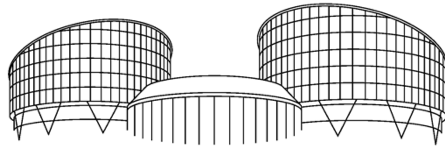

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF P.J. AND R.J. v. SWITZERLAND**

*(Application no. 52232/20)*

JUDGMENT

Art 8 • Family life • Expulsion of first applicant for five years following conviction for a serious drug-related offence • Domestic courts' failure to carry out a careful balancing of individual and public interests at stake in application of the Court's case-law • Failure to give due weight to relevant elements • Imposition of suspended conditional sentence • Low degree of culpability • Lack of prior convictions • Good behaviour post-conviction • Applicant no longer a threat to public safety • Long-term immigrant status • Adverse effect of expulsion on his wife (second applicant) and his daughters

Prepared by the Registry. Does not bind the Court.

STRASBOURG

17 September 2024

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of P.J. and R.J. v. Switzerland,**

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Georgios A. Serghides,
Darian Pavli,
Ioannis Ktistakis,
Andreas Zünd,
Oddný Mjöll Arnardóttir*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 52232/20) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Bosnia and Herzegovina, Mr P.J. (“the first applicant”) and a national of Serbia, Ms R.J. (“the second applicant”), on 24 November 2020;

the decision to give notice to the Swiss Government (“the Government”) of the application;

the decision not to have the applicants’ names disclosed;

the decisions of the Governments of Serbia and Bosnia and Herzegovina not to avail themselves of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 16 April and 2 July 2024,

Delivers the following judgment, which was adopted on the last-mentioned date:

# INTRODUCTION

1. The applicants allege that the expulsion of the first applicant from Switzerland for five years following his conviction for a drug-related offence is a disproportionate measure which violates their right to respect for family life under Article 8 of the Convention.

# THE FACTS

2. The applicants were born in 1983 and 1986 respectively. Currently, the first applicant resides in Bijeljina, Bosnia and Herzegovina, and the second applicant lives in Langnau am Albis, Switzerland. The applicants were represented by Ms F. de Weck, a lawyer practising in Zurich.

3. The Government were represented by their Agent *ad interim*, Mr A. Scheidegger, of the Federal Office of Justice.

4. The facts of the case may be summarised as follows.

## I. BACKGROUND INFORMATION

5. The first applicant was born and lived in Bosnia and Herzegovina, with his brother and parents. In 2011 he met the second applicant, a Serbian national, there. She was born in Switzerland and has lived there all her life on the basis of a long-term residence permit. Her mother, also a Serbian national, lives in Switzerland, while her father lives in Serbia.

6. In 2013 the applicants married, and in October 2013 the first applicant moved to Switzerland to live with the second applicant as a family. In 2014 and 2016 they had two daughters, both born in Switzerland and currently attending school there. The family language was Serbian. The second applicant and the applicants' daughters are fluent in both Serbian and German. The mother of the second applicant assisted the applicants in taking care of their daughters. The first applicant visited his native Bosnia and Herzegovina once or twice a year.

7. Since moving to Switzerland, the first applicant had temporary jobs as an unskilled labourer in construction and maintenance for the first few years, and then jobs such as the installation of underfloor heating, and cleaning. The second applicant, who is the main breadwinner of the family, is a registered nurse and works shifts at a local hospital. According to the applicants, the couple shared the parental care of their daughters, with the first applicant taking the greater part due to the second applicant's work schedule.

## II. EXPULSION OF THE FIRST APPLICANT AND HIS APPEALS

8. On 7 February 2018 the first applicant was arrested while transporting a package containing 194 grams of cocaine of 96% purity for a third party between Langnau am Albis and Zurich. He was to receive 500 Swiss francs (CHF) for his services.

9. On 3 July 2018 the District Court of Zurich found him guilty of an aggravated offence of drug trafficking and, after noting that he had been cooperative, had confessed from the outset, had a clean criminal record and that there was "a presumption of a favourable prognosis as to the risk of recidivism" sentenced him to a conditional prison sentence of twenty months, suspended for two years. In addition, the court ordered his subsequent expulsion from Switzerland for five years pursuant to Article 66a of the Swiss Criminal Code, the minimum duration allowed. Drug trafficking was one of the crimes which imperatively led to a foreigner's expulsion from Switzerland if the expulsion did not lead to a situation of personal hardship (see paragraph 23 below). The first applicant's name was to be entered in the Schengen Information System, which would also prevent him from entering the Schengen area for the duration of the expulsion.

10. On 11 November 2019 the Supreme Court of the Canton of Zurich considered the first applicant's appeal against his conviction and expulsion.

It upheld both but noted that the first applicant had not been unaware of the contents of the package and that his guilt in the commission of the offence had been "light" only because of his low position in the hierarchy of drug trafficking. With regard to his expulsion, the court stated that although the first applicant lived in "stable conditions" in Switzerland, his social contacts were mainly limited to his nuclear family and that, by his own admission, he had only a limited knowledge of German as Serbian was spoken in the family. He arrived in Switzerland at the age of thirty and had only lived there for several years, with a level of integration below average. His interest in staying in Switzerland was only related to his daughters, provided they stayed there. His return to Bosnia and Herzegovina could be reasonably required as he was perfectly familiar with the language and culture, had relatives there and was very capable of reintegrating into the society. As for the second applicant, unlike her husband, she was born in Switzerland and had lived there all her life and her ties with the country were very strong. Nevertheless, she had links with Bosnia and Herzegovina, was familiar with the culture and the language, and therefore had a good chance of successful integration. If she decided not to follow her husband, she could keep in touch with him through modern means of communication or visits. As she was the main financial provider for the family, the first applicant's removal would not deprive the family of its main source of income.

11. The court further found that although the first applicant was not involved in large-scale drug trafficking, the offence was serious as he had transported a large quantity of cocaine and had thereby endangered the lives of others and public safety. Therefore, his private interest in remaining in Switzerland did not outweigh the interest of public safety.

12. On 15 February 2020 the first applicant lodged a further appeal with the Swiss Federal Court. He argued that the Supreme Court of the Canton of Zurich had failed to comply with Article 8 of the Convention and that his expulsion for five years constituted a disproportionate interference with his right to respect for family life. The first applicant referred to the fact that his sentence was suspended, that the offence had been an isolated one, and that no real damage had been caused as a result of it. The expulsion was disproportionate to the minor degree of his guilt in the crime. He had been of exemplary behaviour since his sentencing and had started to work as a gardener within a month of his conviction. The lower courts, which took note of his professional integration, should have taken into account his rehabilitation, the fact that there was no discernible risk that he would reoffend and that more than six-years of family life in Switzerland could not be regarded as a short stay. Although he was not the main breadwinner for the family, he made significant contributions to its budget, which he would not be able to do in Bosnia and Herzegovina due to the lower wages.

13. The first applicant further stated that the crime took place some five years after he and the second applicant had started their family life and

that she could not have expected, when she married him, that he would one day be guilty of a crime that could put an end to his stay in Switzerland. His wife was born in Switzerland and spoke Serbian but had never lived in Bosnia. She had studied professionally in Switzerland and was very successful in her job. As a qualified nurse, she spoke only German for professional technical terms, and it would be difficult for her to adapt to a Bosnian hospital. She was well integrated linguistically, culturally, and socially in Switzerland. Her husband's expulsion would force her to cut her working hours in Switzerland, reducing the family's income and leaving the children to grow up in poor conditions.

14. Finally, the best interests of the applicants' children had not been properly taken into account. The children's fundamental need for the closest possible contact with both parents was jeopardised by their father's expulsion. It was not in the public interest to allow the children to grow up in poor conditions in Bosnia and Herzegovina, particularly at the age when they were undergoing a period of significant development. He was the main caretaker of the children and had a close and loving relationship with them. The children were integrated into Swiss society, they were bilingual, and it would be unreasonable to sever their ties with the country and to expect them and the second applicant to follow the first applicant to Bosnia and Herzegovina.

15. In view of the fact that the first applicant was personally and professionally integrated in Switzerland, posed no risk of reoffending, and had his family life there with his wife and minor children, the only way for him to exercise his right to respect for family life under Article 8 of the Convention without personal hardship was not to be expelled from the country for a period of five years and not to have a corresponding alert in the Schengen Information System.

16. On 17 June 2020 the Swiss Federal Court dismissed the first applicant's appeal. With regard to his possible resettlement in Bosnia and Herzegovina, it found that this would not constitute a personal hardship in view of a number of factors:

- the relatively short duration of his stay in Switzerland. He was only moderately integrated into society and his social contacts were mainly confined to the nuclear family. Although he showed good behaviour after his conviction, it was only after his conviction that he found stable employment as a gardener;

- the first applicant's personal interest in not being expelled from Switzerland was linked to his children living there. However, his daughters were young and therefore of an adaptable age. They would be able to follow their father to Bosnia and Herzegovina because they spoke Serbian, had relatives there and were familiar with the culture and would adjust without significant problems;

- the second applicant would be able to maintain contact with the first applicant through visits or modern means of communication; the lack of physical contact did not mean that regular contact was impossible;

- the first applicant's regular visits to his home country showed that, although he had not lived in Bosnia and Herzegovina for six years, he was very familiar with the language and culture. Admittedly, the economic situation there was difficult, but it was not impossible for the first applicant to support himself in his home country, given that his wife's income was sufficient to support the family in Switzerland;

- if the second applicant decided to remain in Switzerland with their children, such a separation would be the result of the second applicant's free choice. If she decided to follow her husband, she would have professional prospects in Bosnia and Herzegovina without facing serious hardship.

17. As regards the public interest in the first applicant's expulsion, the domestic courts took into account the nature and seriousness of the offence committed by him and other factors. After noting that the first applicant had not raised any concerns about his state of health, the Federal Court found that:

- although the first applicant was probably not involved in large-scale drug trafficking, he had nevertheless received cocaine and transported it to Zurich for a third party. While his culpability had been classified as minor, the threshold for an aggravated offence under Swiss law was 18 grams of cocaine. The fact that he "only" transported the drugs was irrelevant;

- under domestic law, an alien convicted of a drug trafficking offence was subject to expulsion for a period of between five and fifteen years, regardless of the length of the sentence and whether it was conditional, unconditional, or partially conditional. In the case of the first applicant, the duration of his expulsion was the minimum allowed by the law;

- the first applicant had committed the offence at the age of 34 and could not therefore be considered a juvenile offender. He had spent six years in Switzerland, where his employment was of a temporary nature and involved unqualified work. However, according to him, his knowledge of German was not good; he was not integrated into life in Switzerland, in contrast to his integration into life in Bosnia and Herzegovina, where he had grown up, received his education, where he had his professional, social and family relations;

- although the applicants' daughters had always lived in Switzerland, they were, given that they had been born in 2014 and 2016, still of an adaptable age. So far, their social relationships were limited to their family circle;

- the second applicant spoke Serbian and had relatives in Serbia and Bosnia and Herzegovina, including her father, her parents-in-law and her brother-in-law and his family. As a qualified nurse with several years of professional experience, she would be able to integrate professionally. It was therefore "reasonable" to assume that moving to her husband's home country

would be possible or that it would not present difficulties for her and the children.

18. The Federal Court concluded that the public interest outweighed the first applicant's private interests because his expulsion served the legitimate purpose of deterring new crimes to ensure public safety. It was a proportionate interference with his right to respect for family life under Article 8 of the Convention.

19. On an unspecified date in July 2020 the first applicant was expelled from Switzerland. He currently resides in Bosnia and Herzegovina. The second applicant and their daughters live in Switzerland. At some point in 2020 they applied for the Swiss nationality and were granted it in December 2021.

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## I. RELEVANT DOMESTIC LAW

20. The relevant provisions of Articles 5 and 13 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Systematic Compilation of Swiss Federal Legislation - RS - 101) read as follows:

**Article 5**

"...

2. The activity of the State must be in the public interest and proportionate to the aim pursued."

**Article 13**

"1. Everyone has the right to respect for his private and family life. ..."

21. Article 121 of the Federal Constitution concerns legislation on aliens and asylum. Following acceptance by the Swiss people and the cantons on 28 November 2010 of the federal popular initiative "For the removal of foreign criminals (removal initiative)", paragraphs 3 to 6 were added. The provision now reads as follows:

"1. The Confederation is responsible for legislation on the entry, exit, residence and establishment of foreign nationals in Switzerland and on the granting of asylum.

2. Foreign nationals who pose a threat to the country's security may be expelled from Switzerland.

3. They shall be deprived of their residence permit, regardless of their status, and of all their rights to reside in Switzerland:

a. if they have been convicted by a judgment that has entered into force for ... drug trafficking ..., or ...

4. The legislator shall specify the facts constituting the offences referred to. It may add other offences.

5. Foreign nationals who, by virtue of paragraphs 3 and 4, are deprived of their residence permit and of all their rights of residence in Switzerland must be expelled from the country by the competent authorities and banned from entering the country for between 5 and 15 years. In the event of a repeat offence, the ban on entering the country will be set at 20 years.

6. Foreign nationals who contravene the entry ban or enter the country illegally in any way whatsoever are liable to punishment. The legislature shall enact the corresponding provisions."

22. Articles 66a to 66d of the Criminal Code of 21 December 1937 (RS 311.0), which entered into force on 1 October 2016, grant the criminal courts jurisdiction to order the expulsion of a foreign national who has committed a felony or misdemeanour from Swiss territory.

23. Article 66a of the Criminal Code provides for the compulsory expulsion of a foreign national convicted of one of the offences or a combination of offences listed in its first paragraph (letters a - o). The part relevant to the case in question reads as follows:

"1. The judge shall expel from Switzerland a foreign national who has been convicted of one of the following offences, irrespective of the amount of the sentence imposed, for a period of between five and fifteen years:

...

violation of Article 19 paragraphs 2 or 20 paragraph 2 of the Narcotics Act of 3 October 1951 (NarcA);

...

2. The judge may exceptionally waive deportation if it would place the foreign national in a serious personal situation and the public interest in deportation does not outweigh the foreign national's private interest in remaining in Switzerland. In this respect, the judge will take into account the particular situation of foreign nationals who were born or raised in Switzerland. ..."

24. Federal Act on Narcotics and Psychotropic Substances (Narcotics Act, NarcA) of 3 October 1951:

"Article 19. Any person who without authorisation:

...

b. stores, sends, transports, imports, exports or carries in transit narcotic substances,

...

shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

2. The offender shall be liable to a custodial sentence of not less than one year if he or she:

a. knows or must assume that the offence relates to a quantity of narcotic substances that could directly or indirectly endanger the health of a large number of people; ..."

25. The mandatory expulsion entails the loss of the residence permit granted until then (Article 61 § 1 (e) of the Federal Law on Foreign Nationals and Integration):

> “A permit expires:
>
> ...
>
> e. on the holder becoming subject to a legally enforceable order for expulsion from Switzerland under Article 66a [of the Criminal Code] ...”

## II. RELEVANT DOMESTIC PRACTICE

26. In applying the hardship clause provided for in Article 66a § 2, of the Criminal Code, the Swiss courts are guided by the criteria that govern the granting of a residence permit in individual cases of extreme seriousness. These criteria are defined in the first paragraph of Article 31 of the Ordinance of 24 October 2007 on the admission, residence, and exercise of gainful employment (RS 142.201), which reads as follows:

> “1. A residence permit may be granted in individual cases of extreme seriousness. When assessing the case, particular account must be taken of :
>
> a. the applicant’s integration on the basis of the integration criteria defined [in the Federal Act on Foreign Nationals and Integration] ;
>
> b. ...
>
> c. the family situation, in particular the period of schooling and the length of schooling of the children ;
>
> d. the financial situation ;
>
> e. length of stay in Switzerland ;
>
> f. state of health ;
>
> g. the possibility of reintegration in the country of origin ...”

27. Neither the Federal Council’s message concerning the amendment of the Criminal Code (implementation of Article 121 §§ 3 to 6 of the Constitution on the expulsion of foreign criminals; FF 2013 5423) nor the parliamentary proceedings propose a definition of the hardship clause provided for in Article 66a § 2 of the Criminal Code.

## III. COUNCIL OF EUROPE DOCUMENTS

28. The Council of Europe has adopted numerous texts in the field of immigration including the Committee of Ministers Recommendations Rec(2000)15 on the security of residence for long-term immigrants and Rec(2002)4 on the legal status of persons admitted for family reunification (for the relevant paragraphs of these texts, see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 35-38, ECHR 2006-XII). The relevant part of the

Committee of Ministers Recommendation Rec(2000)15 provides, in particular, as follows:

“ *a*. Each member state should recognise as a "long-term immigrant" an alien who:

i. has resided lawfully and habitually for a period of at least five years and for a maximum of ten years on its territory otherwise than exclusively as a student throughout that period; or

ii. has been authorised to reside on its territory permanently or for a period of at least five years; or

iii. is a family member whose residence on the territory of the member state has been authorised for a maximum period of five years for the purpose of family reunification with a national of the member state or an alien as defined in sub-paragraphs i and ii above....

As regards the protection against expulsion

*a.* Any decision on expulsion of a long-term immigrant should take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights’ constant case-law, of the following criteria:

- the personal behaviour of the immigrant;

- the duration of residence;

- the consequences for both the immigrant and his or her family;

- existing links of the immigrant and his or her family to his or her country of origin.

*b.* In application of the principle of proportionality as stated in Paragraph 4.a, member states should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. More particularly, member states may provide that a long-term immigrant should not be expelled:

- after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years’ imprisonment without suspension;

- after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years of imprisonment without suspension.

After twenty years of residence, a long-term immigrant should no longer be expellable...

*d.* In case of an expulsion order, procedural guarantees for a long-term immigrant should in particular include the right to a fair hearing and to be given a reasoned decision...”

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicants complained that the first applicant’s expulsion following his criminal conviction was a disproportionate sanction which violated their right to respect for family life under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

## A. Admissibility

30. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

#### (a) The applicants

31. The applicants did not contest that the first applicant's expulsion had a sufficient legal basis and pursued a legitimate aim. However, in their opinion, it was a disproportionate unnecessary sanction.

32. The first applicant's criminal offence committed in 2018 was a one-off occurrence and prior to that he had had no criminal record. As established by the criminal trial, his guilt in the commission of the crime was minor, he had played a small role in the drug-trafficking scheme and the risk of him re-offending was low. Between his conviction in July 2018 and expulsion in July 2020 he behaved impeccably and found a full-time job as a gardener. His behaviour showed that he no longer posed any risk to public safety.

33. The expulsion of the first applicant would lead to his separation from the second applicant and their two young daughters. Having lived in Switzerland for more than six years, he would find it difficult to adapt to life in Bosnia and Herzegovina, where he would have no job and would not be able to contribute financially to his family's budget. At the same time, for the second applicant, leaving Switzerland for five years to join her husband in Bosnia and Herzegovina meant ending her successful career in Switzerland and losing the income that had contributed most to the family budget.

34. The domestic courts failed to balance the family's interest of maintaining their life together in Switzerland against the public interest of having the first applicant expelled from the country, as the interests of the second applicant and their young daughters, whom the first applicant had looked after, were not duly considered. Given that the second applicant and their daughters were born in Switzerland, had spent all their lives there and were fully socially, culturally, and professionally integrated, for them

following the first applicant to Bosnia and Herzegovina would represent a personal hardship, and their separation from him would constitute a disproportionately harsh measure for them.

35. The domestic courts' balancing exercise was therefore superficial and arbitrary, and they did not provide sufficient and detailed reasons for their decisions.

**(b) The Government**

36. The expulsion of the first applicant pursued several of the aims set out in Article 8 § 2 of the Convention, namely the maintenance of law and order and the prevention of crimes. It was proportionate and "necessary in a democratic society".

37. The courts took into account that the first applicant had been convicted of drug-trafficking and sentenced to twenty months of deprivation of liberty with two years' suspension. Any offence committed by him within the two years following the conviction would have led to the revocation of that suspension. In addition, the Supreme Court of the Canton of Zurich found that the first applicant's minor degree of guilt was due only to his low position in the criminal hierarchy.

38. At the material time, between 2018 and 2020, the second applicant and the applicants' children had only Serbian nationality. Therefore, the fact that they subsequently obtained Swiss nationality in 2021 had no bearing in the present case.

39. Contrary to the applicants' submission, the courts did examine the extent of the difficulties that the second applicant was likely to encounter if she were to follow her husband to his home country. The courts noted that she has lived in Switzerland since birth, had strong ties with the country and was an "established immigrant". At the same time, she had Serbian nationality, spoke Serbian, and had met the first applicant in his home country, where a number of their relatives lived. Her prospects for personal and professional integration in Bosnia and Herzegovina were considered good. She was free to remain in Switzerland with her children and maintain contact with her husband by means of communication or visits.

40. The courts also assessed the first applicant's ties with Switzerland, having concluded that after more than six years in the country he was less integrated than average and that his personal interest in remaining in the country was related to his two children, provided that they remained there. At the same time, he was familiar with the language and culture of Bosnia and Herzegovina, had family there, including his parents, and was perfectly capable of reintegrating there. His return could therefore be reasonably demanded.

41. As for the applicants' children, the domestic courts duly examined the extent of the difficulties that they were likely to encounter in the country to which their father was to be expelled. Given their young age they were still

capable of adapting to a new environment, considering that the culture and language were familiar to them. Since it was not impossible for the second applicant and the children to follow the first applicant to his home country, the daughters' separation from him would be the consequence of a free choice made by their parents. The first applicant invoked the best interests of the children as the only factor to justify the case of a personal hardship. However, it was not sufficient to outweigh the public interest in combating drug trafficking.

42. The courts carefully balanced the interests involved and concluded that the public interest in the first applicant's expulsion outweighed his private interest in remaining in Switzerland and that of the applicants in continuing to live together in Switzerland. In addition, the expulsion was for five years, the minimum period provided. Therefore, it was not a disproportionate sanction, and the domestic courts' decisions were sufficiently reasoned.

*2. The Court's assessment*

43. The parties do not dispute that there was an interference with the applicants' right to respect for their family life, that it was "prescribed by law" and justified by one or more legitimate aims under Article 8 § 2. However, they disagreed whether it was necessary and proportionate and whether the domestic courts duly reasoned their decisions.

44. The Court has to therefore examine whether the impugned measure was "necessary in a democratic society".

**(a) General principles**

45. The relevant general principles have been summarised, among other authorities, in *Üner*, §§ 54-60, cited above, and *Shala v. Switzerland*, no. 52873/09, § 46, 15 November 2012.

46. The States have the right, without prejudice to their treaty obligations, to control the entry of aliens into their territory (see, among many other authorities, *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI; and *Üner*, § 54, cited above) and the power to expel an alien who has committed a criminal offence and entered and is lawfully resident in their territory. However, their decisions in that regard, must 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, for example, *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX, and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X). The Court's task is to determine whether the measures at issue struck a fair balance between the interests at stake, namely, on the one hand, the rights of the person concerned protected by the Convention and, on the other, the interests of society (see *Slivenko*, cited above, § 113, and *Boultif*, cited above, § 47).

47. The domestic courts must give sufficiently detailed reasons for their decisions, in particular to enable the Court to carry out the European supervision entrusted to it (see, *mutatis mutandis*, *X v. Latvia* [GC], no. 27853/09, § 107, ECHR 2013, and *El Ghatet v. Switzerland*, no. 56971/10, § 47, 8 November 2016). Insufficient reasoning by the domestic courts, without a proper balancing of the interests at stake, is contrary to the requirements of Article 8 of the Convention. This is the case where the domestic authorities fail to demonstrate convincingly that the interference with a right protected by the Convention is proportionate to the aims pursued and therefore corresponds to a "pressing social need" within the meaning of the above-mentioned case-law (see *El Ghatet*, cited above, § 47, and *I.M. v. Switzerland*, no. 23887/16, §§ 72 and 77, 9 April 2019). Where the competent national authorities have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interests against the more general public interest in the case, the Court will substitute its own assessment of the merits for that of the competent national authorities only where there are shown to be strong reasons for doing so (see *M.A. v. Denmark* [GC], no. 6697/18, § 149, 9 July 2021, and *Azzaqui v. the Netherlands*, no. 8757/20, § 52, 30 May 2023).

#### (b) Application of the above principles to the present case

48. The Court notes that the first applicant's conviction for the drug offence (twenty months' imprisonment suspended for two years) is of a serious nature. At the same time, it notes that, as the national courts have observed, the first applicant did not have a criminal record or a history of drug-related convictions at the time he committed the offence for which he was subsequently expelled (see, by contrast, among the more recent examples, the cases where the applicants had committed several drug-related offences or had convictions prior to their expulsion: *Al-Masudi v. Denmark*, no. 35740/21, § 28, 5 September 2023; *Loukili v. the Netherlands*, no. 57766/19, § 52, 11 April 2023; and *Nguyen v. Denmark,* no. 2116/21, § 29, 9 April 2024).

49. The first applicant arrived in Switzerland in 2013 at the age of thirty, when he married the second applicant. Prior to that he had spent his entire life, including his schooling and vocational training, in his home country of Bosnia and Herzegovina, where he had parents and a brother and where he had returned from Switzerland regularly. Upon his move to Switzerland to join his wife, through the period up to his criminal conviction, he had held temporary jobs and his wife was the main earner in the family. According to the first applicant, he took a greater share of parental care of his young daughters while his wife was at work. By the time of his expulsion from Switzerland, he had lived there for about six years and eight months and did not, by his own admission, speak good German and, as the authorities

established, was integrated less than average into society (see, by contrast, *Z v. Switzerland*, no. 6325/15, §§ 67 and 69, 22 December 2020).

50. Having identified the relevant factors, the domestic courts focused their assessment of the first applicant's situation on the nature and gravity of the offence committed. In this regard, the Court notes that, although the first applicant's offence was serious, it was not punished by actual imprisonment but by a suspended conditional sentence (see, by contrast, *Veljkovic-Jukic v. Switzerland*, no. 59534/14, §§ 6-7, 21 July 2020; *K.A. v. Switzerland*, no. 62130/15, § 49, 7 July 2020; and *Ukaj v. Switzerland*, no. 32493/08, § 37, 24 June 2014).

51. However, having established that the degree of culpability was low, the domestic courts merely referred to the fact that the first applicant had confessed from the outset, that he had cooperated with the police and that there was a favourable prognosis as to the risk of recidivism (see, by contrast, *Z v. Switzerland*, cited above, § 24, where there was a proven risk of recidivism as the applicant had committed an offence of illegal surveillance shortly after completing his probationary period, and *Vasquez v. Switzerland,* no. 1785/08, § 46, 26 November 2013, where there was a proven risk of recidivism given the applicant's record of difficulties controlling his sexual instincts after his conviction).

52. Moreover, the domestic courts merely mentioned that shortly after the expulsion decision was issued in July 2018, the first applicant found a full-time job, which he kept until he was expelled from Switzerland two years later, and that he had shown good behaviour throughout the period (see paragraph 16 above). The Government implied that such behaviour was to be expected from the first applicant, given that he had received a suspended prison sentence (see paragraph 37 above). However, in their assessment, the domestic courts failed to consider that, while the fear of a suspended sentence turning into an actual prison term might have played a role, the first applicant's overall good behaviour, his ability to secure stable employment shortly after his conviction, and the absence of any subsequent administrative or criminal offenses demonstrated his genuine intention to prove that he was not a danger to public safety. This oversight neglected evidence of the first applicant's rehabilitation and commitment to lawful conduct.

53. The principle of proportionality requires, *inter alia*, that account be taken of personal conduct and the impact on family life (see paragraph 28 above). The domestic courts did not question the genuineness of his family life or the negative impact that the five-year expulsion would have on it. They argued that the second applicant could either follow him to Bosnia and Herzegovina, where she had good prospects, or remain in Switzerland, making the separation a matter of choice (see paragraphs 10 and 16 above).

54. As for the applicants' daughters, the courts concluded that given their age they could adapt to a new environment in Bosnia and Herzegovina and

that their relocation would depend on the second applicant's choice to follow her husband (see *Jeunesse v. the Netherlands* ([GC], no. 12738/10, § 109, 3 October 2014).

55. In the light of the foregoing, the Court finds that, in imposing and upholding the five-year expulsion, the domestic courts did not satisfactorily apply the Court's case-law mandating a careful balancing of the individual and public interests. The courts failed to give due weight to certain aspects. These include the first applicant's low level of culpability, the fact that his sentence was suspended, his lack of a criminal record, the fact that he no longer posed a threat to public safety, his status as a long-term immigrant and the adverse effect of the expulsion on the members of his family.

56. In the light of the above, the Court considers that there has been a violation of Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

58. The applicants did not make a claim in respect of pecuniary damage. They jointly claimed 10,000 euros (EUR) for non-pecuniary damage.

59. The Government submitted that an award of CHF 5,000 would cover any non-pecuniary damage suffered by the applicants as a result of the expulsion of the first applicant.

60. Since the expulsion order against the first applicant has been enforced, the Court awards the applicants EUR 10,000 jointly in respect of non-pecuniary damage.

### B. Cost and expenses

61. The applicants claimed CHF 6,872 in respect of legal costs related to the domestic proceedings and CHF 15,107 in respect of the proceedings before the Court. They claimed a total of CHF 21,979 or EUR 20,943 in costs and expenses.

62. The Government did not contest the amount claimed for the costs of the proceedings before the domestic courts. However, they considered that the amount claimed for representation before the Court was excessive and that an award of CHF 10,000 would be appropriate to cover the costs and expenses under all headings.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it appropriate to award the applicants the sum of EUR 15,000 for the costs and expenses under all heads.

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
   (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of cost and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 17 September 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Milan Blaško<br>Registrar | Pere Pastor Vilanova<br>President |
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In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of judges Schukking and Arnardóttir is annexed to this judgment.

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# JOINT DISSENTING OPINION OF JUDGES SCHUKKING AND ARNARDÓTTIR

1. We respectfully disagree with the majority's conclusion that there has been a violation of Article 8 of the Convention in this case.

2. The Contracting States are entitled, as a matter of international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to expel an alien convicted of a criminal offence, subject to the condition that the expulsion measure is in accordance with Article 8 (see *Boultif v. Switzerland* [GC], no. 54273/00, § 46, ECHR 2001-IX). In *Üner v. the Netherlands* ([GC], no. 46410/99, §§ 57-58, ECHR 2006-XII), the Court set out the criteria which govern its assessment of whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. In keeping with the Court's subsidiary role, it initially falls on the national courts to apply these criteria. When exercising its supervisory function under Article 8, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see, for example, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 86, 7 February 2012). In cases concerning the expulsion of immigrants the Court has held, further, that where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately weighed up the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see *Savran v. Denmark* [GC], no. 57467/15, § 189, 7 December 2021).

3. In our view, the domestic courts, in keeping with the Court's case-law, based their conclusions on an acceptable assessment of the following elements: the fact that the first applicant had stayed in Switzerland for a relatively short period of time and that he was only moderately integrated into Swiss society, while maintaining a close connection with Bosnia and Herzegovina (contrast, for example, *Üner*, cited above, § 62, and *Salija v. Switzerland*, no. 55470/10, §§ 51-52, 10 January 2017); the applicant's children were young and therefore of an adaptable age, in addition to which they spoke Serbian, had relatives in Bosnia and Herzegovina and were familiar with the culture (see, for example, *Üner*, cited above, § 64, and *Salija*, cited above, § 50); the second applicant, who had links with Bosnia and Herzegovina and spoke Serbian, would have professional prospects there without facing serious hardship (see *Üner*, cited above, § 64; contrast

*Amrollahi v. Denmark*, no. 56811/00, § 41, 11 July 2002); the applicants would be able to remain in contact through visits or modern means of communication should the second applicant not wish to follow the first applicant to Bosnia and Herzegovina (see *Salija*, cited above, § 49); and the applicant's expulsion from Swiss territory was limited to five years (compare *Salija*, cited above, § 53; contrast *Savran*, cited above, §§ 199-200). While we agree with the domestic courts and the majority that the applicants' family life was genuine and would be negatively impacted by the expulsion of the first applicant, we see no strong reason to question the domestic courts' assessment of the weight of this impact.

4. In their overall assessment of the proportionality of the expulsion order, the majority place decisive weight on issues relating to the criteria concerning the "nature and seriousness of the offence committed by the applicant" and "the time that has elapsed since the offence was committed and the applicant's conduct during that period" (see *Üner*, cited above, § 57). The majority, thus, emphasise that the first applicant's sentence was suspended, that his culpability was assessed to be low, that he had no prior criminal record and that the domestic courts misjudged the extent to which he remained a threat to public safety. In this respect we note that the first applicant was convicted of an "aggravated offence" of drug trafficking, for having transported a package containing 194 grams of cocaine of 96% purity, and that under Swiss law the threshold for the offence of drug trafficking to be qualified as an "aggravated offence" is the transportation of 18 grams of cocaine. We note, further, that he acknowledged that he was aware of the contents of the package and that the domestic courts only classified his culpability as minor because of his low position in the hierarchy of drug trafficking. Finally, we note that only two years and four months had elapsed between the first applicant's offence and the Federal Supreme Court's judgment, for most of which time he was on probation.

5. The Court has never set a minimum requirement as to the sentence or seriousness of the crime which ultimately results in expulsion, nor has it in the application of all the relevant criteria qualified the relative weight to be accorded to each criterion in the individual assessment. That must be decided on a case-by-case basis, in the first place by the national authorities, subject to European supervision. The Court has, furthermore, tended to consider the seriousness of a crime in this context not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question, and has previously shown understanding of the domestic authorities' firmness as regards those actively involved in drug dealing. While the Court does not necessarily take the same approach as regards those convicted of offences related to drug consumption or possession, it has accepted that, in principle, drug-related offences are properly to be viewed as at the most serious end of the criminal spectrum, given their nature and the

destructive effects they have on society as a whole (see *Loukili v. the Netherlands*, no. 57766/19, §§ 48-49, 11 April 2023, with further references). Even if an applicant has not previously been convicted, this does not detract from the seriousness and gravity of such a crime (see *Amrollahi*, cited above, § 37, with further references). The fact that the offence committed by an applicant was at the more serious end of the criminal spectrum is, however, not in and of itself determinative of the case, but must be weighed in the balance, together with the other relevant criteria which emerge from the Court's case-law (see *Loukili*, cited above, § 49, and *Unuane v. the United Kingdom*, no. 80343/17, § 87, 24 November 2020). By the same token, we consider that when the nature and circumstances of the criminal offence of drug trafficking are considered by the domestic courts to merit a suspended sentence for reasons such as the applicant's low level of culpability or the low risk of recidivism in the light of the applicant's criminal record and/or the applicant's conduct after the offence, this cannot be determinative, but must be weighed in the balance together with the seriousness of the impact an expulsion order would have on the applicant's family life under the other *Üner* criteria.

6. Taking the above approach and noting the domestic courts' acceptable assessment of the extent to which the exclusion order interfered with the applicants' family life, we see no strong reason to substitute our own overall assessment of all the relevant criteria for that of the domestic courts. The national authorities carefully examined the facts, adequately balanced the interests at stake in the light of the relevant criteria that emerge from the Court's case-law under Article 8 in the expulsion context, and based their decisions on relevant and sufficient reasons (for cases dealing with similar facts, see *Nwosu v. Denmark* (dec.), no. 50359/99, 10 July 2001; contrast *Amrollahi*, cited above). In our opinion, therefore, the respondent State did not overstep the margin of appreciation afforded to it under the Convention.