



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

FIFTH SECTION

DECISION

Application no. 47509/13

J.M.

against Sweden

The European Court of Human Rights (Fifth Section), sitting on 8 April 2014 as a Chamber composed of:

Mark Villiger, *President*,

Ann Power-Forde,

Ganna Yudkivska,

Vincent A. De Gaetano,

André Potocki,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 19 July 2013,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is a Rwandan national who has born in 1978. She is currently in Sweden. She is represented by Mr P. A. Hultman, residing in Grebbestad.

A. The circumstances of the case

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

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

3. On 20 October 2008, the applicant applied for asylum and a residence permit in Sweden. She was provided with legal counsel to represent her during the asylum proceedings. Before the Migration Board (*Migrationsverket*), she claimed the following. She originated from Kigali. In 1996, her family had disappeared after being arrested by the police. In August 2008, she had been requested by two men to testify against her neighbour in a Gacaca trial (see below paragraph 28). The men had told her what to say before the court. She had not known her neighbour or of what crime he had been accused. The general public had received a lot of information about the Gacaca court proceedings. According to the law, all villagers had to attend the trials. There had been approximately a hundred persons at the trial in question. Just when she had raised her hand to testify it had started to rain, and the trial had been discontinued. She had therefore not testified. However, everyone present had seen her and observed that she had not testified. Three other persons had testified against the neighbour and she had no information about what had happened to him later. The following day she had been arrested and imprisoned by the local police. She had been repeatedly raped and ill-treated while in detention. In her view, the ill-treatment had been a way to force her to testify. When she had promised to do so, she had been released. Shortly thereafter she had been summoned. She had gone into hiding and with the help of a priest she had managed to leave the country. She would risk being killed by the local authorities or by the police if returned since she had refused to commit perjury. The applicant submitted a copy of her identity card and a summons issued by the local police station to substantiate her claims.

4. On 28 May 2009, the Migration Board rejected the application. It found that the identity card produced was insufficient to substantiate the applicant's identity. However, the Board found that she, through her asylum story, had made it plausible that she originated from Rwanda. Turning to the documentary evidence, the Board found that the submitted summons was of simple quality and thus had low evidential value. Further, the Board found the asylum story vague and lacking in detail. For example, the applicant had not known why she had been requested to testify, who the accused person was, who the other witnesses were or if witnesses were usually summoned in these types of proceedings. Further, she had not known what punishment she risked for not testifying. The Board found it remarkable that the asylum story was so vague, given that the applicant had stated that the general public had received a lot of information about these trials before they were initiated and that she had attended several trials previously. Further, the Board found that the asylum story was inconsistent with relevant country information, which suggested that participation in the proceedings was

voluntary. Consequently, the Board found that the applicant had failed to make plausible that she risked persecution or ill-treatment if returned.

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

6. On 2 July 2010, the Migration Court, after having held an oral hearing, rejected the appeal. It agreed with the Board that the asylum story was vague and lacked credibility. In any event it noted that, according to country information, the majority of the Gacaca court proceedings had been terminated and that although there had been problems of threats and violence against witnesses, essentially taking place locally, there existed a certain witness protection and the authorities investigated and indicted such crimes committed by private actors. Consequently, the court found that the applicant had failed to exhaust the possibilities of obtaining domestic protection.

7. On 23 September 2010, the Migration Court of Appeal (*Migrationsöverdomstolen*) refused leave to appeal. Hence, the expulsion order became enforceable.

8. In November 2010, the applicant claimed that there were impediments to enforcement of the deportation order for medical reasons and on grounds of family ties to her cohabiting partner, X, as well as the general security situation and severe living conditions in her home country.

9. On 20 November 2010, the Migration Board rejected the request since no reasons had emerged to deviate from the general rule that a residence permit, based on family ties, should be lodged with the Swedish authorities abroad. This was in particular so when the family ties had been established after a final decision on expulsion had been rendered. Further, it found that the applicant had not raised any new circumstances in the case.

10. Another request for re-examination of the case, on the basis of circumstances already mentioned and the general situation in Rwanda, was rejected by the Migration Board on 17 January 2011.

11. Thereafter the Migration Board was informed that the applicant had travelled to Belgium and, on 8 July 2011, she was registered as having left Sweden. On 21 September 2011, the applicant re-entered Sweden.

12. In January 2012, the applicant again requested a stay on removal to her home country and a re-examination of the case, relying on family ties to X and their son, Y, who had been born in October 2011. The applicant submitted a copy of the paternity certificate to the Board.

13. On 28 January 2012, the Migration Board rejected the request. It pointed out that the applicant had not produced a passport and thus had failed to prove her identity. It followed already from that that she did not fulfil one of the basic requirements to be granted a temporary residence permit in Sweden. The Board also noted that, since 23 September 2010 when the decision to reject her asylum application became final, the

applicant had no legal right to stay in Sweden. Consequently, it found no reason to deviate from its previous position.

14. The applicant again requested a stay of removal and a re-examination of the case based on family ties to X and Y, and submitted, *inter alia*, a decision from the Swedish Tax Authority.

15. On 7 July 2012, the Migration Board rejected the application. It reiterated that the applicant had not submitted a passport to the Swedish authorities to prove her identity and fulfil one of the basic requirements to be granted a temporary residence permit. It further considered that she had failed to make plausible that she had strong family ties to X and Y. The circumstance that X was her cohabiting partner and that they had Y together led to no other conclusion. Thus, it found that the applicant had not fulfilled the basic requirements for a residence permit.

16. The applicant then made yet another request for re-examination and stated that it would be in violation of the UN Convention on the Rights of the Child, applicable EU directives and the Migration Board's own regulations, if she were forced to return to her home country, and consequently separated from her child, in order to submit her application from there.

17. On 25 May 2013, the Migration Board rejected also this request on the same grounds as its previous decisions.

18. Upon appeal, the Migration Court, on 5 June 2013, upheld the Board's decision in full and considered that the applicant had not invoked any new circumstances.

19. On 2 July 2013, the Migration Court of Appeal refused leave to appeal.

2. Background and proceedings before the Swedish authorities as regards X and Y

20. In October 2003, X applied for asylum and a residence permit in Sweden. Before the Migration Board he stated that he was Rwandan of Hutu ethnicity and had been involved in the 2003 presidential election campaign, responsible for youth activities in his municipality, and had arranged illicit meetings which had come to the authorities' attention.

21. On 20 March 2006, the Migration Board rejected the application. It found no reason to question X's claim of political activity in connection to the election but considered that he had merely been politically active at a low level and it was thus unlikely that the authorities would have any interest in him.

22. Upon appeal, the Migration Court, on 22 June 2006, granted X asylum and a residence permit in Sweden. Having regard to all the circumstances of the case, the court found that he had made plausible that his fear of persecution, based on ethnicity and his political activity, was well-founded and lasting.

23. On 17 January 2012, Y applied for asylum and a residence permit on the grounds that he risked persecution in Rwanda, with reference to the applicant's and X's asylum claims. Furthermore, family ties to X were relied on. Supporting documents, *inter alia*, a copy of the paternity investigation and certificates were submitted to the Board.

24. On 13 April 2012, the Migration Board granted Y refugee status, a permanent residence permit and travel documents, valid in relation to all countries except Rwanda for the period 2012 to 2017. The Board noted that it was undisputed in the case that X was the father of Y. Since X had been granted a residence permit in Sweden as a refugee this should also apply to Y, in accordance with the principle of family unity.

B. Relevant domestic law

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

25. The basic provisions 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

26. 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).

27. 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."

C. Relevant information on Rwanda

28. According to Human Rights Watch, *World report 2013 –Rwanda*, the community-based Gacaca courts, set up to try cases related to the 1994 genocide, closed in June 2012. Moreover, the trial of Jean Bosco Uwinkindi, the first case transferred to Rwanda by the International Criminal Tribunal for Rwanda (ICTR), opened in Kigali. The ICTR has agreed to transfer seven other cases to Rwanda. Human Rights Watch also noted that Rwanda had made important economic and development gains but that the government had continued to impose tight restrictions on freedom of expression and association. Opposition parties were unable to operate.

COMPLAINTS

29. The applicant complained that she would risk being ill-treated by the Rwandan authorities and by private actors if returned because she had refused to testify in Gacaca court proceedings and due to X's refugee status in Sweden. Furthermore, the applicant complained that her expulsion from Sweden to Rwanda would violate her right to family life under Article 8 of the Convention. In her view, it would entail the permanent dissolution of her family since it would be impossible for them to live together in Rwanda.

THE LAW

30. The applicant complained of a violation of Article 3 of the Convention, which reads as follows:

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

31. The Court observes that the Migration Board and the Migration Court both found that the applicant had failed to make plausible that she was in need of international protection. In this respect, the Court notes that the applicant's asylum application was carefully examined by the domestic authorities. The Migration Board held interviews with her and the Migration Court held an oral hearing. Moreover, the applicant was represented by legal counsel throughout the proceedings. Furthermore, there is nothing to indicate that the domestic authorities' decisions were arbitrary or otherwise flawed. Moreover, the Court notes that the community-based Gacaca courts closed in June 2012 (see paragraph 28). Thus, since the applicant has not substantiated further her claims under Article 3 in her submissions before

the Court, it finds no reason to deviate from the domestic authorities' assessment.

32. In so far as concerns the applicant's fear of persecution due to X's activities in Rwanda, she has not specified how his activities, carried out more than 10 years ago, would reflect negatively on her today if she were to return to Rwanda. In this respect, the Court observes that the first applicant and X are not married and that she neither carries his last name nor is otherwise officially linked to him in a manner that is likely to be known in Rwanda.

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

34. The applicant further complained that her removal to Rwanda would contravene Article 8 of the Convention, which reads:

“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.”

35. 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 (see, *inter alia*, *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102 Series A no. 215, p. 34).

36. 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 in the way of the family living in the country 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, *Rodrigues da Silva and Hoogkamer*, cited above, *ibid.*, and *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000).

37. 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 applicant a residence permit based on family ties. No decision thereon has yet been taken.

38. 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 applicant return to Rwanda to apply for family reunion from there.

39. In this respect, the Court considers that the applicant's relation to X and Y clearly amounted to family life within the meaning of Article 8 § 1 of the Convention. It further finds that the impugned decision to remove the applicant from Sweden interfered with her right to family life.

40. 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 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.

41. In this assessment, the Court refers to the Swedish authorities' repeated findings, in respect of the issue of re-examination of the case on the basis of family ties, namely, that the applicant had not substantiated her identity, since she had not submitted a passport, and that she thereby did not fulfil one of the basic requirements to be granted a temporary residence permit in Sweden (see paragraph 26). In addition, she had remained in Sweden illegally after her asylum application had finally been rejected in September 2010. Consequently, the Swedish authorities found no ground on which 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, and, accordingly, the applicant could not apply for family reunion in Sweden.

42. 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).

43. In this respect, the Court notes that the applicant has at no time been granted lawful residence in Sweden. Moreover, she first relied on family ties to X, and subsequently to Y, after her asylum application had been finally rejected by the Swedish migration authorities and there was an enforceable expulsion order against her. Thus, the applicant and X knew, well before the applicant became pregnant, that they would most probably

not be able to establish and maintain their family life undisrupted in Sweden.

44. Moreover, as the Court has concluded above (see paragraphs 31-33), the applicant has not provided relevant and sufficient reasons that she would be at risk of treatment contrary to Article 3 if she had to return to Rwanda to submit her application for family reunion from there.

45. Thus, at this stage, the Court finds that there is nothing to suggest that the separation would be other than temporary or that the process of examining the application for family reunion would be unduly lengthy, even considering Y's young age. Furthermore, the applicant has the possibility to submit her application electronically and request priority, which would speed up the process. In addition, although X and Y cannot be expected to accompany the applicant to Rwanda due to their refugee status and the travel restrictions in Y's travel documents in relation to Rwanda, it has not emerged that the applicant would lack the possibility to be in contact with them via, *inter alia*, telephone or the internet during the period in question (see *Bolek v. Sweden* (dec.), no. 48205/13, 28 January 2014).

46. Lastly, the Court notes that the applicant claimed during the domestic proceedings that she does not have a passport. However, Rwanda has an embassy in Stockholm where she could have, and still can, apply for a passport. In this respect, the Court observes that it has not even been claimed that the applicant would be unable to obtain a passport if she were to take the necessary steps.

47. In these circumstances, the Court finds that the Swedish authorities have not failed to strike a fair balance between the applicant's 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.

48. It follows that this part of the application is likewise 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 by a majority

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President