



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

FIFTH SECTION

CASE OF KHAN v. GERMANY

(Application no. 38030/12)

JUDGMENT

STRASBOURG

23 April 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Khan v. Germany,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ganna Yudkivska,

André Potocki,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 March 2015,

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, from the Federal Ministry of Justice.

3. The applicant alleged that her envisaged expulsion to Pakistan would breach Articles 8 and 6 of the Convention.

4. On 25 November 2013 the President of the Fifth Section, to which the case was allocated, decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. In 1990 the applicant married in Pakistan and converted to her husband’s faith, that of the Ahmadiyya.

7. The applicant and her husband moved to Germany in 1991. The husband was granted refugee status but the applicant's own application for asylum was refused. As the spouse of a refugee, she received a temporary residence permit on 16 June 1994.

8. On 11 February 1995 the applicant gave birth to her son. In 1998 the applicant and her husband separated. The son stayed with the applicant. From then on the applicant worked as a cleaner in different companies. On 7 September 2001 she was awarded a permanent residence permit.

9. In March 2004 the applicant became unemployed due to behavioural issues that appeared to be caused by psychological problems. In July 2004 she and her spouse divorced. In 2005 the domestic family court transferred custody rights over her son to her husband and her son was living with him from then on.

10. On 31 May 2004 the applicant killed a neighbour by strangling her and pushing her down a staircase. Subsequently, she was detained and held in pre-trial detention. Following an attempt to harm herself, a domestic court ordered her committal to a psychiatric hospital.

11. On 13 July 2005 the Gießen Regional Court established that the applicant had committed manslaughter in a state of mental incapacity. At the time of the act she had been in a state of acute psychosis. A medical expert noted that she suffered from symptoms of schizophrenia and had diminished intelligence. She did not acknowledge her own psychological condition. The domestic court therefore concluded that she remained a danger for the general public and a continuous stay in a psychiatric hospital had to be ordered. The applicant was also appointed a legal guardian.

12. On 4 June 2009 the administrative authority Waldeck-Frankenthal ordered the applicant's expulsion. Relying on Section 55 § 2 of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (hereafter "the Residence Act", *Aufenthaltsgesetz*, see paragraph 25 below), the authority referred to the offence which had led to the applicant's committal to the psychiatric hospital and her mental condition in general. The authority concluded that she posed a danger to public safety. In such a case her personal circumstances, namely her long stay in Germany and her residence status, were secondary. She was neither economically integrated nor sufficiently able to communicate in German, which was an obstacle to her therapy. She only had limited contacts with her former husband and her son and she was still familiar with the Pakistani culture. Adequate medical care was available in Pakistan and the applicant's family there could assist her.

13. In November 2009 the applicant was granted privileges in the hospital, for example she was granted days of leave, which had not led to any complaints. She also started working full-time in the laundry department of the clinic. This was possible due to her improved mental health. In proceedings concerning a provisional stay on the expulsion, the

authorities committed themselves not to execute the expulsion decision before a court ruling on the merits.

14. On 1 March 2011 the Kassel Administrative Court refused the applicant's action against the expulsion order. It upheld the decision that the applicant could be deported, on the grounds of the serious offence committed by her, lack of awareness of her own condition and given that a high probability of reoffending therefore existed. Moreover, she was not integrated into German society, especially due to her lack of German language skills. Article 8 of the Convention was not applicable as the applicant had no significant family relationships. The domestic court noted that, in principle, in Pakistan basic medical care for psychiatric patients existed in big cities like Lahore and that the applicant could afford treatment, including medication, as she would be receiving a small pension in the amount of around 250 euros (EUR). The domestic court recognised that family members in Pakistan had explicitly ruled out that they would take her in, when asked by the German Embassy. However, the domestic court thought it conceivable that the applicant's relatives would help her with organising the required treatment if she were to provide them with small sums in euros in return. Furthermore, the applicant did not hold a visible position within the Ahmadiyya religion, so there would be no specific danger for her in that regard.

15. On 23 May 2011 the Hessian Administrative Court of Appeal dismissed the application for leave to appeal. It noted that the administrative court had taken into account all relevant facts of the case.

16. The applicant complained in vain of the breach of her right to be heard (*Gehörsrüge*). She argued that her submissions on her improved state of health, the death of her sister in Pakistan and the expected living conditions there had not been given proper consideration. Moreover, she claimed that she had close contact with her son who visited her on a regular basis.

17. On 24 November 2011 the Marburg Regional Court lifted the hospital treatment order on the recommendation of a medical report and released the applicant on probation, ordering a five-year probation period. It ordered the applicant to remain in regular contact with the medical personnel of the clinic and to continue to take the prescribed medication. The domestic court held that, due to the treatment, the danger of the applicant's re-offending had diminished to such an extent that a residual risk had to be tolerated.

18. The medical report in question further indicated that, after having overcome some initial difficulties, she was reachable, while deficits in her cognitive performance remained. The language barrier caused problems during some therapy sessions and due to cognitive deficiencies difficulties remained, even with the assistance of an interpreter. She continued to work in the laundry, took her medication regularly and ultimately showed

balanced behaviour. Her son visited her on a regular basis and wished to be more involved in her care. Such involvement, however, would have to be limited due to his situation as a young adult beginning his studies. She was compliant with all requirements and embraced the stable environment in which she was settled. Her prognosis could be considered positive.

19. The applicant was transferred to sheltered accommodation close to the clinic, where the required structure would be ensured.

20. On 13 December 2011 the applicant's constitutional complaint against the deportation order was not admitted for review by the Federal Constitutional Court.

21. The applicant was notified on 19 September 2013 that a petition to the parliament of the *Land* of Hesse in this matter had not been successful.

22. So far, no date for the applicant's removal to Pakistan has been set.

II. RELEVANT DOMESTIC LAW

23. *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory* ("*Residence Act*")

Section 53 Mandatory Expulsion

"A foreigner shall be expelled, if he or she

1. has been sentenced by final judgment to a prison term or a term of youth custody of at least three years for one or more intentionally committed offences or several prison terms or terms of youth custody for intentionally committed offences totalling at least three years within a five-year period or preventive detention has been ordered in connection with the most recent final conviction,

2. has been sentenced by final judgment to at least two years youth custody or to a prison term for an intentionally committed offence under the Narcotics Act, for a breach of the peace under the conditions specified in Section 125a, sentence 2 of the Criminal Code or for a breach of the peace committed at a prohibited public gathering or a prohibited procession pursuant to Section 125 of the Criminal Code and the sentence has not been suspended on probation, or

3. ..."

Section 54 Regular Expulsion

"A foreigner will generally be expelled if

1. he or she has been sentenced by final judgment to at least two years' youth custody or to a prison term for one or more intentionally committed offences and the sentence has not been suspended on probation,

2. ...

3. he or she cultivates, produces, imports, carries through the federal territory, exports, sells, puts into circulation by any other means or traffics narcotics without

authorisation and in contravention of the provisions of the Narcotics Act, or if he or she aids or abets such acts,

4. he or she perpetrates or participates in acts of violence against persons or property which are committed concertedly from within a crowd in a manner which endangers public safety at a prohibited or disbanded public gathering or in a prohibited or disbanded procession,

5. there is reason to believe that he or she belongs to or has belonged to an organisation which supports terrorism or supports or has supported such an organisation; membership or supportive acts in the past may justify expulsion only if they constitute a current threat,

5a. he or she endangers the free democratic basic order or the security of the Federal Republic of Germany, participates in acts of violence or publicly incites to violence in pursuit of political objectives or threatens the use of violence,

5b. there is reason to believe that he or she is preparing or has prepared a serious violent offence endangering the state as specified in Section 89a (1) of the Criminal Code pursuant to Section 89a (2) of the Criminal Code; preparatory acts in the past may justify expulsion only if they constitute a special clear and present danger,

6. ...; or

7. he or she belonged to the leadership of an organisation subject to a non-appealable ban because its purpose or activities are in breach of the criminal laws or he or she opposes the constitutional order or the concepts of international understanding.”

Section 55 Discretionary expulsion

“(1) A foreigner may be expelled if his or her stay is detrimental to public safety and law and order or other substantial interests of the Federal Republic of Germany.

(2) In particular, a foreigner can be deported if he or she

1. ...

2. has committed not just an isolated or minor violation of laws or judicial or administrative decisions or orders or committed an offence outside the Federal territory which is to be considered an intentional crime inside the Federal territory,

...

(3) In reaching the decision on expulsion, due consideration shall be accorded to

1. the duration of lawful residence and the foreigner’s legitimate personal, economic and other ties in the Federal territory,

2. the consequences of the expulsion for the foreigner’s dependents or partner who is/are lawfully resident in the Federal territory and who lives/live with the foreigner as part of a family unit or cohabits with the foreigner as his or her partner in life,

3. the conditions specified in Section 60 (2) and (2b) for the suspension of deportation.”

Section 56 Special protection from expulsion

“(1) A foreigner who

1. possesses a settlement permit and has lawfully resided in the Federal territory for at least five years,

...

shall enjoy special protection from expulsion. He or she shall only be expelled on serious grounds pertaining to public security and law and order. Serious grounds pertaining to public security and law and order generally apply in cases covered by Section 53 and Section 54 (5) – (5b) and (7). If the conditions specified in Section 53 apply, the foreigner shall generally be expelled. If the conditions specified in Section 54 apply, a discretionary decision shall be reached on his or her expulsion.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant complained that her expulsion to Pakistan would give rise to a violation of Article 8 of the Convention, which 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.”

25. The Government contested that argument.

A. Admissibility

26. 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 parties’ submissions*

(a) **The applicant**

27. The applicant claimed that the German authorities would not comply with their obligations, inherent in Article 8 of the Convention, to allow her to reside in Germany. She submitted that her personal interests in remaining in Germany outweighed the State’s interest in securing public order and safety so that her expulsion would be a disproportionate measure under

Article 8 of the Convention. This was the case especially in view of the treatment she had received over the years which had resulted in a significant improvement in her mental health.

28. The applicant relied on Article 8 and argued that removal to Pakistan would have a severely damaging effect on her private and family life. The withdrawal of social and medical services would lead to a deterioration in her mental state.

29. The applicant added that the domestic authorities and the Government had given too much weight to the criminal act itself, while disregarding the fact that she had committed a criminal act only once and when in a state of mental incapacity. Thanks to the treatment and structure provided, her behaviour was now balanced and she had been given a positive prognosis for the future. She also maintained that her deportation would result in the disruption of her close relationship with her son.

30. The applicant further claimed that, due to her long stay, she was as well-integrated as it was possible to be, considering her illness. She spoke German sufficiently well. She had lost ties with Pakistan. The level of treatment for her mental illness there would be inadequate and, when interviewed by the German Embassy, her siblings there had clearly ruled out the possibility of taking her in or visiting her in an institution. Hospitals in Pakistan did not provide assistance for anything that was not strictly medical treatment. Thus, she would need a carer from outside for assistance with day-to-day necessities. Considering that the German Embassy had calculated the cost of treatment in a psychiatric ward at 150 euros per month the applicant would not have sufficient financial means to employ someone to help her. Due to her personal circumstances she would face a hostile environment in Pakistan.

(b) The Government

31. The Government reiterated that the expulsion order against the applicant was a justified measure under Article 8 of the Convention. They submitted that the circumstances which had led to the applicant's placement in the psychiatric hospital in 2005 were very serious. The Government further acknowledged that the applicant had been successful in dealing with her psychological condition and that she continued her psychiatric treatment. However, her release was only possible due to the possibility of sheltered accommodation in which the necessary structure was provided. She would be dependent on such a structure and medication for the rest of her life. The Government concluded that the applicant was ultimately still a threat to public safety in Germany. The long period between the placement in the hospital and the expulsion order was due to the need to establish whether the applicant would be able to recover to such a degree that she posed no further risk.

32. Concerning the applicant's family life, the Government claimed that her relationship with her now adult son could not be considered close. Moreover, even before her illness she had had no social contacts and was therefore not integrated in German society. She had been residing in Germany for more than 20 years but lacked German language skills. The language problem also remained a considerable hindrance to the progress of her therapy.

33. The Government further considered that the applicant could re-establish a life in Pakistan, where she had grown up. In principle, she could receive adequate medical care and it could be assumed that members of her family would support her. The expulsion order and the domestic court decisions had taken all major factors into account.

34. In view of all the interests at stake, the Government were of the view that the State's interests in safeguarding public order and safety outweighed the applicant's personal interests in remaining in Germany.

2. *The Court's assessment*

(a) **General principles**

35. With regard to the applicant's mental health problems it has to be noted that the Court's case-law does not rule out that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect, where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36). Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (*Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I).

36. As far as the specific context of an expulsion is concerned, the Court reaffirms that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *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). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuit of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*,

19 February 1998, § 52, *Reports* 1998-I; *Mehemi v. France*, 26 September 1997, § 34, *Reports* 1997-VI; *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

37. Article 8 protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). It must therefore be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8 (see *Miah v. the United Kingdom* (dec.), no. 53080/07, § 17, 27 April 2010).

38. The Court has previously held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (*Slivenko v. Latvia* [GC], cited above, § 97; *Kwaky-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000). It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see *Üner v. the Netherlands* [GC], no. 46410/99, § 59, 5 July 2005).

39. In order to assess whether an expulsion order and the refusal of a residence permit were necessary in a democratic society and proportionate to the legitimate aim pursued under Article 8 of the Convention, the Court has laid down the relevant criteria in its case-law (see *Üner*, cited above, §§ 57-58; *Maslov v. Austria* [GC], no. 1638/03, §§ 68-76, ECHR 2008; and *Emre v. Switzerland*, no. 42034/04, §§ 65-71, 22 May 2008). In *Üner*, the Court summarised those criteria as follows:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children from the marriage and, if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

40. Lastly, the Court has also consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The Court's task consists in 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 (see *Slivenko and Others*, cited above, § 113, and *Boultif*, cited above, § 47).

(b) Application of the above principles in the instant case

(i) Interference with the rights established in Article 8 of the Convention

41. The Court notes that the applicant does not deny that, in principle, medical care for her condition would be available in Pakistan. The Court further notes that a risk of further damage to an individual's mental health caused by an expulsion under such circumstances could be considered speculative. Therefore, the applicant's moral integrity would not be substantially affected to a degree as to constitute an issue under Article 8 of the Convention (*Bensaid v. the United Kingdom*, no. 44599/98, §§ 36, 48, ECHR 2001-I).

42. But the Court also emphasises that as far as the totality of social ties between the applicant and the community in which she is living is concerned, these constitute part of the concept of "private life" within the meaning of Article 8. In the present case, the applicant has resided in Germany since 1991, that is to say for more than 23 years, and she worked and raised her family there. The Court has therefore no reason to doubt that the applicant has established some ties in the respondent State. The Court reiterates that in expulsion cases not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 § 2 (see *Anam v. the United Kingdom* (dec.), no. 21783/08, 7 June 2011). Thus, the Court considers that the immigration measures which have been ordered by the domestic authorities interfere with her rights under Article 8 of the Convention.

(ii) Justification of the interference

43. The Court has no difficulty in accepting that the interference with the applicant's right to respect for her private and family life was based on

domestic law. As established by the domestic authorities, the immigration measures taken by the German authorities were based on Section 55 of the Residence Act (see paragraph 25 above).

44. The measure would also be taken in pursuit of a legitimate aim, namely in the interest of public safety. It remains for the Court to determine, therefore, whether the deportation would be “necessary in a democratic society”. Having regard to the criteria expressed by the Grand Chamber in *Üner*, cited above, the Court finds that the following criteria are of relevance in the applicant’s case: (i) the nature and seriousness of the offence committed by the applicant; (ii) the length of the applicant’s stay in the country from which she is to be expelled; (iii) the time that has elapsed since the offence was committed and the applicant’s conduct during that period; and (iv) the solidity of social, cultural and family ties with the host country and with the country of destination.

45. Having regard to the first of the relevant criteria, the Court observes the nature of the offence which gave rise to deportation proceedings against the applicant. She committed an act of manslaughter, an offence which is undoubtedly very serious. It was the first time she had committed such an act but the seriousness was evidenced by the fact that the act ultimately gave rise to the applicant’s commitment to a closed psychiatric ward for the protection of herself and others and in order to provide the necessary treatment. The applicant had committed the act in a state of mental incapacity as she had been in a state of acute psychosis at that time. While it is true that the applicant was not criminally “guilty” of the offence, there is nevertheless a continuing threat to public safety.

46. Turning to the second of the criteria listed above, namely the applicant’s length of stay in Germany, the Court observes that she arrived in Germany as an adult and has been living there for more than 20 years, almost half of her life.

47. Regarding the third criterion, namely the time that has elapsed since the offence was committed and the applicant’s conduct during that period, the Court notes that she committed the offence in 2004 and the trial took place in 2005. The expulsion order was served four years later in 2009 whilst the applicant was still undergoing treatment in the psychiatric hospital. By the time domestic court proceedings regarding the lawfulness of the expulsion order had been concluded, the applicant’s condition had improved significantly and with the help of her medication and a structured daily routine she was then considered able to control her condition.

48. The Court notes that even after the Federal Constitutional Court had rejected the applicant’s complaint in December 2011, no measure of execution of the expulsion decision was undertaken. As release from the closed psychiatric ward was granted under specific conditions, she has continued her treatment and regular intake of the necessary medication. Considering the time period elapsed, the applicant might claim an

expectation to remain in her familiar environment. However, no such expectation can be concluded from the authorities' acts, where the German authorities merely took into account, as a humanitarian aspect, the necessity of a considerable stabilisation in her mental health for her return to Pakistan. Furthermore, while the applicant's general condition has indeed improved over the course of time and could be considered stable, none of the medical reports suggest that the applicant has completely recovered from her mental illness.

49. There is no indication that the applicant reoffended after her commitment to hospital and her later release, even during periods when she was granted leave. However, the Court also notes that her behaviour was closely monitored at all times in order to prevent her from harming herself and others.

50. Finally, the Court has examined the fourth of the criteria listed above, namely the respective solidity of the applicant's ties to the host country and the destination country. As far as family ties to her son are concerned, it has to be noted that her son is now an adult. Even assuming a close relationship between the applicant and her son, there are no special circumstances that would require the constant presence of the applicant in Germany. The son would not play the role of a carer. Relations between adult family members do not enjoy protection under the specific protection of family life unless there are other elements of dependence than normal bonds of affection between family members (*Ezzouhdi v. France*, no. 47160/99, § 34, 13 February 2001; *Yilmaz v. Germany*, no. 52853/99, § 44, 17 April 2003). Further contacts with her son would be beneficial but between adults they could continue by telephone and e-mail as well as by occasional visits to Pakistan.

51. Regarding the applicant's private life, the Court will assess the applicant's further ties to Germany as host country. Before the applicant fell ill, she had been integrated into the German labour market as a cleaner. However, apart from mentioning the duration of her long stay in Germany and her employment, she submits no other evidence of any further participation in social life (see *Trabelsi v. Germany*, no. 41548/06, § 62, 13 October 2011, § 58; *Lukic v. Germany* (dec.), no. 25021/08, 20 September 2011; *Mutlag v. Germany*, no. 40601/05, § 58, 25 March 2010). The domestic courts have highlighted the applicant's apparent lack of social contact and the fact that she only gained limited German language skills during her long time in Germany.

52. Regarding ties to the country of destination, the Court noted that the applicant did not contest that her family members still resided in Pakistan and that she was still familiar with the culture and language of that country. It can be concluded that a reintegration in Pakistan would not be impossible (see *Savasci v. Germany* (dec.), no. 45971/08, § 28, 19 March 2013). Furthermore, she did not submit specific details of possible persecution on

religious grounds. The Court takes note that family members in Pakistan had stated that they would refuse to take the applicant in or visit her in a psychiatric institution. The Court therefore accepts that there appear to be no strong family ties but it maintains that it does not appear impossible that contacts with the family in Pakistan could be pursued and ultimately strengthened (see *Trabelsi*, cited above, § 63).

53. The Court also took note of the specific circumstances of the applicant's health problems and considered their consequences within the assessment of possible consequences of her return to a state without a functioning social network (see *Emre v. Switzerland*, cited above, § 83). As far as the applicant's specific state of health is concerned, the Court notes that in principle, medical treatment for her condition would be available in Pakistan. The Court is aware of problems she might face in obtaining the necessary care without the help of relatives or an outside carer. It further notes that she will receive a pension in euros which, considering its corresponding value in Pakistan, might open up the possibility of obtaining further assistance. Eventually, a balance between the interests of all parties has to be struck. The Court concludes that, even taking into consideration a rather difficult environment for the applicant in Pakistan, the possible problems would not carry enough weight to represent an overwhelming obstacle for the applicant's return to Pakistan.

54. The Court is not in doubt that the applicant's deportation to Pakistan would have a serious impact on her private life. The reestablishment of her life there would be significantly more difficult for her than for an average person. Nevertheless, the continuous danger to public safety that the applicant still represents has to be taken into account (see, *mutadis mutandis*, *Anam v. the United Kingdom* (dec.), no. 21783/08, 7 June 2011).

55. The Court further notes that all of the above factors were in principle referred to and discussed by the domestic courts. In the present case the Court considers that their assessment of the weight to be accorded to each of these factors was within their margin of appreciation.

56. 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 German authorities did not fail to strike a fair balance between the personal interests of the applicant as regards her private life on the one hand and the preservation of public safety on the other. In conclusion, the Court holds that ultimately the applicant's expulsion from Germany would be proportionate to the aims pursued and can be regarded as necessary in a democratic society. The expulsion would accordingly not give rise to a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained under Article 6 § 1 of the Convention that the domestic courts did not investigate all relevant facts and this amounted to a violation of the guarantee of a fair hearing.

58. The Court considers that the fact that the expulsion might have repercussions on the applicant's life cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention. Furthermore, orders excluding aliens do not concern the determination of a criminal charge either (see *Maaouia v. France* [GC], no. 39652/98, §§ 38-40, ECHR 2000-X). Hence, the Court considers that Article 6 § 1 is not applicable in the instant case. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention.

59. This part of the application is inadmissible under Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds*, by six votes to one, that the expulsion of the applicant to Pakistan would not give rise to a violation of Article 8 of the Convention.

Done in English, and notified in writing on 23 April 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Dissenting opinion of Judge Zupančič;
- (b) Declaration of Judge Yudkivska.

M.V.
C.W.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I am unable to agree to a finding of no violation in this case.

The facts of this case are to some extent analogous to those of the case of *A.A. v. the United Kingdom*¹, and also bring to mind that of *Aswat v. the United Kingdom*². In all three cases we are dealing with a foreigner who had committed a censurable act and who was in turn earmarked for an expulsion or extradition by the authorities.

The two above-cited cases ought to have provided sufficient reasons for deciding this case differently.

In *Aswat* the Court found that the extradition of the applicant – a paranoid schizophrenic – to the United States would amount to a violation of Article 3, precisely on account of the applicant’s vulnerability due to his mental illness. In *Aswat*, however, the applicant was to be extradited to a fairly structured, albeit prison, environment in which his mental illness was to be, according to the explicit assurances given by the United States Department of Justice, taken care of.

Nevertheless, the Court in *Aswat* took the position that a mere change of setting – from the protected environment of the Broadmoor [mental] Hospital to the facility in the United States – would be sufficiently austere and traumatic to amount to a violation of Article 3 of the Convention. It is useful, therefore, to keep in mind that the applicant in the case at hand would contrariwise be released into completely unstructured surroundings in Pakistan with total uncertainty as to the possibilities of her continued mental care in a country from which she has been absent for 23 years and where her relatives have already rejected the possibility of taking care of her.

In *A.A. v. the United Kingdom* the application was based on Article 8, as in the present case. The applicant, when 13 years old, committed a rape and was sentenced to four years in a Young Offenders’ Institution. The question was posed subsequently whether his expulsion to Nigeria, in view of this offence, was, under the Convention, acceptable, given that between the age of 13 and 29 the applicant had not re-offended. His family life consisted of relationships with his mother and his sisters. The Court, after a careful consideration of all the factors in play, and in particular the situation at the time of the proposed expulsion, maintained as follows (§ 67):

“Any other approach would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate *having regard to subsequent developments*.” (emphasis added)”

It further found (§ 68):

¹ *A.A. v. the United Kingdom*, no. 8000/08, 20 September 2011.

² *Aswat v. the United Kingdom*, no. 17299/12, 16 April 2013.

“... in a case where deportation is intended to satisfy the aim of preventing disorder or crime, *the period of time which has passed since the offence was committed and the applicant’s conduct throughout that period* are particularly significant.” (emphasis added).

In the case before us, the applicant has likewise not reoffended for a period of 11 years, that is, if it could be maintained for the sake of argument that she, as an insane person with schizophrenia and diminished intelligence, had “offended” in the first place. In the light of what the Court held in *Aswat* and in *A.A.*, to expel a schizophrenic woman who is now 53 years old, because she purportedly represents a danger “for the prevention of disorder or crime”, is clearly incompatible with the Court’s case-law.

The applicant in this case, it is said in paragraph 13 of the judgment, had committed “manslaughter” in a state of mental incapacity because at the time of the act she had been in a state of acute psychosis. A medical expert noted that she had been suffering from schizophrenia and diminished intelligence.

It is true that insanity is an excuse, not a justification, for the act. In German law, the distinction is made between the reasons that exclude the very illegality of the act itself (e.g. self-defence) on the one hand and the reasons that exclude only criminal responsibility (e.g. insanity) on the other. A similar distinction is made in the common law between the justification (for the act) and the excuse (for the actor).

The question, therefore, is whether the insane person has or has not committed a criminal act. Since the basic criminal law doctrine requires that the act be a genuine emanation of the actor’s personality, it is impossible to maintain that an actor who is of unsound mind has himself or herself committed the act. The causal link, as required for the very establishment of an insanity defence, is to the mental illness. It follows logically that the mental illness is to blame. The actor is thus blameless, as indeed Shakespeare understood:

“This presence knows, and you must needs have heard,
How I am punished with a sore distraction.
What I have done
That might your nature, honour and exception
Roughly awake, I here proclaim was madness.
Was’t Hamlet wronged Laertes? Never Hamlet.
If Hamlet from himself be ta’en away
And when he’s not himself does wrong Laertes,
Then Hamlet does it not; Hamlet denies it.
Who does it then? His madness. If’t be so,
Hamlet is of the faction that is wronged –

His madness is poor Hamlet's enemy.”³

However, if somebody commits a homicide (a neutral term) in a state of mental incapacity, i.e., if he or she is insane, that homicide cannot be legally characterised as “manslaughter” because according to the strict criminal law criteria an insane person cannot commit a criminal act. The first of the criteria from the case of *Üner v. the Netherlands* ([GC], no. 46410/99, ECHR 2006-XII) refers to the nature and seriousness of the offence committed by the applicant –, whereas in the present case the applicant had, quite simply, not committed a criminal act at all. In paragraph 54 of the present judgment the Court nevertheless refers to the “continuous danger to public safety” that the applicant, who is now 52 years old, is said to represent, and which supposedly necessitates her deportation to Pakistan.

In the cases of *A.A. v. the United Kingdom* and *Aswat v. the United Kingdom*, situations that were comparable to that of the case at hand were resolved in the opposite direction. In *A.A.* the “continued danger” of the applicant’s presence for the public, although he was a young man and therefore in principle more likely to reoffend, was not decisive for the subsequent outcome of the case; the danger was reassessed by the Court as being insignificant. However, in the case before us, to maintain that a schizophrenic and oligophrenic woman aged 52, who has been inoffensive for 11 years, because she continues to be under antipsychotic medication, now represents an objective danger to the public, is absurd.

Moreover, the applicant’s mental illness, after 23 years in Germany, will obviously be exacerbated by her forcible removal from the country in which she is a longstanding immigrant, and by being sent back to Pakistan, where even her relatives do not wish to care for her. The forced removal of a schizophrenic person with diminished intelligence, from an environment that she has been used to, is not equivalent to the removal, as in the case of *A.A.*, of a normal person in full command of his or her mental capacities.

In other words, this cannot be a question of the 250 euros she will be receiving from Germany as her pension and which would presumably be sufficient for her to be able to pay for her medication. It is quite clear, therefore, that her mental state following expulsion to Pakistan will, in view of her fragile mental health, be fatally affected.

A finding of a possible violation in this case if the applicant were to be expelled would have prevented the tragedy. Empathy would require no less.⁴

³ W. Shakespeare, *Hamlet* (The Arden Shakespeare 2006), Act 5, Scene 2 (emphasis added).

⁴ See the very persuasive dissenting opinion of Judge Pinto de Albuquerque in the recent case of *S. J. v. Belgium*, no. 70055/10, 19 March 2015.

DECLARATION OF JUDGE YUDKIVSKA

I have voted with the majority in favour of finding no violation of Article 8 in the present case; however, this was purely for the reasons set out in paragraphs 52-53 of the judgment, namely that the applicant's reintegration in Pakistan does not appear impossible and medical treatment for her condition is available there.

Nevertheless, I profoundly disagree with the application of the *Üner* test in these circumstances, since it cannot be claimed that the applicant had committed a crime in terms of criminal law. In this respect I fully share the views expressed by Judge Zupančič in his dissenting opinion.