent residence permit in Sweden because of the third applicant's health and age which, according to the Migration Board, constituted impediments to expelling her, and the second applicant, to the DRC.

38. Against this background, it has not emerged that there are any impediments against the expulsion of the first applicant to his home country. There is nothing to suggest that the period expected for the examination of the first applicant's request for family unification in Sweden is excessively long. Moreover, it has not emerged that the first applicant would lack the possibility to be in contact with the other applicants via, *inter alia*, telephone or the internet during the period in question.

39. In these circumstances, the Court finds that the Swedish authorities have not failed to strike a fair balance between the applicants' interests on the one hand and the State's interest in effective implementation of immigration control on the other or that the assessments made appear at variance with Article 8 of the Convention.

40. It follows that the application is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips Deputy Registrar	Mark Villiger President