



## Inadequate assessment of an expulsion order against a Kosovar national was in breach of the Convention

In today's Chamber judgment<sup>1</sup> in the case of [I.M. v. Switzerland](#) (application no. 23887/16) the European Court of Human Rights held, unanimously, that there would be a **violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights if **I.M. were to be expelled to Kosovo**<sup>2</sup>.

The case concerned the Swiss authorities' refusal to renew the residence permit of I.M. (a Kosovar<sup>2</sup> national who has lived in Switzerland since 1993) and the order expelling him from Swiss territory, following his conviction for a rape committed in 2003. I.M., whose rate of disability has been assessed at 80%, is currently living in Switzerland with his adult children, on whom he is dependent.

The Court found in particular that the Federal Administrative Court, when adjudicating in 2015 – that is to say more than 12 years after the offence committed by the applicant – had not taken account of the change in the applicant's behaviour or assessed the impact of the major downturn in his state of health on the risk of his reoffending. Nor had the Federal Administrative Court taken into consideration the strength of the applicant's social, cultural and family bonds with the host country (Switzerland) and the country of destination (Kosovo), or carried out a sufficiently thorough analysis of the implications of I.M.'s dependence on his adult children.

The domestic authorities had thus conducted a superficial examination of the proportionality of the expulsion order and had failed convincingly to demonstrate that it was proportionate to the legitimate aims sought to be achieved (the prevention of disorder or crime) and necessary in a democratic society.

### Principal facts

The applicant is a Kosovar national who was born in 1964 and has been living in Switzerland since 1993.

In 1993 he lodged an asylum application with the Swiss authorities, which rejected it but granted him provisional admission. In August 1998 I.M.'s former wife, who lived in Kosovo and whom he divorced in May 1998, arrived in Switzerland with the applicant's three children. Their asylum application was accepted. Subsequently, I.M. married a Swiss national and obtained a residence permit on the basis of that marriage. The couple divorced in 2006.

In 2003 I.M. was convicted on charges of sexual coercion and rape, based on incidents which had occurred the same year. In 2005 the Court of Appeal, which only considered the charge of rape, reduced the initial sentence to two years and three months' imprisonment, and upheld I.M.'s expulsion from Swiss territory for 12 years, suspended, with a probation period of five years.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

<sup>2</sup> All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

In 2006 the Basle-Rural Canton Immigration Office rejected I.M.'s request for an extension of his residence permit, noting that the fact that he had been sentenced to over two years' imprisonment for rape constituted grounds for expelling him from Swiss territory. In 2007 the Basle-Rural Canton State Council and then the Basle-Rural Cantonal Court dismissed I.M.'s appeals.

In 2010 the State Secretariat for Migration extended the cantonal expulsion order to cover the entire Swiss territory. In 2013 I.M., whose health had been affected, was awarded a full invalidity pension, with retroactive effect from 1 October 2012, his rate of disability having been assessed at 80%.

In 2015 the Federal Administrative Court dismissed an appeal lodged by I.M. against the 2010 decision to extend the cantonal expulsion order to the whole country, on the grounds, in particular, that the prison sentence of two years and three months which had been imposed on him had clearly exceeded the threshold for admitting a breach of serious endangerment of public order and security.

In 2016 I.M.'s disability pension was suspended. Since then he has been provided for financially by his children. He reportedly lives with two of his adult children, who do the housework and shopping, take general care of him, wash and clothe him, and are the primary persons to whom he relates.

## Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained about his expulsion order from Swiss territory. He emphasised the lack of any risk of his reoffending, as well as his health problems and the fact that he was dependent on the care provided by his relatives in Switzerland.

The application was lodged with the European Court of Human Rights on 28 April 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Vincent A. **De Gaetano** (Malta), *President*,  
 Branko **Lubarda** (Serbia),  
 Helen **Keller** (Switzerland),  
 Dmitry **Dedov** (Russia),  
 Pere **Pastor Vilanova** (Andorra),  
 Georgios A. **Serghides** (Cyprus),  
 María **Elósegui** (Spain),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

## Decision of the Court

### [Article 8 \(right to respect for private and family life\)](#)

The Court considered that the expulsion order amounted to an interference with I.M.'s right to respect for his private and family life on the grounds, firstly, of his long period of residence in Switzerland, and secondly, of his relationship with his children. The Court further noted that the interference had been based on the relevant provisions of domestic law and had aimed at the prevention of disorder and crime.

The Court found that the Federal Administrative Court had held that even though the events had occurred 10 years previously, rape was a serious crime for which even a low risk of reoffending was unacceptable in the field of aliens' law. That court had also considered that the application of the exclusion clause, even having regard to the considerable difficulties which the applicant would have to overcome on his return to his country of origin, was proportionate. It therefore adjudicated on

the seriousness of the criminal offence committed, dealing briefly with the matter of the risk of reoffending and mentioning the difficulties which I.M. would face on returning to Kosovo.

Nevertheless, whereas it was hearing and determining the case more than 12 years after the offence, the court had completely disregarded the change in I.M.'s behaviour since he had committed the offence. Nor had it assessed the impact of the major downturn in his health (80 % disability since 1 October 2012) on the risk of his reoffending. It had also failed to consider several case-law criteria in assessing the necessity of the expulsion order. In particular, the court had not taken into consideration the strength of I.M.'s social, cultural and family bonds with the host country (Switzerland) and the country of destination (Kosovo), or the specific circumstances of the case, such as the medical evidence.

In more specific connection with respect for family life, even though the courts had acknowledged at least the applicant's financial dependence on his adult children, they had not analysed in greater detail the implications of that dependence for the applicant's enjoyment of his rights under Article 8.

Accordingly, the Court considered that, applying the criteria set out in its case-law, no clear-cut conclusion could be drawn on whether the applicant's private and family interests in continuing to reside in the territory of the respondent State overrode the public interest in expelling him in order to fulfil its responsibility for preventing public disorder.

If the domestic authorities had carried out a thorough exercise of balancing the competing interests, taking into account the various criteria established in the Court's case-law, and if they had set out relevant and sufficient grounds to justify their decision, the Court might, in line with the subsidiarity principle, have been induced to conclude that the domestic authorities had neither failed to strike a fair balance between the interests of the applicant and the respondent State, nor overstepped their margin of appreciation in matters of immigration.

Consequently, the Court considered that the Federal Administrative Court had conducted a superficial examination of the proportionality of the expulsion order. In view of the lack of any genuine balancing of the competing interests, the Court held that the domestic authorities had failed convincingly to demonstrate that the expulsion order had been proportionate to the legitimate aims sought to be achieved and therefore necessary in a democratic society. **There would consequently be a violation of Article 8 if I.M. were to be expelled.**

### Just satisfaction (Article 41)

The Court held that the finding of a violation in itself provided adequate just satisfaction for the non-pecuniary damage sustained. It also held that Switzerland had to pay I.M. 4,500 euros in respect of costs and expenses.

### Separate opinion

Judge Keller expressed a concurring opinion which is annexed to the judgment.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.