

## **ECtHR - I.M. v. Switzerland, 9 April 2019, Application No. 23887/16**

**Country of Applicant:**

Kosovo

**Date of Decision:**

09-04-2019

**Citation:**

App No. 23887/16

**Court Name:**

European Court of Human Rights (Third Section)

**Keywords:**[Assessment of facts and circumstances](#) [1][Family unity \(right to\)](#) [2][Personal circumstances of applicant](#) [3][Return](#) [4]**Relevant Legislative Provisions:**Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5]**Headnote:**

It is necessary to make a proportionality assessment with consideration of both the gravity of the crime committed by the applicant and the interests of society, and the applicant's individual rights, particularly his right to private and family life under Article 8.

The Federal Administrative Court failed to fully assess the impact that the measure of removal would have on the applicant. The evolution of the applicant's conduct since the occurrence of the crime, the applicant's deteriorating medical condition, and his social, cultural and family ties in the host country were not sufficiently examined in the decision. The failure to assess the proportionality of the removal order and amounted to a violation of Article 8 of the Convention.

**Facts:**

After arriving in Switzerland 1993, the applicant made an application for asylum, which was subsequently rejected by the Federal Office for Migration. However, he was granted provisional admission in the State. The Federal Council lifted this provisional admission and the applicant was ordered to leave by 15 January 1999. Meanwhile, the applicant's ex-wife, M.M., arrived in Switzerland in August 1998 with their three children. Their asylum applications were accepted. In January 1999, the applicant married a Swiss national and received a full residence permit.

On 3 December 2003, the Criminal Court of the Canton of Basel-Stadt sentenced the applicant to 3 years prison and a 12 year suspended expulsion with a 5 year probation period for sexual coercion and rape. The Court of Appeal upheld the offence of rape and the sentencing remained the same. In February 2006, the M.M. gave birth to twins. At the time, the father was unknown. The applicant divorced his Swiss wife in May 2006.

In August 2006, the Migration Office rejected an application to extend I.M.'s residence permit on medical grounds. It was decided that the applicant's health was not such that he was prevented from returning to Kosovo and that the measures were proportionate in respect of Article 8 ECHR. In January 2010, the removal order was extended to all Swiss territory. The applicant appealed this decision to the Federal Administrative Court. In February 2013, the Federal Administrative Court decided to suspend proceedings relating to the dismissal of the applicant.

In July 2013, he was awarded a full disability pension. In October 2014, the Federal Administrative Court resumed proceedings on the decision to remove the applicant. All appeals were rejected, and in October 2015, the Federal Administrative Court held that the applicant's convictions were such that he was deemed to pose a serious endangerment to public order and security, and that his general state of health was not such that he couldn't return to Kosovo where he would have access to adequate health care.

In January 2016, he made a subsequent application for appeal in which he claimed that he was the father of his ex-wife's twins. The application was dismissed on the grounds that such a claim should have been presented much earlier in proceedings. The applicant submitted medical certificates in support of subsequent applications showing that he was suffering from, *inter alia*, depression and suicidal ideation and generalised pain disorder. He claimed to be entirely dependent on his family for care and would risk his condition deteriorating in the event of his expulsion.

In February 2019, I.M. was obliged to leave Switzerland.

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### **Decision & Reasoning:**

The Court first held that the applicant had exhausted all domestic remedies and that the complaint under Article 8 ECHR was admissible. It noted that while the applicant had not indicated that he was the father of M.M.'s twins until 2015, this fact could not be completely disregarded in the aim of ensuring practical and effective protection of Article 8 rights.

Indeed, as a result of the length of the applicant's stay in Switzerland, the Court observed that the decision to extend his removal order to all Swiss territory constitutes an interference with private life. In respect of 'family life', the Court noted that there must be an element of dependency between a parent and their adult children. Such a relationship was deemed to be present in this case.

It then considered that an interference with the right to respect for private and family life must be necessary in a democratic society and proportionate to the aim pursued. In this case, the

assessment of the applicant's Article 8 rights in relation to his removal order should have considered, *inter alia*: the nature and gravity of the offence committed; the length of stay in Switzerland; the length of time elapsed since the offence; the applicant's family circumstances; the interests and welfare of the applicant's children; the strength of social, cultural and family ties in Switzerland and Kosovo; and any circumstances particular to the case, such as state of health.

The Court added that domestic courts must give sufficiently detailed reasons for decisions and must demonstrate convincingly that the interference was proportionate and corresponding to a 'pressing social need'. On this assessment, the Court observed that the Federal Administrative Court had considered the gravity of the offence committed, but had offered a limited analysis in respect of Article 8 ECHR. For example, the Federal Administrative Court had not considered the changed conduct of the applicant 12 years after the offence, the deteriorating state of his health, nor the strength of social, cultural and family ties established. The Court concluded that the examination by the domestic court was superficial and had failed to demonstrate that the removal order was proportionate to the legitimate aim pursued and necessary in a democratic society.

It was not necessary to consider the complaints in relation to Article 3.

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**Outcome:**

Violation of Article 8 in the event of return to Kosovo.

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**Subsequent Proceedings :**

The judgment became final on 9 July 2019.

**Case Law Cited:**

ECtHR - Demopoulos and Others v. Turkey (nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04)

ECtHR - Ndidi v. United Kingdom, no. 41215/14, 14 September 2017

ECtHR - Udeh v. Switzerland, no12020/09

ECtHR - Kissiwa Koffi v. Switzerland, no 38005/07

ECtHR - Hussein v. Sweden, Application No. 10611/09

ECtHR - Vasquez v. Switzerland, no. 1785/08

ECtHR - Hasanbasic v. Switzerland, no 52166/09

ECtHR - Emre v. Switzerland (no.1) (Application no. 42034/04)

[ECtHR - Paposhvili v. Belgium, Application no. 41738/10, 13 December 2016](#) [6]

ECtHR - Gablshvili v. Russia, application no. 39428/12, § 37, 26 June 2014

ECtHR - Udeh v. Switzerland, no12020/09

ECtHR - Raza v Bulgaria, Application no. 31465/08, 11 February 2010

ECtHR - Beldjoudi v France, Application No. 12083/86

[ECtHR - K.M. v. Switzerland, Application no. 6009/10, 2 June 2015](#) [7]

ECtHR - Hamesevic v. Denmark, no. 25748/15, 16 May 2017

[Saber and Boughassal v. Spain, Applications 76550/13 and 45938/14, 18 December 2018](#) [8]

ECtHR ? Vuckovic and others v Serbia, Application No. 17153/11

[ECtHR ? El Ghatet v. Switzerland, Application No. 56971/10, 8 November 2016](#) [9]

ECtHR - X v Latvia, Application No. 27853/09

ECtHR - Shala v. Switzerland, no 52873/09

ECtHR - Üner v. the Netherlands [GC], Application No. 46410/99

ECtHR - Boultif v Switzerland, Application No. 54273/00

ECtHR - Boujlifa v. France, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI

ECtHR - Mehemi v. France, no. 53470/99

[ECtHR - Abdulaziz, Cabales and Balkandali v The United Kingdom, Application nos. 9214/80; 9473/81 and 9474/81, 28 May 1985](#) [10]

ECtHR - Nada v. Switzerland [GC], Application No. 10593/08

ECtHR - Slivenko v. Latvia [GC], Application No. 48321/99

ECtHR - Maslov v. Austria ([GC], no 1638/03

ECtHR - Neulinger and Shuruk v. Switzerland [GC], Application No. 41615/07

ECtHR - Ukaj v. Switzerland, no 32493/08

ECtHR - Dalia v. France, Application No. 26102/95

ECtHR - Shala v. Switzerland, no 52873/09

**Attachment(s):**



[AFFAIRE I.M. c. SUISSE.pdf](#)[11]

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**Authentic Language:**

English

**State Party:**

Switzerland

**National / Other Legislative Provisions:**

Constitution of the Swiss Federation

18 April 1999  
Article 121  
article 13  
Federal Law of 26 March 1931  
Articles 7  
10  
12  
14(a)(6)  
Federal Aliens Act  
16 December 2005  
Article 96.  
Regulations implementing the Federal Act on the Residence and Establishment of Foreigners  
1 March 1949  
Article 17

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**Links:**

- [1] [https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A10](https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A10)
- [2] [https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A196](https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A196)
- [3] [https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A56](https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A56)
- [4] [https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field\\_keywords%3A2490](https://m.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2490)
- [5] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [6] <https://m.asylumlawdatabase.eu/en/content/ecthr-paposhvili-v-belgium-application-no-417381013-december-2016>
- [7] <https://m.asylumlawdatabase.eu/en/content/ecthr-km-v-switzerland-application-no-600910-2-june-2015>
- [8] <https://m.asylumlawdatabase.eu/en/content/saber-and-boughassal-v-spain-applications-7655013-and-4593814-18-december-2018>
- [9] <https://m.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-el-ghatet-v-switzerland-application-no-5697110-8-november-2016>
- [10] <https://m.asylumlawdatabase.eu/en/content/ecthr-abdulaziz-cabales-and-balkandali-v-united-kingdom-application-nos-921480-947381-and-0>
- [11] <https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/AFFAIRE%20I.M.%20c.%20SUISSE.pdf>