



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

GRAND CHAMBER

CASE OF KHAN v. GERMANY

(Application no. 38030/12)

JUDGMENT

(Striking out)

STRASBOURG

21 September 2016

This judgment is final but it may be subject to editorial revision.

In the case of Khan v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
András Sajó,
Luis López Guerra,
Angelika Nußberger,
Khanlar Hajiyev,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Dmitry Dedov,
Robert Spano,
Iulia Motoc,
Branko Lubarda,
Síofra O’Leary,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Pere Pastor Vilanova,
Pauliine Koskelo, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 16 March 2016 and on 7 July 2016,

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

PROCEDURE

1. The case originated in an application (no. 38030/12) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Pakistani national, Ms Farida Kathoon Khan (“the applicant”), on 19 June 2012.

2. The applicant was represented by Ms E. Gabsa, a lawyer practising in Giessen. The German Government (“the Government”) were represented by their Agent, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. In her application, the applicant alleged that her expulsion to Pakistan would be in breach of Article 8 of the Convention.

4. The application was assigned to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 April 2015 a Chamber of that Section, composed of Mark Villiger, President, Angelika Nußberger, Boštjan Zupančič, Ganna Yudkivska, André Potocki, Helena Jäderblom, Aleš Pejchal, judges, and also Claudia Westerdiek, Section Registrar,

delivered a judgment in which it unanimously declared the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible, and found, by six votes to one, that the implementation of the expulsion order against the applicant would not give rise to a violation of Article 8 of the Convention. The dissenting opinion of Judge Zupančič and a declaration by Judge Yudkivska were annexed to the judgment.

5. On 23 July 2015 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 14 September 2015 a panel of the Grand Chamber acceded to that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. Both the applicant and the Government submitted further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case and proceedings before the national authorities

8. The applicant was born in Pakistan in 1963 and currently lives in sheltered accommodation in Haina (*Land of Hesse*, Germany).

9. In December 1991 the applicant and her husband, a Pakistani national, arrived in Germany. The husband was granted refugee status. In October 1993 the applicant's own application for the same status was refused. On 16 June 1994 she was granted a temporary residence permit as the spouse of a refugee. On 11 February 1995 she gave birth to a son. In 1998 the couple separated. The son stayed with the applicant, who then worked as a cleaner in different companies.

10. On 7 September 2001 she was awarded a permanent residence permit.

11. In March 2004 the applicant lost her job on account of behavioural issues. In July 2004 she and her husband divorced. In 2005 a family court transferred custody rights over her son to her former husband and ruled that the child should live with his father from then on.

12. On 31 May 2004 the applicant was placed in pre-trial detention for having killed a neighbour. Following an attempt to self-harm, she was provisionally transferred to a psychiatric hospital.

13. On 13 July 2005 the Giessen Regional Court ordered the applicant's permanent confinement in a psychiatric hospital. It established that she had committed manslaughter while in a state of mental incapacity, noting that at

the material time she had been suffering from acute psychosis. A medical expert certified that she had symptoms of schizophrenia and diminished intelligence, and that she was unaware of her own psychological condition. The Regional Court concluded that she still represented a danger for the general public and therefore had to be committed to a psychiatric hospital. A guardian was also appointed for the applicant.

14. On 4 June 2009 the Waldeck-Frankenberg administrative authority ordered the applicant's expulsion. Referring in particular to the act which had led to her committal to the psychiatric hospital and her general state of mental health, the authority concluded that she posed a danger to public safety which outweighed her personal interest in not being expelled, despite her long stay in Germany and her residence status. It noted that the applicant was not economically integrated, had an insufficient command of German, which was an obstacle to her therapy, only had limited contact with her former husband and her son and remained immersed in Pakistani culture. The authority added that the applicant could be given the necessary medical treatment for her condition in Pakistan and receive support from her family there.

15. The applicant lodged an appeal against that decision with the Kassel Administrative Court, accompanied by a request for a stay of execution. During the interlocutory proceedings the administrative authorities undertook not to execute the expulsion order until the Administrative Court had ruled on the merits.

16. In November 2009 the applicant was granted certain privileges in the hospital, such as occasional days of leave, and subsequently, after an improvement in her mental health, she started working full-time in the hospital's laundry department.

17. On 1 March 2011 the Administrative Court dismissed the applicant's appeal. In reaching that decision it noted that she had committed a serious act, that she lacked awareness of her own condition and that there was a high risk of her reoffending. Moreover, she was not socially and economically integrated into German society, especially owing to her lack of German language skills. The Administrative Court added that the applicant had no significant family ties in Germany because she had been divorced for years and parental authority over her son had been granted to his father. With regard to the situation in Pakistan, it noted that according to information supplied by the German Embassy in Pakistan, basic medical care for patients with mental illness was available in large cities such as Lahore and that the applicant could afford the treatment she needed as she would be receiving a monthly pension of around 250 euros (EUR). It found that although members of the applicant's family in Pakistan had indicated to the German Embassy that they were not prepared to take her in, it was conceivable that they might help her to arrange for the required treatment in return for payment of a few euros. It also endorsed the administrative

authority's conclusion that the applicant had not expressed prominent views in favour of the Ahmadiyya religion, so there would be no specific danger for her in that regard.

18. On 23 May 2011 the Hesse Administrative Court of Appeal refused the applicant leave to appeal, noting that the Administrative Court had taken into account all the relevant facts of the case. On 2 August 2011 it dismissed a complaint by the applicant of a breach of the right to be heard, in which she had, in particular, argued that the court had not given proper consideration to her submissions on her improved state of health, the death of her sister in Pakistan and the living conditions she would face in the event of her return there.

19. On 13 December 2011 the Federal Constitutional Court, without providing reasons, dismissed a constitutional complaint by the applicant (no. 2 BvR 1923/11).

20. Previously, on 24 November 2011, the Marburg Regional Court, on the recommendation of a medical expert, had suspended the implementation of the hospital treatment order and released the applicant on probation (*Führungsaufsicht*) for a five-year period. The applicant was, in particular, required to remain in regular contact with the hospital's medical personnel and to continue to take the prescribed medication. The Regional Court held that, thanks to the treatment, the danger of the applicant's reoffending had receded sufficiently for the residual risk to be tolerable.

21. Since the expulsion order was issued, the applicant's presence in Germany has been tolerated under the tolerated residence (*Duldung*) measures set out in section 60a of the Residence Act (see paragraph 27 below). The latest of these measures, which are generally valid for six months, was ordered on 22 March 2016 and is valid until 17 February 2017.

B. The Chamber judgment

22. In its judgment of 23 April 2015 the Chamber held, by six votes to one, that there had been no violation of Article 8 of the Convention (see paragraph 4 above).

C. Developments since the Chamber judgment

23. Following the Chamber judgment, on 14 September 2015 a panel of the Grand Chamber acceded to the applicant's request for the case to be referred to the Grand Chamber (see paragraph 5 above).

24. In their observations of 7 January 2016 on the merits of the case, the Government, in their own name and on behalf of the *Land* of Hesse, which is responsible for deciding on the applicant's residence rights, gave an assurance that before taking any measures for the applicant's removal, the German administrative authorities would issue a new expulsion order taking

account of the time which had passed. They further certified that a new expulsion order could not be issued unless and until a thorough medical examination of the applicant had confirmed that neither her removal nor her settlement in Pakistan would expose her to a life-threatening medical risk.

25. Subsequently, in reply to several questions put by the Court, the Government declared that the administrative authorities would not expel the applicant on the basis of the original expulsion order, that the assurance they had given could be relied on to prevent any attempt to remove the applicant on the basis of the original expulsion order and that the German authorities considered themselves bound by that undertaking at all levels, since it had been made in consultation with and with the agreement of the Hesse *Land* government.

26. On 9 February 2016 the Government officially requested that the Court strike the application out of its list of cases in accordance with Article 37 § 1 (b) of the Convention. On that occasion they reiterated the aforementioned assurance, specifying that any new expulsion order would replace the original one and that the applicant would have access to all the remedies available in German law if she wished to challenge it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Section 60a of the Residence Act (*Aufenthaltsgesetz*) of 30 July 2004 governs provisional suspension of expulsion orders (tolerated residence - *Duldung*). It provides in particular that the expulsion of an alien must be suspended while removal is impossible for reasons of fact or of law and while no residence permit has been issued (§ 2). Tolerated residence measures must be issued in writing (§ 4) and do not confer residence rights (§ 3). The period of validity of a tolerated residence measure is not established in legislation; it is variable, ranging from one day to more than a year. Tolerated residence measures can be renewed as often as required.

THE LAW

I. REQUEST FOR THE APPLICATION TO BE STRUCK OUT OF THE LIST

28. The applicant alleged that her expulsion to Pakistan would give rise to a violation of Article 8 of the Convention, the relevant parts of which read as follows:

“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 ... public safety or the economic well-being of the country, for the prevention of disorder or crime ...”

A. The parties’ submissions

29. The Government invited the Court to strike the case out of its list of cases pursuant to Article 37 § 1 (b) of the Convention on the ground that the applicant no longer ran any risk of being expelled to Pakistan on the basis of the expulsion order of 4 June 2009. They explained that even though the assurance they had given could not eradicate that order, the latter was no longer enforceable and the assurance in question could be relied on to prevent any attempt to enforce it. The Government emphasised that the applicant could henceforth only be expelled on the basis of a possible new expulsion order taking account of her state of health and the time which had passed since the 2009 expulsion order. They added that the German authorities would tolerate the applicant’s residence in Germany under section 60a of the Residence Act pending the potential adoption of a new expulsion order with final effect.

30. The applicant submitted that since she had lost her residence rights, the assurance given by the Government did not make her situation any less insecure, even if her removal would require a fresh expulsion order and the German authorities were not, for the time being, planning to take any decision to expel her to Pakistan. She did not respond to the Government’s request for the application to be struck out.

B. The Court’s assessment

31. Article 37 § 1 of the Convention provides:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.”

32. The Court first of all notes that Article 37 § 1 (a) of the Convention is not applicable to the present case because the applicant did not state that she was withdrawing her application after the Government had given the above-mentioned assurance (see, *mutatis mutandis*, *Atmaca v. Germany* (dec.), no. 45293/06, 6 March 2012).

33. The Court secondly observes that according to its established case-law, once an applicant under threat of expulsion has been granted a residence permit and no longer risks being expelled, it considers the matter to have been resolved within the meaning of Article 37 § 1 (b) of the Convention and strikes the application out of its list of cases, even without the applicant's agreement. The reason for this is that the Court has consistently approached the issue as one of a potential violation of the Convention, and the threat of a violation is removed by virtue of the decision granting the applicant the right of residence in the respondent State concerned (see *F.G. v. Sweden* [GC], no. 43611/11, § 73, 23 March 2016 and the references therein, and *M.E. v. Sweden* (striking out) [GC], no. 71398/12, §§ 32 and 33, 8 April 2015).

34. On the other hand, in some cases where the applicant has not been granted a residence permit, the Court has held that it was no longer justified to continue to examine the application, within the meaning of Article 37 § 1 (c) of the Convention, and decided to strike it out of its list of cases because it was clear from the information available that the applicant no longer faced any risk, at the moment or for a considerable time to come, of being expelled and subjected to treatment contrary to Article 8 of the Convention, and that he or she had the opportunity to challenge any new expulsion order before the national authorities and if necessary before the Court (see *F.I. and Others v. the United Kingdom* (dec.), no. 8655/10, 15 March 2011, *Atayeva and Burmann v. Sweden* (striking out), no. 17471/11, §§ 19-24, 31 October 2013; and, *mutatis mutandis*, as regards Article 3, *Atmaca*, cited above; *Ozbeek v. the Netherlands* (dec.), no. 40938/09, 9 October 2012; *Sharifi v. Switzerland* (dec.), no. 69486/11, 4 December 2012; *P.Z. and Others v. Sweden* (striking out), no. 68194/10, §§ 14-17, 18 December 2012; *B.Z. v. Sweden* (striking out), no. 74352/11, §§ 17-20, 18 December 2012; *L.T. v. Belgium* (dec.), no. 31201/11, 12 March 2013; *Isman v. Switzerland* (dec.), no. 23604/11, § 24, 21 January 2014; *I.A. v. the Netherlands* (dec.), no. 76660/12, 27 May 2014; *H.S. and Others v. Belgium* (dec.), no. 10973/12, 24 March 2015; *A.A. v. Belgium* (dec.), no. 66712/13, 19 May 2015; and *S.S. v. the Netherlands* (dec.), no. 67743/14, 1 September 2015).

35. In all the cases cited above, the Court explicitly or implicitly found that there were no special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto requiring the continued examination of the application (Article 37 § 1 *in fine*).

36. In the instant case, the Court notes that the German Government gave an assurance that the applicant would not be expelled on the basis of the 4 June 2009 expulsion order which is the subject of her application. The Government also undertook to ensure that any further decision to expel the applicant would be taken only after she had received a thorough medical

examination and would take into account the time that had passed since the 2009 expulsion order.

37. The Court has no reason to doubt the validity of the German Government's assurances and their binding effect (see *F.I. and Others v. the United Kingdom*, cited above, and *Atmaca*, cited above), especially since they were also given on behalf of the authorities of the competent *Land*. Consequently, the expulsion order of 4 June 2009 is no longer enforceable. Furthermore, the applicant has been granted "tolerated residence" status under section 60a of the Residence Act. The Court reiterates in this context that it has struck out applications after having been informed by the respondent Government that the national authorities no longer intended to expel the applicant to the country of destination in the near future or for some time to come, even though that information had not been accompanied by any formal undertaking by the respondent Government (see, among many other authorities, *Ozbeek*, cited above; *Abdi Mohammed v. the Netherlands* (dec.), no. 2738/11, 4 December 2012; *I.A. v. the Netherlands*, cited above; and *S.S. v. the Netherlands*, cited above).

38. The Court also notes – and the German Government have confirmed – that should the German authorities issue a new expulsion order, the applicant would have remedies available under domestic law for challenging the order in the German courts. Moreover, she would have the opportunity, if necessary, to lodge a fresh application with the Court (see references in paragraph 34 above). The Court concludes that the applicant faces no risk of being expelled at the moment or in the foreseeable future.

39. Under those circumstances and in view of the subsidiary nature of the supervisory mechanism established by the Convention, the Court considers that it is not justified to continue the examination of the application (Article 37 § 1 (c) of the Convention).

40. Furthermore, the Court takes the view that the present case does not involve any special circumstances regarding respect for human rights as guaranteed by the Convention and the Protocols thereto requiring the continued examination of the application (Article 37 § 1 *in fine*). It considers, in particular, that unlike in the case of *F.G. v. Sweden* (cited above, § 82), which raised major issues under Articles 2 and 3 of the Convention, the present case does not go beyond the applicant's specific situation because it primarily concerns the assessment by the domestic authorities of facts relating to her family situation (an adult son), her integration, her dangerousness, her state of health and the availability of appropriate health care in Pakistan, which facts may, moreover, change with time (*Abdi Mohammed; Isman*; and *I.A. v. the Netherlands*, all cited above).

41. The Court would also reiterate that after it has struck an application out of its list of cases it can at any time decide to restore it to the list if it considers that the circumstances justify such a course, in accordance with

Article 37 § 2 of the Convention (see *Atmaca*; *Abdi Mohammed*; *I.A. v. the Netherlands*; and *H.S. and Others v. Belgium*, all cited above).

42. Accordingly, the application should be struck out of the list of cases.

II. APPLICATION OF RULE 43 § 4 OF THE RULES OF COURT

43. The relevant part of Rule 43 § 4 of the Rules of Court reads as follows:

“When an application has been struck out ... the costs shall be at the discretion of the Court.”

44. The Court reiterates that unlike Article 41 of the Convention, which is only applicable in the case of a finding of a violation of the Convention or of the Protocols thereto, Rule 43 § 4 authorises it to make an award to the applicant in respect of costs and expenses – and in this respect only – when the application has been struck out (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 132, ECHR 2007-I).

45. The Court notes that after her application was referred to the Grand Chamber, the applicant was informed that her claims in respect of just satisfaction before the Chamber would be taken into account and that she could claim additional costs and expenses in respect of the proceedings before the Grand Chamber. It observes that before the Chamber the applicant claimed EUR 5,731.33 in respect of lawyers’ fees incurred for the proceedings before the administrative authorities and courts, the Federal Constitutional Court, the Parliament of Hesse and the Court, as well as EUR 211.90 in respect of court fees. The applicant also claimed a minimum of EUR 300 for the further proceedings and translation fees. The applicant did not submit any additional claims before the Grand Chamber.

46. The Government made no comment on the applicant’s claims in respect of costs and expenses before the Chamber or the Grand Chamber.

47. The Court reiterates that the general principles governing the reimbursement of costs under Rule 43 § 4 are essentially the same as under Article 41 of the Convention. In other words, in order to be reimbursed, the costs must relate to the alleged violation or violations and be reasonable as to quantum. Furthermore, under Rule 60 § 2, itemised particulars of any claim must be submitted, together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part (see *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 276, 3 October 2008). Moreover, it is clear from the structure of Rule 43 § 4 that when the Grand Chamber makes a decision on the award of expenses, it must do so with reference to the entire proceedings before the Court, including the stages prior to referral to the Grand Chamber (see *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 55, 7 December

2007, and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, §§ 39-40, 20 December 2007).

48. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum claimed in respect of lawyers' and court fees. It notes in that connection that the total amount of lawyers' fees indicated in the supporting documents submitted by the applicant does not match the sum claimed, and actually exceeds it. Nevertheless, the Court has no doubt that the applicant did incur expenses amounting to the sum claimed (EUR 5,731.33) and it awards her that amount, together with the sum claimed in respect of court fees (EUR 211.90). As regards the reimbursement of the other expenses indicated, including translation fees, the Court notes that the applicant did not submit any supporting documents with her observations before the Chamber and the Grand Chamber. That being the case, the Court does not consider it appropriate to award the applicant the other sums claimed. In conclusion, the Court awards the applicant a total of EUR 5,943.23 in respect of costs and expenses.

FOR THESE REASONS, THE COURT,

1. *Decides*, by sixteen votes to one, to strike the application out of the list of cases;
2. *Holds*, unanimously,
 - (a) that the respondent State is to pay the applicant, within three months, the sum of EUR 5,943.23 (five thousand nine hundred and forty-three euros and twenty-three cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and notified in writing on 21 September 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert
Deputy to the Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

G.R.A.
J.C.

DISSENTING OPINION OF JUDGE SAJÓ

To my regret I cannot follow the majority in this case as the conditions for a strike-out are not met. The case concerns the fate of a mentally disabled person whose only supportive environment is the current one. Does “tolerated residence”, in such cases, comply with the Convention? This question must be answered in order to ensure respect for human rights as defined in the Convention (see Article 37 § 1 of the Convention).

I find it particularly troubling that the Court sees no justification for continuing the examination of the application under the circumstances “and in view of the subsidiary nature of the supervisory mechanism established by the Convention.” The Court’s role is not supervisory; it has to *ensure* the observance of the engagements undertaken by the High Contracting Parties (see Article 19 of the Convention). Whatever subsidiarity might mean in the present context, it cannot serve as a ground justifying a strike-out. Otherwise any other reason could be used to justify a strike-out, and the Court would be exercising unfettered discretion.

For these reasons I am compelled to dissent.