CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 17868/03
by Charles NDANGOYA
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 22 June 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Ms L. MIJOVIĆ, *judges*
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 10 June 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Charles Ndangoya, is a Tanzanian national who was born in 1963. He was represented before the Court by Mr P. Bergquist, a lawyer practising in Tyresö. The respondent Government were represented by Ms E. Jagander, Ministry for Foreign Affairs.

A. The circumstances of the case

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

1. Application for a residence permit

The applicant entered Sweden on 28 October 1991. He applied for a permanent residence permit, based on his marriage to a Swedish national, on the following day.

In support of his application the applicant stated, *inter alia*, that he had met his wife in August 1990, at which time he had been living with his family in Arusha, Tanzania and working as a machine operator at a pharmaceutical factory. After a period of time he had moved in with her and the couple had subsequently married at the Swedish Embassy in Tanzania on 14 August 1991. His family had accepted the relationship and permission to marry had been sought from his uncle, who was living in Kenya and who had become the head of the family after the death, in 1986, of the applicant's father. His grandfather had been a "tribal chief". His father had been educated and the family had been living in town. His mother was residing in Arusha and he had eight brothers and sisters, seven of whom were living in Tanzania.

Interviewed together with the applicant, his wife stated, *inter alia*, that she had been working as a teacher in Tanzania since September 1989 and that before she met the applicant she had been acquainted with his sisters and the family. The applicant's father had apparently been a highly respected man and she had noticed that people recognised the family when their name was mentioned. All the applicant's siblings had received an education, all but one of them probably as teachers. The family also had a family business that dealt in gems. In March 1991 the applicant had left his job at the pharmaceutical factory as it caused him to experience allergic reactions. He had thereafter not had any other employment but had assisted his mother who was building a house.

On 27 November 1991 the applicant was given a temporary residence permit in Sweden which was subsequently extended until 27 May 1993. On 13 December 1991 the applicant's wife gave birth to the couple's first child.

In October 1993 the couple left for Tanzania, where they remained until the beginning of 1996. While the applicant's wife returned to Sweden in

January 1996, the applicant re-entered Sweden on 12 March 1996. On the same day the couple's second child was born. The applicant was granted a permanent residence permit in Sweden on 10 July 1996.

2. Criminal proceedings

As a result of tests performed in connection with her pregnancy, the applicant's wife in the summer of 1991 learned that she was infected with the HIV virus. A test was subsequently performed also on the applicant which showed that he too carried the infection. The applicant was in this context, and subsequently on repeated occasions, informed of his obligations as a carrier of an infectious disease to refrain from conduct that could cause any further spreading of the disease. According to the evidence subsequently given by the applicant's (then former) wife at his trial, both she and the applicant were very well aware of the precautions they were obliged to observe, both with respect to each other and with respect to other persons who did not carry the infection.

In September 1997 the applicant and his wife separated and the applicant moved out of the family home in the province of Dalarna and settled in Stockholm. The couple was divorced in November 1998.

On 30 December 1998 the District Court (*tingsrätten*) of Stockholm found the applicant guilty of making unlawful threats and of carrying knives in a public place. He was given a conditional sentence and ordered to pay a fine. No appeal was made against the judgment.

In the winter and spring of 1999 reports were made to the unit for prevention of infectious diseases at the Karolinska hospital in Stockholm that the applicant was engaging in sexual contacts without disclosing to his partners that he was HIV positive. As a result, he was in May 1999 subjected to compulsory isolation pursuant to the Infectious Diseases Act (*Smittskyddslagen*, 1988:1472). Following police investigation he was subsequently charged with having had unprotected sexual intercourse with three different women without disclosing to them that he carried the HIV virus, thereby transmitting the infection to two of them.

During the preliminary investigation, the applicant provided further information on his family background and the circumstances surrounding his life in Tanzania. He stated, *inter alia*, that he grew up with his mother and stepfather in his home village. He first went to a primary school close to the village and later attended a catholic high school in Arusha. He had six full brothers and sisters and eight siblings on his father's side.

By a judgment of 8 September 1999 the District Court found the applicant guilty of two counts of aggravated assault and one count of attempted aggravated assault and sentenced him to six years' imprisonment.

However, the District Court rejected the public prosecutor's request for the applicant to be expelled from Sweden. Stating that the applicant had been living in Sweden since 1991 and that he had held a permanent

residence permit for three years and referring to his wife's testimony that the applicant had a very good relationship with his daughters and that, due to the parents' HIV infection, their chances of having a long life together with the daughters were very limited, the court concluded that the applicant's connection to Sweden and the other circumstances of the case were such that exceptional reasons to expel him were not at hand.

Upon the applicant's and the prosecutor's appeal, the Svea Court of Appeal (*Svea hovrätt*), on 2 December 1999, upheld the applicant's conviction and sentence. Whilst not finding any evidence to show that the applicant had deliberately sought to transmit the virus to the victims, the court observed that he on repeated occasions had been informed of the special risk of transmitting the disease during unprotected sexual intercourse and that he accordingly had been well aware of that risk. Yet, the material before the court showed that he had not informed any of the three victims of his condition. With respect to two of the victims the unprotected sexual contacts had occurred on repeated occasions and in the remaining case on a single occasion when the victim was asleep and despite the fact that she at all previous times had insisted that the applicant should use a condom throughout the intercourse. Considering that the applicant had acted with exceptional ruthlessness and indifference towards his victims, the court concluded that that he would not have refrained from having sexual intercourse with them even if he had known that the disease would be transmitted. The applicant had accordingly shown the requisite *mens rea* under the applicable principles of Swedish criminal law to be held criminally liable for having committed the crimes with intent.

The Court of Appeal further ordered the applicant's expulsion from Sweden. Having found that the crimes for which he had been convicted justified a seven-year prison sentence, the court had regard to the inconvenience caused by his expulsion and consequently fixed the sentence at six years' imprisonment. In regard to the expulsion, the court made, *inter alia*, the following observations. The applicant's only connection to Sweden was the fact that his former wife and their two children were residing in the country. He had no other link to the country; he had not learned the Swedish language or established himself on the Swedish labour market and did not appear to have undergone any continuous prescribed treatment for his HIV infection in Sweden. In regard to the applicant's contacts with his children, evidence given by his former wife revealed that he had been seeing them about four to five times per year and that he had otherwise only had contact with them by telephone. The former wife had maintained, particularly out of concern for the children, certain contacts with the applicant's relatives in Tanzania. There were thus contacts by letter and telephone between the children and the relatives. The court further found that the applicant had not been continuously residing in Sweden for such a period of time that exceptional reasons were required for his expulsion. However, even if he

were to be considered as having resided in Sweden for such a continuous period, the court considered that, in view of the very serious nature of the offences and the applicant's unsettled conditions in the country, there were sufficiently strong reasons to expel him from Sweden with a lifelong ban on his return. In this context, the court noted that the children's established contact with relatives in Tanzania would probably mean that the expulsion would not cause the contact between the applicant and his children to be severed. The court also stated that there was probably a significant risk that the applicant would relapse into the same type of criminal behaviour and that this factor strongly militated in favour of expulsion.

The applicant appealed to the Supreme Court (*Högsta domstolen*). He submitted a statement of 5 January 2000 by Mr Sören Strid, a psychologist at the Child and Youth Psychiatric Clinic (*Barn- och ungdomspsykiatriska mottagningen*) in Karlstad, according to which the applicant's former wife and their two children had visited the clinic on four occasions during the autumn of 1999. Mr Strid stated that the children had a strong emotional relationship to their father and that their need of continuous contact with him could not realistically be maintained should he be expelled to Tanzania.

By a decision of 1 February 2000 the Supreme Court refused the applicant leave to appeal against the Court of Appeal's judgment.

3. Requests for the expulsion order to be revoked

During the applicant's time in prison, five petitions have been made to the Government for a revocation of the expulsion order. They were rejected by decisions of 29 June 2000, 26 July 2001, 7 November 2002 (two petitions) and 12 June 2003 respectively.

In support of his requests for a revocation, the applicant submitted several statements. In a medical certificate of 27 November 2001, Dr Stefan Lindbäck, chief physician at the HIV unit at Huddinge hospital and the physician responsible for the applicant's treatment during the preceding two years, stated that the applicant had undergone anti-retroviral treatment, albeit irregularly, between the summer of 1996 and the end of 1998, and had thereafter not been under treatment until October 1999 when – viral levels in his blood being very high and his immune system being severely weakened and "at the level where AIDS complications usually appear" – he had resumed his medication. The resumed treatment had been successful to the point where the HIV levels in the applicant's blood were no longer detectable. According to Dr Lindbäck, his chances of receiving life-sustaining HIV treatment in Tanzania were very slim. Moreover, experience showed that the interruption of treatment of a patient like the applicant would lead to a relatively rapid deterioration of the immune system leading to the development of AIDS within 1 to 2 years and death within 3 to 4 years. In a further certificate of 2 June 2003 Dr Lindbäck reiterated his previous statements and added that the applicant's understanding and

acceptance of his disease had improved and that the risk of his relapsing into his previous behaviour had to be considered as extremely small.

In a statement, dated 18 December 2001, Ms Christina Persson, a counsellor (*kurator*) at the HIV ward at the same hospital, stated that she had met the applicant regularly since August 1997, during which time he had shown an increased understanding of his illness, his previous actions and his prevailing situation. Ms Persson concluded that there was no great risk that the applicant would relapse into his previous hazardous behaviour, as the root causes of that behaviour – fear that his illness would become known to other people, depression and alcohol abuse – had been removed.

In submissions of 13 August 2002 Mr Andreas Berglöf, ombudsman at the Swedish Association for HIV-positive People (*Riksförbundet för hivpositiva*; RFHP), stated that the applicant had expressed anxieties about his impending expulsion, partly because of the lack of adequate treatment in Tanzania and partly because of the risk of his contact with his children being severed. The applicant had also mentioned that one of his brothers had recently died from AIDS and that a sister was seriously ill due to an HIV infection.

In a report of 4 May 2003 the National Prisons and Probation Authority (*Kriminalvården*) stated that, after initially having been in a bad state, both mentally and physically, at the prison where he was serving his sentence, the applicant's situation had improved considerably. He was open and understanding about his illness and received continuous medical treatment. He also received regular visits once a month from his children, accompanied by his former wife, a contact which was very important both to him and the children.

In submissions of 21, 26 and 28 May 2003, respectively, a friend of the applicant's former wife, her psychiatric counsellor and her brother attested to the close relationship between the applicant and his children and the fact that they had met regularly at the prison.

In a letter of 31 May 2003 the applicant's former wife described her and the children's relationship to the applicant. She explained that since it had been easier for her to integrate on the labour market, the applicant had stayed at home with the children. Even after the separation and the applicant's move to Stockholm, they had remained in close contact, seeing each other as often as their financial situation permitted. They had ensured that the children spoke Swahili; the older child spoke Swahili with the applicant whereas the younger child preferred Swedish. During the applicant's serving of his sentence, they had visited him as often as possible, altogether on 47 occasions. She further claimed that she could not afford regular visits to the applicant if he were to be expelled to Tanzania.

In his latest application for a revocation of the expulsion order, submitted to the Government during the spring of 2003, the applicant maintained that, as from the autumn of 2001, he had a new relationship with a Swedish

woman and that there was no risk that he upon release would relapse into the same type of criminal behaviour. The new relationship had apparently been established in the autumn of 2001 through the exchange of letters. The couple met for the first time in the prison in February 2002 and the woman had subsequently visited the applicant every fortnight. She had a metabolic disturbance and was consequently considerably overweight.

On 13 June 2003, following the Court's indication, under Rule 39 of the Rules of Court, that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to expel the applicant to Tanzania until further notice, the Minister of Justice decided to stay the enforcement of the expulsion order. The Minister further decided that the applicant upon his release from prison on the following day was to be taken into custody pursuant to chapter 6, sections 2 and 9 of the Aliens Act (*Utlänningslagen*, 1989:529) on the ground that there was reason to believe that he would abscond.

On 14 June 2003 the applicant was released on probation. He remains in detention.

In a report to the Government of 11 July 2003 the Swedish Embassy in Tanzania, after consulting with medical doctors with experience of HIV/AIDS treatment at the Nordic clinic in Dar es Salaam, the head of the Tanzania Occupational Health Service in Dar es Salaam and three of the latter's colleagues from other parts of the country, provided the following information. Both HIV treatment, in the form of anti-retroviral therapy, and medical care for persons suffering from an HIV infection or developed AIDS were available in Tanzania for those who could afford it. Anti-retroviral therapy and medical attention could be obtained in Dar es Salaam and probably also in Arusha in the north of the country. The physicians with whom the Embassy had been in contact could not with certainty say that anti-retroviral therapy could be obtained in other parts of the country. So-called "CD4-count", a test to establish the number of certain white blood cells, was available at two hospitals in Dar es Salaam and in all probability also at a medical centre in Moshi in the north. Various types of antibiotics were available throughout Tanzania, also the most modern types suitable for persons suffering from allergy to penicillin. The cost of anti-retroviral therapy lay between 50,000 and 100,000 Tanzanian shillings per month, to be compared with the minimum wage of a Government employee which was 45,000 shillings (1000 Tanzanian shillings approximately corresponded to 0.87 euros). The cost of antibiotics and the treatment of different types of opportunistic diseases varied and was difficult to estimate but lay above 40,000 shillings per month. The cost of "CD4-count" in Dar es Salaam was 40,000 shillings.

B. Relevant domestic law

Pursuant to chapter 1, section 8 of the Penal Code (*Brottsbalken*), a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a special consequence.

Provisions on expulsion on this ground are laid down in the Aliens Act. According to chapter 4, section 7 of the Act, an alien may not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are satisfied. Firstly, he must be convicted of a crime that is punishable by imprisonment. Secondly, he may only be expelled if he is in fact sentenced to a more severe punishment than a fine and if (1) it may be assumed, on account of the nature of the crime and other circumstances, that he will continue his criminal activities in Sweden or (2) the offence, in view of the damage, danger or violation involved for private or public interests, is so serious that he ought not to be allowed to remain in the country.

Furthermore, under chapter 4, section 10 of the Act, when considering whether or not an alien should be expelled, the court shall take into account his links to Swedish society. As regards aliens who are considered to be refugees, special rules apply. Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to chapter 8, section 1 of the Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment. Further, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

COMPLAINTS

1. The applicant complained under Articles 2 and 3 of the Convention that his expulsion to Tanzania, due to the difficulty of obtaining medical treatment in the country, would accelerate the course of his HIV disease and considerably reduce his life expectancy.

2. He also complained under Article 8 of the Convention that the expulsion would interfere with his contacts with his children. Moreover, his current partner would not be able to settle in Tanzania for medical reasons.

THE LAW

1. The applicant complained that his expulsion to Tanzania would be contrary to Articles 2 and 3 of the Convention. These provisions read as follows:

> Article 2:
>
> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."
>
> Article 3:
>
> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The respondent Government submitted that the application should be declared inadmissible as being manifestly ill-founded. They stated that, according to the evidence relied on by the applicant before the Court, his condition was such that if his treatment would continue, and barring any rare or unknown side effects, he could be expected to enjoy a normal life span. There was accordingly no indication in the medical evidence that he had reached the stage of AIDS or that he suffered from any HIV-related illness.

While recognising the seriousness of the applicant's medical condition and his continued need of treatment, the Government further maintained, based on the information obtained through the Swedish Embassy in Tanzania, that the relevant medical treatment for persons suffering from HIV infection could be obtained in that country. Under these conditions, the fact that the applicant's circumstances in Tanzania might be less favourable than those enjoyed by him in Sweden could not be decisive from the point of view of Article 3 of the Convention. In this context, the Government pointed out that, although the applicant at that time was well aware of his HIV infection, he had chosen to reside during two and a half years between October 1993 and March 1996 in his country of origin, the same country to which he was now allegedly unable to return.

Moreover, noting that the information provided by the applicant to the Swedish authorities concerning his family situation in Tanzania was different from the submissions he had made to the Court, the Government submitted that the information supplied to the Swedish authorities offered strong support for the conclusion that he upon return to his country of origin would have the possibility of receiving comfort and support from a network of close relatives. Indeed, it would appear from this information that the applicant's family on his father's side enjoyed a situation of relative prosperity, indicating its potential ability to contribute economically to his medical treatment. The Government emphasised that the applicant upon return would be at liberty to take up residence in any part of Tanzania that he deemed appropriate. For this reason the evaluation of his circumstances upon return should not be allowed to be predetermined by his bare assertion that he intended to settle in his home village in the Serengeti area. In this context, they observed that the applicant for a period of five years prior to his departure to Sweden had resided in the town of Arusha.

The applicant claimed that he would not be able to continue his treatment in Tanzania and that, with reference to the medical opinion of Dr Lindbäck, his expulsion to that country would consequently lead to the development of AIDS within 1 to 2 years and death within 3 to 4 years. Having regard to the information supplied by the Swedish Embassy in Tanzania, he found it obvious that he would not be able to afford the required treatment and he also claimed that that information did not convincingly show that the medicine he needed was at all available in Tanzania. In any event, it was clear that HIV treatment was very difficult to come by in Serengeti and in the countryside. Allegedly, the Swedish State had a special responsibility to see to it that the applicant would get treatment in Tanzania equivalent to the one he had undergone in Sweden as the discontinuation of treatment was more hazardous than the lack of treatment altogether.

As regards his situation in Tanzania, the applicant stated that he was the only child of a lower colonial official in a relationship with a woman whom his father intended to take as a "second wife". His mother subsequently had seven children by a later marriage and he also had eight brothers and sisters on his father's side. He had been raised by his maternal grandmother and he had, after her death, lived a nomadic life among the Masai, to whom he ethnically belonged. He had never lived with his brothers and sisters. Except for two children who had died in HIV/AIDS, his siblings on his mother's side were living according to the Masai tradition and were spread throughout the northern parts of Tanzania. One of the siblings on his father's side was living in Kenya and the others were spread throughout the country. None of the siblings lived in the applicant's home village and his attempts during his time in prison to re-establish contact with relatives in Tanzania had been unsuccessful. In any event, the applicant submitted that

his family situation was of lesser importance as even the support of many relatives would not prevent his dying of AIDS in Tanzania.

The Court notes firstly that the complaint raised by the applicant under Article 2 is indissociable from the substance of his complaint under Article 3 in respect of the consequences of a deportation for his life, health and welfare (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 795, § 59). These complaints should therefore be examined in unison, and the following considerations apply, in so far as relevant, also to the complaint under Article 2.

The Court reiterates at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies.

It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

While it is true that Article 3 has been more commonly applied by the Court in contexts where the risk to the individual of being subjected to ill-treatment emanates from intentionally inflicted acts by public authorities or non-State bodies in the receiving country, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the risk that he runs of inhuman or degrading treatment in the receiving country is due to factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances of the case to rigorous scrutiny, especially the applicant's personal situation in the expelling State (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, §§ 32 and 34, ECHR 2001-I).

According to established case-law aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances an implementation of a decision to remove an

alien may, owing to compelling humanitarian considerations, result in a violation of Article 3 (see *D. v. the United Kingdom*, cited above, p. 794, § 54).

In the case of D. v. the United Kingdom the Court found that the applicant's deportation to St. Kitts would violate Article 3, taking into account his medical condition. The Court noted that the applicant was in the advanced stages of AIDS. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant's death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant's fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (see *D. v. the United Kingdom*, cited above, pp. 793–794, §§ 51–54).

The Court has therefore examined whether there is a real risk that the applicant's expulsion to Tanzania would be contrary to the standards of Articles 2 and 3 of the Convention in view of his present medical condition. In so doing, the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant's state of health (see *S.C.C. v. Sweden* (dec.), no. 46553/99, 15 February 2000, unreported).

The Court notes that, in a medical opinion of 2 June 2003, Dr Lindbäck, the physician treating the applicant, reiterated his previous statement of 27 November 2001 that the treatment was successful. In the previous statement he had pointed out that the HIV levels in the applicant's blood were no longer detectable. There is no indication in the medical evidence relied on by the applicant that he has reached the stage of AIDS or that he suffers from any HIV-related illness.

While acknowledging Dr Lindbäck's estimation that the applicant would develop AIDS within 1 to 2 years if treatment is discontinued, the Court notes that adequate treatment is available in Tanzania, albeit at a considerable cost. It is true that treatment might be difficult to come by in the countryside where the applicant apparently would prefer to live upon return, but the Court notes that the applicant is in principle at liberty to settle at a place where medical treatment is available. In this connection, it should be stressed that the applicant stated to the Swedish authorities that, before coming to Sweden, he had lived at least for some time in Arusha. It appears that treatment could probably be obtained in that town. The Court further notes that the applicant resided in Tanzania between October 1993 and March 1996, at a time when he was already carrying the HIV infection.

Moreover, although the applicant has given somewhat contradictory information about his family situation in Tanzania to the Swedish

authorities and to the Court, it is clear that he has many siblings in the country. Whereas he claimed to have made unsuccessful attempts during the serving of his sentence to re-establish contact with relatives in Tanzania, his former wife gave evidence before the Court of Appeal that she had maintained certain contacts with those relatives and that there were thus contacts by letter and telephone between the applicant's children and the relatives. It therefore appears that the family links have not been completely severed and that, consequently, the applicant would not be unable to seek the support of his relatives upon return to Tanzania.

In these circumstances the Court considers that, unlike the situation in the above-cited case of *D. v. the United Kingdom* or in the case of *B.B. v. France* (no. 39030/96, Commission's report of 9 March 1998, subsequently struck out by the Court by judgment of 7 September 1998, *Reports* 1998-VI, p. 2595), it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Tanzania would be less favourable than those he enjoys in Sweden cannot be regarded as decisive from the point of view of Articles 2 and 3 of the Convention.

Accordingly, although the Court accepts the seriousness of the applicant's medical condition, it does not find that the circumstances of his situation are of such an exceptional nature that his expulsion would amount to treatment proscribed by Articles 2 and 3 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant also complained that the expulsion would violate his right to respect for his family life. He relied on Article 8 of the Convention, which provides the following:

> "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."

Having regard to the fact that the applicant was a father of two minor children residing in Sweden with whom he had remained in contact after his divorce, the Government did not dispute that the enforcement of the applicant's expulsion would amount to an interference with his right to respect for his family life. They submitted, however, that that interference was "in accordance with the law", pursued legitimate aims and was "necessary in a democratic society" to achieve the aims concerned.

As regards the latter condition, the Government stated, *inter alia*, the following. The applicant had on two separate occasions been convicted of criminal offences of some gravity. Most importantly, by repeatedly and knowingly engaging in unprotected sexual intercourse without disclosing that he was HIV positive, he had perpetrated criminal offences of the utmost gravity, causing irreparable and potentially life-threatening harm to two of his victims. The Court of Appeal had found that there were sufficient grounds for ordering the applicant's expulsion partly due to its assessment that there was a significant risk that he would relapse into the same type of criminal behaviour. Later evaluations that the applicant's propensity to re-offend was small had to be seen against the background that he had been in different types of detention since May 1999 and that, accordingly, they all suffered from an inherent difficulty to accurately estimate his behaviour when exposed to conditions "on the outside". Furthermore, although the applicant's expulsion would negatively affect his enjoyment of the relationship with his children, the Government maintained that, in assessing whether the expulsion constituted a proportionate interference, it had to be taken into account that the applicant would not be prevented from maintaining contact with his children via letters, telephone and similar means. Also, the applicant's former wife, as well as the older child, had previously lived in Tanzania and had remained in contact with his family there, thus facilitating future visits to that country. In any event, the Government was of the opinion that the applicant had committed crimes of such severity that his expulsion was justified notwithstanding its impact on his family life. In regard to the applicant's new relationship with a Swedish woman, the Government submitted that, if this relationship were to be taken into account under Article 8 of the Convention, it could not be considered a weighty element when balancing the interests at issue, as it had been established at a time when the order for the applicant's expulsion had already acquired legal force. Moreover, no medical evidence had been presented to show that they would be prevented from continuing their relationship in Tanzania.

The applicant claimed that the order for his expulsion had not been decided "in accordance with the law". While acknowledging that the Court of Appeal was competent under Swedish law to order the expulsion, he submitted that the court had not made any examination whether the expulsion was legitimate or necessary under Article 8 of the Convention. Moreover, as the crime of assault had originally not intended to cover cases of transmission of the HIV virus, the applicant had allegedly not been able to understand the nature of the accusation against him and to properly prepare his defence. As his rights under Article 6 of the Convention therefore had not been respected, the expulsion order could not be considered to have been "in accordance with the law" under Article 8.

As regards the criterion "necessary in a democratic society", the applicant submitted that a fair balance had not been struck between the interests involved. He contended that he had committed his crimes after his divorce when he was depressed and abused alcohol and did not receive the necessary support of a counsellor. He had changed during his time in prison and there was no longer any risk that he would relapse into criminal behaviour. This had been shown by evidence given by several professionals trained to assess the risk of future criminal behaviour and of conduct that could cause the spreading of infections. In any event, this element had to be balanced against the great impact which the applicant's expulsion would have on his relationship with his children. The children's development would be impaired if they could not meet their father. Letters and telephone calls would not be sufficient. The applicant pointed out that he had had the main responsibility for the children until his divorce from his former wife. Furthermore, the possibility of their visiting him in Tanzania was very slim, having regard to the fact that they were attending school and that the family's financial situation did not allow for a sufficient number of contacts. The fact that his former wife was carrying the HIV virus also had to be taken into account in this respect. With respect to his new relationship with a Swedish woman, the applicant maintained that it was relevant for the assessment under Article 8 of the Convention and that it had to be taken into account that she could not settle abroad due to the fact that she had a metabolic disorder and was in need of certain medicaments and regular medical checks. Finally, the applicant claimed that regard had to be had to his illness under Article 8 as his life expectancy would be shortened in case of an expulsion to such an extent that he would probably die before his children reached the age of majority.

The Court notes that it was common ground between the parties that the expulsion order against the applicant constituted an interference with the applicant's right to respect for his family life, as guaranteed by Article 8 § 1 of the Convention. The Court further finds that the interference was in accordance with Swedish law, in particular chapter 1, section 8 of the Penal Code in conjunction with the relevant provisions of the Aliens Act, and pursued legitimate aims, namely public safety and the prevention of disorder or crime, within the meaning of Article 8 § 2.

It remains to be determined whether the interference was "necessary in a democratic society".

The Court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8 § 1 of the Convention (see, among other authorities, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 18, § 36).

It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens 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 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*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Boultif v. Switzerland*, judgment of 2 November 2001, *Reports* 2001-IX, p. 130, § 46; and *Jakupovic v. Austria*, no. 36757/97, § 25, 6 February 2003, unreported).

Accordingly, the Court's task consists in ascertaining whether the expulsion order in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the interests of public safety and the prevention of disorder and crime, on the other.

The Court notes that the applicant arrived in Sweden in October 1991 and that – save for the period between October 1993 and March 1996, when he resided in Tanzania – he has lived there since. However, as from May 1999, he has been in different types of detention, and his subsequent stay in Sweden has been due to his serving a prison sentence and, later on, on account of his awaiting the enforcement of the expulsion order against him.

The applicant's connection to Sweden consists of his two children living there, who are both Swedish citizens, and his new relationship with a Swedish woman. It does not appear that he has established any other link to the country.

With respect to the applicant's new relationship, the Court reiterates that it commenced at a time when the applicant's expulsion had already been finally ordered. Consequently, they could not reasonably have expected that they would be able to continue that relationship in Sweden. Furthermore, no medical evidence has been presented which would show that the applicant's partner would be unable to follow him to Tanzania. In the Court's view, this situation cannot therefore be decisive.

However, the Court acknowledges that the applicant's expulsion would greatly affect his relationship with his children. The applicant's former wife, the mother of the children, cannot be expected to settle in Tanzania and it might be difficult, economically and otherwise, for the children to make frequent visits to Tanzania. Nevertheless, the Court observes that the applicant met his former wife in Tanzania, where she was working at the time, and that the couple lived together for some time and married in that country. Moreover, the older child lived in Tanzania between October 1993 and January 1996 and both children apparently speak Swahili. The applicant's former wife and the children have also maintained contact with

relatives of the applicant in Tanzania. Thus, to the extent their financial situation would allow it, there does not seem to be any obstacle for the children, accompanied by their mother, to pay the applicant visits in that country. It appears clear, however, that regular contact between the applicant and his children would have to be limited to letters and telephone calls and there is thus no doubt that his expulsion would have serious implications for his family life.

These implications will have to be balanced against the crimes of which the applicant has been convicted. In this respect, the Court notes that the applicant has been convicted on two occasions, on 30 December 1998 of making unlawful threats and of carrying knives in a public place and by the Court of Appeal's judgment of 2 December 1999 of two counts of aggravated assault and one count of attempted aggravated assault. The second conviction is of the utmost gravity, involving unprotected sexual contacts with three women without disclosing to them that he carried the HIV virus. As a consequence of the applicant's conduct, two of the victims have been infected with the virus. In its judgment, the Court of Appeal considered that the applicant had acted with exceptional ruthlessness and indifference towards his victims and concluded that that he would not have refrained from having sexual intercourse with them even if he had known that the disease would be transmitted. While the court considered that the crimes justified a seven-year prison sentence, it took account of the inconvenience caused by the expulsion order and sentenced the applicant to six years' imprisonment.

Further account will have to be taken of the risk that the applicant, upon release from detention, would relapse into the same type of criminal behaviour and transmit the HIV virus to further victims. The Court of Appeal found that there was a significant risk of such behaviour whereas the physician treating the applicant, Dr Lindbäck, later concluded that that risk was extremely small. Other evidence presented by the applicant has attested to the improvement of the applicant's situation and his increased understanding of his illness and his previous actions. Although, as adduced by the applicant, the later evaluations were made by professionals trained to assess the risk in question, it is true, as submitted by the Government, that they have all been made while the applicant was in detention. The Court therefore finds it difficult to assess whether there would be a risk, upon the applicant's release, of his engaging in further conduct that could cause the spreading of his HIV infection.

However, even assuming that the applicant would refrain from further hazardous behaviour, the Court is of the opinion that the crimes of which he was convicted by the Court of Appeal's judgment of 2 December 1999 are of such a serious nature that the order for his expulsion must be considered to have been justified and that, notwithstanding the resulting implications for his relationship with his children, it cannot be regarded as

disproportionate to the legitimate aim of preventing disorder and crime. In other words, the expulsion order struck a fair balance between the interests involved and the applicant's expulsion to Tanzania, if effected, may reasonably be considered "necessary" within the meaning of Article 8 § 2 of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President