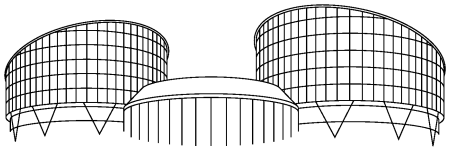

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF EJIMSON v. GERMANY

(Application no. 58681/12)

JUDGMENT

STRASBOURG

1 March 2018

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 Ejimson v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 6 February 2018,

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

PROCEDURE

1. The case originated in an application (no. 58681/12) 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 Nigerian national, Mr Tony Chuks Ejimson ("the applicant"), on 6 September 2012.

2. The applicant, who had been granted legal aid, was represented by Mr I.-J. Tegebauer, a lawyer practising in Trier. The German Government ("the Government") were represented by two of their Agents, Ms K. Behr and Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that the decision to refuse him a residence permit infringed his right to family life with his daughter, as guaranteed by Article 8 of the Convention.

4. On 12 May 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in Nigeria in 1975 and lives in Zölling.

A. Background to the case

6. In Nigeria, the applicant completed eleven years of schooling and subsequently held various jobs in Lagos. After leaving the country, he lived in Spain from 1994 to 1997, living at first on social security and later working as a day-labourer on several farms. In 1997 he arrived in Germany, where he applied for asylum under a different identity. His application was finally rejected in July 1998. He left Germany for Italy with a German national with whom he had started a relationship. In January 1999 he moved on to Spain, where he worked as a cook and waiter in various restaurants.

7. In October 2000 the applicant re-entered Germany. On 21 October 2000 his daughter, from his above-mentioned relationship, was born. The applicant's daughter is a German national.

8. In 2000 and 2001 the applicant and the child's mother lived together. From the outset they had, and continue to have, joint custody. On 11 December 2000, the Authority of the City of Munich issued the applicant a residence permit based on family ties, valid until 1 December 2001.

9. On 18 July 2001 the applicant was arrested on suspicion of having committed an offence under the Narcotics Act (*Betäubungsmittelgesetz*).

10. On 28 May 2002 the Munich Regional Court sentenced him to eight years' imprisonment for drug trafficking on a large scale. It observed that the applicant had recruited and instructed the child's mother as a drugs runner for two separate consignments of cocaine from South America to Europe in summer 1998 and in late 1999/early 2000. It considered, in favour of the applicant, that this was his first criminal conviction, that the first delivery had failed (the drugs did not actually enter the distribution system), and that the applicant had been detained on remand since July 2001. The Regional Court held against the applicant that he had used as drugs runners two young women who were adolescents at the time the offences were committed, and who ran the risk of a lengthy prison sentence in South America; that he had exploited the naivety of his daughter's mother; that a large amount of cocaine was meant to be smuggled in the first case and that four kilograms of cocaine were smuggled into Europe in the second case; and that the entire undertaking had been handled very professionally. In addition, the Regional Court considered that a conviction for a third case of drug smuggling could not be envisaged for the sole reason that the precise amount of cocaine transported in a suitcase from Peru to Spain could not be determined.

11. The applicant submitted that his daughter and her mother had visited him in prison from 2001 to 2003 and that he had sought a court ruling on contact with his daughter, when the child's mother discontinued the visits. On 4 July 2006, the applicant and the child's mother agreed before the Munich Family Court that supervised meetings between him and his daughter would take place as soon as he was released from prison. As of

31 January 2008, the daughter visited the applicant regularly in prison – every four weeks for two hours at a time – in the company of a priest.

12. On 3 July 2009 the applicant was released, after having served his entire sentence. He was placed under supervision of conduct (*Führungsaufsicht*) until 3 July 2013.

13. After his release, the applicant was granted exceptional leave to remain (*Duldung*) under Section 60a of the Residence Act – according to the information available to the Court this was granted most recently in January 2017 and would last until July 2017. It meant that enforcement of the expulsion order was temporarily suspended, being impossible to execute as the applicant did not have a valid passport (see paragraphs 28, 29 and 36-42 below). He began occupational re-training as a management assistant in marketing communication in April 2010, which he successfully completed in June 2012, but was not allowed to engage in gainful employment since his release.

14. The applicant has not lived with his daughter and her mother since his release. Since 2012 they have been living in different cities, with distances between their homes varying between thirty and seventy kilometres and the travelling time varying between forty minutes and one hour. The applicant sees his daughter on a regular basis and maintains close contact with her. It is not disputed between the parties that she spends every other weekend with him. According to a social worker's statement, he has become an important contact person for her. Both the applicant's daughter and her mother explicitly wish the applicant's contact with his child to continue.

15. Since his release, the applicant was convicted of three offences by the Munich District Court, of fraud in 2011 and of theft in 2015 and 2016. He was sentenced to twenty, thirty and ninety day-fines, respectively. By being present on German territory without having a passport, he committed an ongoing offence under the Residence Act. Criminal proceedings in this connection were discontinued by the public prosecutor in November 2013 because the applicant's guilt was considered to be of a minor nature and because prosecution was not in the public interest. The matter was referred to the administrative authority for treatment as an administrative offence.

B. The proceedings concerning a residence permit

1. The previous proceedings

16. On 21 March 2003 the Authority of the City of Munich refused to renew the applicant's residence permit and ordered his expulsion. It held that the applicant's expulsion was mandatory pursuant to Section 47 § 1 of the Aliens Act (*Ausländergesetz*; since 2004: Section 53 of the Residence Act) which foresaw the mandatory expulsion of an alien if he or she were

sentenced to either at least three years' imprisonment for a criminal offence, or to any period of imprisonment (not on probation) for an offence under the Narcotics Act. The authority examined whether the applicant enjoyed special protection against expulsion because he was the father of a German child. It found that the applicant had lived with his daughter only for a short time prior to his imprisonment, she had thus experienced separation from the applicant and that, in the light of the applicant's very serious criminal offences, the State's interest in removing the applicant prevailed over his interest in enjoying family life with his daughter. He could remain in contact with her by letter or telephone and could apply for permission to enter Germany for specific periods of time (*Betretenserlaubnis*). It considered that the applicant's expulsion was in conformity with Article 8 § 2 of the Convention. This decision, which also contained an unlimited re-entry ban and notice that he would be deported to Nigeria if he did not leave Germany voluntarily within four weeks after being released from prison, became final on 26 August 2003.

17. On 15 November 2006, after the applicant had served more than two thirds of his prison sentence, the authorities envisaged his expulsion as of 1 November 2007.

18. On 3 December 2007 the applicant introduced another asylum application (see paragraph 6 above). On 8 February 2008, the Federal Office for Migration and Refugees dismissed his application as manifestly ill-founded under Section 30 § 3 of the Asylum Procedure Act (see paragraph 33 below) and, finding that there were no impediments to his return to his country of origin, ordered his expulsion. The decision again contained notice that he would be deported to Nigeria if he did not leave Germany voluntarily within one week after the decision became final. On 6 March 2008, the Munich Administrative Court granted suspensive effect to the applicant's appeal in the asylum procedure. On 8 September 2009 it dismissed his appeal in the main procedure, also finding, *inter alia*, that the applicant's ties to his daughter could not be taken into account in the asylum procedure. This decision became final on 1 December 2009.

2. The proceedings at issue

19. On 10 September 2009 the applicant applied for a residence permit based on family ties.

20. On 9 February 2010 the Authority of the City of Munich rejected his application, holding that there was a final expulsion decision (of 21 March 2003) against the applicant, which precluded granting him a residence permit. No impediments arose from the fact that his daughter was a German national. The applicant could maintain contact with her through letters, telephone calls and occasional visits. His daughter was accustomed to a long-distance relationship with him. He was responsible for the renewed separation and the purpose of the expulsion order had not yet been achieved.

At the same time, it reduced the re-entry ban to five years and ruled that the applicant could, starting one year after his actual expulsion, apply for permission to enter Germany twice a year for a total of four weeks.

21. On 14 April 2010 the Munich Administrative Court quashed that decision and ordered the administrative authority to issue a residence permit. It noted that the applicant met the requirements for a residence permit based on family ties, but that granting such a permit was precluded by the final expulsion decision. However, the applicant was entitled to a residence permit on humanitarian grounds in accordance with Section 25 § 5 of the Residence Act, with the margin of appreciation inherent in this provision being reduced to zero. Section 11 § 1 of the Residence Act was not applicable to this provision and the applicant's departure was impossible in law due to his family life with his daughter, which was protected, *inter alia*, by Article 8 of the Convention.

22. The Administrative Court found that, despite the serious nature of the criminal offences the applicant had committed, there was no public interest that outweighed the child's best interests and the applicant's interest in having contact with his daughter. The relationship between the applicant and his daughter had the quality of a "family" and their ties were of benefit to the child. It considered that they could only live together in Germany, as the child could not be expected to relocate to Nigeria; that the applicant had committed the criminal offences prior to the birth of his daughter; that he had made considerable efforts as a father, as was also evidenced by his choice to remain imprisoned in Germany and to have supervised meetings with his daughter as of January 2008 rather than having his sentence suspended and being expelled as of 1 November 2007; that the latter event marked a turning point, which occurred after the expulsion order had become final in 2003 and which had not been taken into account by the administrative authorities; that the child had already been deprived of a relationship with her father for many years during his imprisonment; that the material assessment with a view to the applicant's expulsion had been conducted on 21 March 2003, years before the developments in the father-daughter relationship and the moment the expulsion order would be enforced; and that the enforcement of the expulsion order in connection with a re-entry ban would deprive the child of the possibility of a normal father-daughter relationship for the remainder of her childhood.

23. On 27 June 2011 the Bavarian Administrative Court of Appeal overturned that judgment and denied the applicant's right to a residence permit. It considered that his asylum application had been rejected as manifestly ill-founded under Section 30 § 3 of the Asylum Procedure Act and that, therefore, in accordance with Section 10 § 3, second sentence, of the Residence Act, he could not be granted a residence permit prior to leaving Germany (see paragraph 33 below). The exception to this rule, foreseen in the third sentence of this paragraph, was not applicable because

the applicant did not have a claim to a residence permit within the meaning of that provision (see paragraph 34 below).

24. First, a claim to a residence permit based on family ties under Sections 27 et seq. of the Residence Act was precluded by Section 11 of the Residence Act due to the final expulsion order of 21 March 2003 (see paragraph 35 below). Second, a claim to a residence permit on humanitarian grounds under Section 25 § 5 of the Residence Act was proscribed because the applicant did not have a valid passport, which was a general requirement for the granting of a residence permit (see paragraph 32 below). As the decision to waive this requirement in cases concerning residence permits on humanitarian grounds was a discretionary one, the applicant did not have a claim to a residence permit within the meaning of Section 10 § 3, third sentence, of the Residence Act, not even if the margin of appreciation were reduced to zero (see paragraph 34 below). Third, the court found that the applicant could not base a claim to a residence permit on impediments to his return to his country of origin either, referring to the outcome of the asylum proceedings in 2008 and 2009 (see paragraph 18 above). The Court of Appeal concluded that, under these circumstances, it was not decisive whether the ties between the applicant and his daughter were such that the requirements for a residence permit on humanitarian grounds under Section 25 § 5 of the Residence Act were met, if the applicant's asylum application had not been dismissed, and refrained from elaborating on this aspect.

25. On 12 September 2011 the applicant lodged an action to be granted leave to appeal on points of law, arguing that his case raised a matter of fundamental importance. He submitted that he should be granted a residence permit under Section 25 § 5 of the Residence Act because, as the father of a minor child of German nationality for whom he had joint custody, he did, in principle, have a claim to a residence permit based on family ties. The purpose of Section 10 § 3 of the Residence Act was to sanction abuse of the asylum procedure, but an abusive asylum application should not bear negative consequences where the foreigner had a claim, within the meaning of that provision, to a residence permit. In that regard, it should be decisive whether or not the substantive requirements of the respective provision for a residence permit were met, as in his case with regard to the permit based on family ties, and that the reason for the claim not being realised, in his case the final expulsion order against him, should not be relevant.

26. On 16 February 2012 the Federal Administrative Court rejected the applicant's action. It noted that, according to the case-law of the domestic courts, the exception foreseen in Section 10 § 3, third sentence, of the Residence Act only applied to claims that followed directly from legislative provisions and in respect of which all requirements, general and specific, were met. A residence permit based on family ties was precluded because of the final expulsion order against the applicant. Under these circumstances,

granting a residence permit on humanitarian grounds was to be considered. However, as the applicant did not have a valid passport, which was a general requirement for the granting of a residence permit from which derogations were, in cases concerning Section 25 § 5 of the Residence Act, possible only by way of a discretionary decision, the exception foreseen in Section 10 § 3, third sentence, of the Residence Act was not applicable. The decision was served on the applicant on 22 February 2012.

27. On 22 March 2012 the applicant lodged a constitutional complaint with the Federal Constitutional Court, alleging that the decisions of the Administrative Court of Appeal and of the Federal Administrative Court violated his right to respect for his family life with his daughter. On 18 July 2012 the Federal Constitutional Court declined to accept the applicant's constitutional complaint without providing reasons (no. 2 BvR 657/12).

3. Subsequent developments

28. After the Authority of the City of Munich, on 12 June 2012, had ordered the applicant to present himself to the Embassy of Nigeria in Germany so that a passport for the upcoming expulsion could be issued, the applicant refused to do so and filed an action against this order with the Munich Administrative Court. During the court hearing on 1 August 2012, the applicant and the immigration authorities agreed to the following:

> "- The effect of the re-entry ban will be limited to two and a half years after leaving Germany.
>
> - The immigration authorities will give their consent for a visa to enter Germany based on family reunion. If the applicant by then still has joint custody with the child's mother, a residence permit on the grounds of family ties will be issued. If the applicant no longer has joint custody for his daughter, the immigration authority will use its discretion regarding the issue of a residence permit in favour of the applicant.
>
> - All of this applies only if the applicant can show that he has not committed further criminal offences and if no other reasons for his expulsion emerge.
>
> - A time-limit for leaving the country is set at 1 November 2012."

In the light of this agreement, the applicant withdrew his action, and the proceedings before the Munich Administrative Court were discontinued.

29. On 25 September 2012 the Embassy of Nigeria in Germany declared that it would not issue a passport to the applicant as long as the proceedings before this Court were pending. On 6 November 2012 the applicant informed the immigration authorities that he would not leave Germany, contrary to his initial plans and to his declaration before the Munich Administrative Court. As a result, the agreement concluded before that court became void.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Residence permit based on family ties

30. The granting of residence permits based on family ties is primarily governed by the provisions on family reunion, that is, Sections 27 et seq. of the Residence Act. At the material time, Section 28 § 1, first sentence, no. 3 of that Act provided that a parent of foreign nationality, who had custody for a minor and unmarried German child, was to be granted the right to reunite with his or her child in Germany, if the general requirements for granting residence permits contained in Section 5 of the Act were met (see paragraph 32 below) and if there were no grounds for refusal (see paragraphs 34 and 35 below).

B. Residence permit based on humanitarian grounds

31. Under Section 25 § 5, first sentence, of the Residence Act, a foreigner who has an enforceable expulsion order against him or her may be granted a residence permit if his or her departure is impossible in fact or in law and if the impediment to the departure is not likely to cease in the foreseeable future. According to the case-law of the domestic courts, a residence permit under this provision may only be granted if both the foreigner's removal and his or her voluntary departure are impossible (see Federal Administrative Court, no. 1 C 14/05, § 15, judgment of 27 June 2006). Such impediments may relate to the foreigner's ties to Germany, including the right to respect for his or her private or family life under Article 8 of the Convention, or follow from the situation in the country to which the person is to be removed (ibid., § 17). The paragraph's second sentence provides that a residence permit shall be granted if the deportation has been suspended for 18 months. For a residence permit to be granted under Section 25 § 5 of the Act, the general requirements under Section 5 of the Act have to be met (see paragraph 32 below) and there must be no grounds for refusal (see paragraphs 34 and 35 below).

C. General requirements for the granting of residence permits

32. Section 5 of the Residence Act contained general requirements for the granting of residence permits, requiring, *inter alia*, that the person concerned had a valid passport (Section 5 § 1 no. 4). Paragraph 3 of the same provision foresaw exemptions – some mandatory and others discretionary – from the passport requirement in relation to residence permits on certain grounds. With regard to residence permits based on family ties, no exemptions were foreseen, whereas the possibility of a

discretionary exemption was foreseen for residence permits based on humanitarian grounds under Section 25 § 5 of the Act.

D. Grounds for refusing residence permits

1. Section 10 § 3 of the Residence Act

33. In accordance with Section 10 § 3, second sentence, of the Residence Act a foreigner was barred from being granted a residence permit prior to leaving the country if his or her application for asylum had been rejected as manifestly ill-founded under Section 30 § 3 of the Asylum Act (*Asylgesetz* – previously Section 30 § 3 Asylum Procedure Act, *Asylverfahrensgesetz*), which concerned some, but not all scenarios of manifestly ill-founded asylum applications. Section 10 § 3, third sentence, of the Residence Act provided for exceptions from this rule where the person concerned had a claim to a residence permit or where he or she met the requirements for a residence permit under Section 25 § 3 of the Act, which concerned cases where the removal was prohibited because it would either be in breach of the Convention or expose the foreigner to a significant and concrete risk for his or her life, limb or liberty.

34. According to the constant case-law of the domestic courts, only claims that directly followed from a legal provision and that did not foresee any discretionary assessment were "claims" to a residence permit within the meaning of Section 10 § 3, third sentence, of the Act, whereas claims involving a discretionary assessment would not qualify, not even where, in a case at hand, the margin of appreciation was reduced to zero (see Federal Administrative Court, no. 1 C 37/07, § 21, judgment of 16 December 2008). Only in relation to the former category of claims the legislator had decided to favour a foreigner's right to remain, in a clear and binding manner which did not leave room for a discretionary assessment by the case-processing authorities, which were only to examine whether or not the requirements for the claim in question were met (ibid.). Considering that the proceedings for the determination of claims involving a discretionary assessment may take up to several years over various instances, it would undermine the purpose behind the ban contained in Section 10 § 3, second sentence, of the Act, which was to sanction foreigners for abuse of the asylum procedure in certain case scenarios, if the foreigner were allowed to remain in Germany for the duration of these proceedings (ibid., § 22).

2. Section 11 of the Residence Act

35. Section 11 of the Residence Act, as applicable at the material time, provides that a foreigner who has been expelled may not re-enter or reside in Germany. He or she may not be granted a residence permit even if he or she meets the requirements of such permit under the Act, except if he or she

is entitled to a residence permit on humanitarian grounds under its Section 25 § 5. A time-limit may be set for a ban on entry and residence. Prior to the expiry of that time-limit, the foreigner may, by way of exception, be allowed to enter Germany for a short period of time if this time is required for compelling reasons or if the refusal of permission would constitute undue hardship.

E. Exceptional leave to remain (*Duldung*)

36. Prior to the deportation of a foreigner whose removal has been ordered, he or she has to be given notice in writing that he or she will be deported (Section 59 § 1 of the Residence Act). It is sufficient that such notice be given once and, consequently, no such notice has to be given where the authorities have previously given notice (see no. 1.3.1 of the general administrative instructions on Section 59 of the Residence Act – *Allgemeine Verwaltungsvorschriften zu § 59 AufenthG*). The existence of grounds for the temporary suspension of deportation shall not preclude the issuance of the notice of intention to deport (Section 59 § 3).

37. Where the deportation of a foreigner is temporarily suspended because it is impossible for reasons of fact or of law, the authorities are under the obligation to grant him or her "exceptional leave to remain" (*Duldung*) pursuant to Section 60a § 2, first sentence, of the Residence Act. The measure has to be issued in writing (Section 60a § 4). The main consequence of granting exceptional leave to remain is to avoid the foreigner being liable to sanctions under Section 95 § 1 no. 2 of the Act for being present in Germany despite being subject to a deportation order. The system of domestic law does not, as a rule, foresee unregulated presence in Germany (see Federal Administrative Court, no. 1 C 23/99, § 13, judgment of 21 March 2000).

38. Deportation can be impossible for reasons of fact where the foreigner does not have a passport. The absence of a passport is, however, not in itself sufficient to render a deportation impossible for reasons of fact in all cases. Rather, the pertinent administrative instructions require that the experience of the German authorities must have shown that the authorities of the receiving State would not receive the foreigner concerned without a passport or substitute documents (*Passersatzpapiere*), or that a previous attempted deportation has failed (see no. 2.1.2 of the general administrative instruction on Section 60a of the Residence Act). The foreigner is obliged to contribute, in a reasonable manner, to the issuance of a document which allows for his or her deportation to be carried out, and the authorities may use force to bring him or her to the relevant embassy to that end (see Section 48 § 3, first sentence, Section 49 § 2 and Section 82 § 4 of the Act, and Berlin-Brandenburg Administrative Court of Appeal, no. OVG 11 S 32.14, decision of 27 May 2014).

39. Exceptional leave to remain does not constitute a residence permit within the meaning of Section 4 § 1, second sentence, of the Residence Act. Its duration is not established in legislation; it is variable, ranging from one day to more than a year, and can be renewed as often as required.

40. Exceptional leave to remain affects neither the foreigner's obligation to leave Germany (Section 60a § 3 of the Residence Act) nor the enforceability of an existing final expulsion order (Section 58 § 1 and Section 59 § 3 of the Act). It shall be revoked when the circumstances preventing deportation cease to exist (Section 60a § 5, second sentence, of the Act), for example if the foreigner, whose deportation had been impossible because he did not have a passport, obtains a passport or substitute documents and there are no other circumstances preventing his or her deportation. Appeal against the revocation of, or the refusal to grant, exceptional leave to remain lies to the administrative courts.

41. If a person has been granted exceptional leave to remain for more than one year – including cumulatively – and that leave was terminated by way of revocation, notice of the intended deportation shall be served at least one month in advance (Section 60a § 5, fourth sentence, of the Residence Act). Where the exceptional leave to remain had been granted for more than one year but was terminated by lapse of time, no such obligation to give prior notice of the intended deportation exists (see Federal Court of Justice, no. V ZB 317/10, § 10, decision of 10 November 2011; Lüneburg Administrative Court of Appeal, no. 8 ME 47/10, § 4, decision of 16 March 2010). The legislator had, in 2007, deliberately chosen to limit the duty to give notice in cases of revocation (ibid.). The exact date of deportation shall, in any event, not be communicated to the foreigner (Section 59 § 1, eighth sentence, of the Act).

42. Once exceptional leave to remain ceases, the foreigner shall be deported without delay, without the authorities giving further notice of the intention to deport and without a new time-limit for voluntary departure (Section 60a § 5, third sentence, of the Residence Act). Once the notice of intention to deport (see paragraph 36 above) has become final, it is at the discretion of the authorities whether or not to ignore any circumstances cited by the foreigner which represent an obstacle to deportation (Section 59 § 4 *in fine* of the Act); such circumstances include rights under Article 8 of the Convention (see no. 4.2 of the general administrative instructions on Section 59 of the Residence Act).

THE LAW

I. SCOPE OF THE APPLICATION

43. The Court considers it necessary to clarify at the outset that the scope of the present case is delimited by the complaint raised in the applicant's original application to the Court, which concerned the right to respect for his family life with his daughter. It notes that the applicant submitted for the first time that he would be at risk if expelled to Nigeria, due to the serious human rights violations there, in his observations following the communication of the application. The Court concludes that the applicant, who was represented by a lawyer when he lodged the application, cannot be considered to have validly raised, in the context of the present case, a complaint as regards a potential violation of Article 3 of the Convention if he were removed to Nigeria.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained that the refusal to grant him a residence permit infringed his right to family life with his daughter, as guaranteed by Article 8 of the Convention, which provides, in so far as relevant:

> "1. Everyone has the right to respect for his private and family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ..."

45. The Government contested that argument.

A. Admissibility

46. The Court notes that 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' observations

(a) The applicant

47. The applicant submitted that his relationship with his daughter constituted not only "private life", but "family life" within the meaning of Article 8 § 1 of the Convention. They lived together in one apartment from

the child's birth in October 2000 until the applicant's detention in July 2001. In November 2000 the applicant and the child's mother declared that they would exercise joint custody. He was visited in prison by his daughter until 2003 and again as of 2008. In the meantime he had remained in contact with her by means of writing letters and sending gifts. After his release from prison, their relationship strengthened and became close. They had regular contact and spent every other weekend together; during holiday periods they saw each other even more often. He also gave her monthly pocket money and played an important role in her daily life and development. His daughter had explained their close relationship and the importance of his love and support in letters submitted to the Court.

48. He argued that the interference with the right to respect for his family life was not justified under Article 8 § 2 of the Convention. The domestic courts had failed to strike a fair balance between the competing interests. His interest in being granted a residence permit to exercise his family life with his daughter in Germany outweighed the public interest in the prevention of disorder and crime. It was true that he had committed serious offences between 1998 and 2000, but he had served his entire prison sentence and had not tried to have the period of his imprisonment reduced to two-thirds by accepting expulsion. He had committed these offences prior to the birth of his daughter, had understood the wrongs and had not committed any drug-related offences since. The offences he had committed since being released from prison, theft and fraud, were minor in nature and had to be seen against the background of not being allowed to engage in gainful employment. His ties to Germany, where he had been living since 2000 and where he had successfully completed professional re-training after his release and integrated into society, were much closer than to Nigeria, which he had left in 1994, had not visited since and where he would be at risk due to the poor human rights situation.

49. Contrary to its obligation to attach paramount importance to the child's best interests in all decisions involving children, the Bavarian Administrative Court of Appeal had denied the applicant's right to a residence permit on formal considerations, notably that he did not have a valid passport, without examining the best interests of his daughter (see paragraphs 23 and 24 above). It was in her best interests that he be granted a residence permit in Germany. Denying him a right to remain, and consequently expelling him to Nigeria, would interrupt their contact, which could not be adequately replaced by letters or the telephone. She was a German national and lived in Germany with her mother, who approved of their contact. She had no links to Nigeria, could not be expected to join him there and, for financial reasons, could not visit him either. She had already been deprived of a "lived" relationship with her father during his imprisonment and would be deprived of it for the remainder of her childhood if he were not allowed to remain in Germany.

(b) The Government

50. The Government submitted that the relationship between the applicant and his daughter did not constitute "family life" but rather "private life" within the meaning of Article 8 § 1 of the Convention and that the interference with his right to respect for his private life was justified under Article 8 § 2 of the Convention. They disputed that the applicant's daughter had visited him in prison before 2008, that he had sent her letters prior to 2007, that he supported her financially, and that they had seen each other more frequently than every other weekend since his release. They emphasised that the applicant and his daughter had never lived in the same household, save for nine months in 2000 and 2001, and that a "lived" father-daughter relationship had not been possible until 2009, as he had been imprisoned for eight years. They had not lived in the same household since his release from prison, and since 2012 had not even lived in the same city. Beyond his relationship with his daughter, the applicant had no strong ties to Germany, whereas he had three siblings in Nigeria, where he had lived until the age of 19, gone to school for eleven years and worked in different jobs.

51. At the same time, the applicant had committed very serious drug-related offences, to which his eight-year prison sentence bore testimony. After being released from prison, he had committed further criminal offences. Under these circumstances, the public interest in deterring others from acting similarly and in preventing the applicant from committing further offences, was considerable and outweighed his interest to reside in Germany to have regular contact with his daughter there. The expulsion order against him had become final as early as 2003 and could not be enforced for the sole reason that, probably intentionally, he had not obtained a valid passport, which he was obliged to do under the Residence Act and which he could have done without difficulty. In fact, while he had been present in Germany for a long period of time, he could not legitimately expect to remain there. He had only had a residence permit for roughly one year, in 2000-2001, and had been subject to a final expulsion order since 2003. He had spent eight years of his time in Germany in prison and, by having committed the said criminal offences, bore the responsibility for being denied a residence permit.

52. While significant weight had to be accorded to the child's best interests, these alone could not be decisive. There were no indications that refusing the applicant a residence permit was detrimental to his daughter's best interests to such an extent that it would infringe Article 8 § 1 of the Convention. There were no indications that her mother, who equally had custody, was unable or unwilling to raise her or that the daughter, at a later point, would not care for herself. She could maintain contact with her father by email, telephone or visits. In that regard, it had to be borne in mind that the duration of the applicant's re-entry ban was limited to five years by the

decision of the Authority of the City of Munich of 9 February 2010 and that, starting one year after his actual expulsion, he could apply for permission to enter Germany twice a year for a total of four weeks. He could have improved his situation even further if he had complied with the agreement he had concluded with the immigration authorities on 1 August 2012: this foresaw a reduction of the duration of the re-entry ban to two and a half years and the authorities' consent to a subsequent application for a visa for purposes of family reunion if he left Germany by 1 November 2012. This agreement became void because of his unwillingness to leave Germany as agreed.

53. Finally, the Bavarian Administrative Court of Appeal was not required to engage in an assessment of the child's best interests, because the legislator had, by adopting Section 5 § 1 no. 4 of the Residence Act and the requirement, as a rule, to have a valid passport in order to be granted a residence permit, already balanced the competing interests and attached significant weight to the duty of persons to have a valid passport. There was no good reason to derogate from this rule, for example because of practical difficulties in obtaining a valid passport, as the applicant had not faced such difficulties.

2. The Court's assessment

54. The Court observes that the domestic proceedings leading up to the present application exclusively concerned the issue of whether the applicant was entitled to a residence permit despite the final expulsion order against him (see paragraphs 19 to 27 above). In other words, the issue at stake is not whether the expulsion order, which became final in 2003, complied with the criteria established by the Court's case-law in this regard (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 57-58, ECHR 2006-XII), but rather whether or not the subsequent refusal of a residence permit was in breach of Article 8 of the Convention, that is, whether the authorities were under a positive obligation to grant the applicant a residence permit (compare *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 105, 3 October 2014; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 38, ECHR 2006-I).

55. It is not in dispute between the parties that the applicant is the biological father of a daughter born in October 2000, that they lived together for nine months until he was arrested in July 2001, that the applicant always had and continued to have joint custody, that she had regularly visited him in prison since January 2008, that they had spent every other weekend together since his release in July 2009, and that she explicitly wished to continue the regular contact with him, stating before the domestic authorities that he had become an important person for her. Against this background, the Court is satisfied that the relationship between the applicant and his daughter, at the time the decision denying him a residence permit

became final on 16 February 2012 (see paragraph 26 above and *Trabelsi v. Germany*, no. 41548/06, § 47, 13 October 2011), constituted "family life" within the meaning of Article 8 § 1 of the Convention.

56. The Court reiterates that Article 8 of the Convention neither guarantees the right of a foreign national to enter or to reside in a particular country nor, as its corollary, entails a general obligation for a State to authorise the residence of a foreign national on its territory (see *Jeunesse*, cited above, § 100) or issue a particular type of residence permit (see *Dremlyuga v. Latvia* (dec.), no. 66729/01, 29 April 2003). Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations will vary according to the particular circumstances of the persons involved and the general interest (*Jeunesse*, cited above, § 107). The applicable principles are similar in respect of positive and negative obligations under this provision. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (ibid., § 106).

57. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion (ibid., § 107). Another important consideration is whether family life was created at a time when the persons involved were aware, due to the immigration status of one of them, that the persistence of that family life within the host State would from the outset be precarious (ibid., § 108). The Court has further held that where children are involved, their best interests must be taken into account. Whilst alone they cannot be decisive, such interests certainly must be accorded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (ibid., § 109).

58. The Court observes that there is a final expulsion order of 21 March 2003 in relation to the applicant, based on the drug-related offences he committed, which continues to be enforceable (see paragraphs 16 and 40 above), that the authorities have informed him in two sets of proceedings of their intention to deport him to Nigeria (see paragraphs 16, 18 and 36 above), and that his deportation has been impossible for reasons of fact because he did not have a valid passport (see paragraphs 13, 28, 29, 37 and 38 above). Domestic law furthermore provides that exceptional leave to remain, which the applicant has been granted since 2009 (see paragraph 13 above), shall be revoked as soon as his deportation is no longer impossible,

notably because the required papers have been issued (see paragraph 40 above). That has, however, not yet been done in the present case. Neither has it been claimed by the applicant that his exceptional leave to remain had been terminated by lapse of time and not prolonged.

59. The applicant had, by the time of the Federal Administrative Court's decision in 2012, lived in Germany for more than a decade. However, he had only held a residence permit for one year, in 2000-2001, and had spent eight years in prison. His immigration status at the time he created his family life had been such that its persistence within the host State was, from the outset, precarious and he had been granted exceptional leave to remain since his release from prison in 2009, his deportation being temporarily suspended because he had failed to obtain a valid passport, in contravention of his obligations under the Residence Act. While he successfully completed professional re-training in 2012, he has not been allowed to engage in gainful employment since his release from prison. Moreover, the drug-related offences committed by the applicant prior to the birth of his daughter were very serious and he had committed further offences, albeit of a less serious nature, since his release from prison, weighing in favour of his exclusion from Germany (compare and contrast *Jeunesse*, cited above, § 116; *Rodrigues da Silva and Hoogkamer*, cited above, § 43).

60. The applicant's daughter is a German national and was eleven and a half years old at the time of the Federal Administrative Court's decision. She lives with her mother, likewise a German national, who also has custody, and could not be expected to move to Nigeria to enjoy family life with the applicant there. However, contact could be maintained by telephone and different forms of electronic communication and the applicant, if removed to Nigeria, could, starting a year after his departure, enter Germany twice a year for a total period of four weeks in order to see his daughter. Also, the applicant's exclusion from Germany was not permanent, but limited to five years (see paragraph 20 above).

61. In relation to the applicant's submission that his daughter had already been deprived of a "lived" relationship with him during his imprisonment and would be deprived of it for the remainder of her childhood if he were not allowed to remain in Germany, the Court observes, first, that the applicant's own actions had previously caused his daughter to be deprived of such a relationship. Second, the Court notes that the authorities have not deported the applicant while the proceedings have been pending before it. In the light of the length of these proceedings, if the applicant were eventually deported to Nigeria, there would have been a significant lapse of time between the final decision denying him a residence permit on 16 February 2012 and the actual deportation, allowing the Court to have regard to the developments during that time (see, *mutatis mutandis*, *Maslov v. Austria* [GC], no. 1638/03, §§ 92-95, ECHR 2008). By the time the present judgment becomes final, the applicant's daughter will have

almost reached the age of eighteen. The argument that she would be deprived of a "lived" relationship with the applicant for the remainder of her childhood if he were not allowed to remain in Germany loses considerable weight when it is considered that the failure to execute the deportation order for the period of time outlined above has ensured that the applicant has been able to enjoy family life with his daughter for most of her life, barring the period spent in prison.

62. The Court has certain reservations as to the Government's submission that the domestic courts were not required to explicitly engage in an assessment of the applicant's relationship with his daughter and of the child's best interests because the legislator had already balanced the competing interests and attached significant weight to the duty of persons to have a valid passport in order for a residence permit to be granted (see paragraph 53 above). It notes that the authorities had last engaged in a balancing exercise regarding the relationship between the applicant and his daughter and her best interests when they issued the expulsion order against the applicant in 2003 (see paragraphs 16 and 18 above). The relationship between the applicant and his daughter cannot reasonably be considered to have been the same in 2012 as it had been in 2003. Nonetheless, again having regard to developments that occurred after the final decision on a residence permit was taken, the Court observes that the immigration authorities sought to reach an agreement with the applicant on 1 August 2012 which would have allowed him to return to Germany two and a half years after his proposed expulsion (see paragraphs 28 and 29 above). This agreement can be understood as a subsequent balancing exercise that had regard to the individual circumstances of the case.

63. Furthermore, the Court notes that the applicant would, according to domestic law, be able to challenge the revocation of his exceptional leave to remain – or the refusal to grant him such leave again once it expired by lapse of time – before the administrative courts (see paragraph 40 above). He would not, in such circumstances, be prevented from arguing that his deportation has now become impossible for reasons of law, notably his rights under Article 8 of the Convention, and the domestic authorities would be able to examine such submissions (see paragraphs 40 and 42 above).

64. The foregoing considerations are sufficient to enable the Court, looking at the proceedings as a whole, including the agreement of 1 August 2012, to conclude that the domestic authorities have not attributed excessive weight to the general interest in controlling immigration and have not overstepped the margin of appreciation afforded to them in the circumstances of the present case.

65. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 1 March 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Erik Møse
Registrar	President