HØJESTERETS DOM
afsagt mandag den 30. oktober 2023

Sag 34/2023
(1. afdeling)

Anklagemyndigheden
mod
T
(advokat Eddie Omar Rosenberg Khawaja, beskikket)

I tidligere instanser er afsagt dom af Københavns Byret den 10. marts 2022 (SS 4-108/2022) og af Østre Landsrets 7. afdeling den 16. december 2022 (S-779-22).

I pådømmelsen har deltaget fem dommere: Poul Dahl Jensen, Lars Hjortnæs, Kristian Korfits Nielsen, Jørgen Steen Sørensen og Peter Mørk Thomsen.

Påstande
Dommen er anket af T med påstand om frifindelse for udvisning.

Anklagemyndigheden har påstået skærpelse for så vidt angår straffen og stadfæstelse for så vidt angår udvisningen.

Over for anklagemyndighedens påstand om skærpelse af straffen har T påstået stadfæstelse.

Retsgrundlag
Den Europæiske Menneskerettighedsdomstol afsagde den 5. september 2023 to domme, hvor domstolen fandt, at det var i strid med Den Europæiske Menneskerettighedskonventions artikel 8 om retten til privatliv at udvise to afghanske statsborgere fra Danmark med indrejseforbud i 12 år.

Af dommen i sag 31434/21 (Sharifi mod Danmark) fremgår bl.a.:

> ”4. The facts of the case may be summarised as follows.
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> 5. In 2001, when the applicant was 9 years old, he entered Denmark together with his parents and siblings. On 10 February 2003 they were granted a residence permit under section 7(2) of the Aliens Act (see paragraph 13 below).
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> 6. The applicant has a criminal past. When he was a minor (between 15 and 18 years old), he was convicted of the following offences: (a) by a judgment of 28 February 2008, he was convicted of violence and witness tampering and sentenced to six months' imprisonment, suspended;
> (b) by a judgment of 17 April 2009, he was convicted of theft, use of a motor vehicle belonging to someone else and violations of the Weapons and Explosives Act and the Controlled Substances Act, for which he received a forty-day suspended sentence; and (c) by a judgment of 24 September 2010, he was convicted of taking a motor vehicle without the owner's consent, with particularly aggravating circumstances, and was sentenced to twenty days' imprisonment, suspended. As an adult, by a judgment of 14 February 2012, the applicant was convicted of repeated violence, and sentenced to thirty days' imprisonment, and by a judgment of 15 August 2012, he was fined for a violation of the Controlled Substances Act.
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> 7. By a District Court (Retten i Holbæk) judgment of 27 September 2019 the applicant was convicted under Article 192a of the Penal Code of being in possession of two shotguns with particularly aggravating circumstances in a public place, with a view to their illegal sale, committed on 18 January 2019, which carried a sentence of up to eight years' imprisonment. He was also convicted of being in possession of 0.4 grams of cocaine. He was sentenced to two years and six months' imprisonment, and was expelled from Denmark with a twelve-year re-entry ban.
> …
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> 10. By a judgment of 1 July 2020, the High Court upheld the judgment of the District Court…
> …
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> 30. As to the criterion "the solidity of social, cultural and family ties with the host country and with the country of destination", the domestic courts properly took this into account. They accepted that his ties with Denmark were stronger than his ties with Afghanistan, but found that he would not be lacking the basic requirements for establishing a life in his country of origin.
> …
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> 32. Lastly, regard will be had to the duration of the expulsion order, and in particular whether the re-entry ban was of limited or unlimited duration. The Court has previously found such a ban to be disproportionate on account of its unlimited duration, whereas in other cases it has considered the limited duration of such an exclusion measure to be a factor weighing in favour of its proportionality (see, for example, Savran v. Denmark [GC], no. 57467/15, §§ 182 and 199, 7 December 2021, and the

cases cited therein). One of the elements relied on in this respect has been whether the offence leading to the expulsion order was of such a nature that the person in question posed a serious threat to public order (see, among other authorities, Ezzouhdi v. France, no. 47160/99, § 34 13 February 2001; Keles v. Germany, no. 32231/02, § 59, 27 October 2005; and Bousarra v. France, no. 25672/07, § 53, 23 September 2010, in which the Court found that the persons in question did not pose a serious threat to public order; see also Mutlag v. Germany, no. 40601/05, §§ 61-62, 25 March 2010, and Balogun v. the United Kingdom, no. 60286/09, § 49, 10 April 2012, in which the Court found that the person in question did pose a serious threat to public order).

33. In the present case, the Court does not call into question the finding that the applicant's crime leading to the expulsion order was of such a nature that he posed a serious threat to public order at the time (see also, among other authorities and mutatis mutandis, Abdi, cited above, § 39; Mutlag, cited above, §§ 61-62; and Balogun, cited above, § 53).

34. The Court notes, however, that, prior to the case at hand, apart from the three offences committed as a minor, as an adult the applicant was convicted on two occasions, both in 2012 (see paragraph 6 above), but that during the following six years he had no further convictions. Accordingly, it cannot be said that in general during this period he posed a threat to public order. In this respect the present case resembles the situation in, for example, Ezzouhdi (cited above, § 34) and Abdi (cited above, § 40).

35. The Court also observes that the applicant had not previously been cautioned about the risk of expulsion or given a conditional expulsion order (see, for example, Abdi, cited above, § 41).

36. Nevertheless, despite his lack of recent previous convictions and the absence of any warnings as to the risk of expulsion, and although a relatively lenient sentence was imposed in the present case (compare Abdi, cited above, § 42), the High Court decided, in accordance with the applicable legislation, to combine the expulsion of the applicant with a re-entry ban for twelve years, although it had discretion to reduce the duration of the ban even further (see paragraph 16 above, and contrast Savran, cited above, § 200), and although it could have explored whether a shorter ban would have been pertinent in the circumstances of the present case.

37. This observation should also be seen in the light of the fact that the applicant had arrived in Denmark at a young age and had lawfully resided there for approximately sixteen years. He thus had very strong ties with Denmark (see paragraphs 29-30 above), whereas his ties with Afghanistan were virtually non-existent.

38. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant, in particular combined with a re-entry ban for twelve years was disproportionate (see, in particular and mutatis mutandis, Ezzouhdi, cited above, §§ 34-35; Keles, cited above, § 66; Bousarra, cited above, §§ 53-54; and Abdi, cited above § 44, although all the cases cited concerned permanent re-entry bans).

39. It follows that there has been a violation of Article 8 of the Convention."

Af dommen afsagt samme dag i sag 44810/20 (Noorzae mod Danmark) fremgår bl.a.:

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

5. The applicant was born in Afghanistan in 1995. In 2000, when he was five years old, he entered Denmark and was granted a residence permit on the basis of family reunion.

6. The applicant has a criminal past. When he was a minor (between 15 and 18 years old), he was convicted of the following offences:
(a) by a judgment of 28 April 2011, he was convicted of violence and sentenced to thirty days' imprisonment, suspended; and
(b) by a judgment of 6 February 2013, he was convicted of offences including violence and sentenced to sixty days' imprisonment, suspended.

7. As an adult, the applicant was fined several times for theft and vandalism (2015 and 2016) and violations of the Controlled Substances Act and the Traffic Act.

8. By a judgment of 21 May 2019, the Lyngby District Court (Retten i Lyngby) convicted the applicant under Article 191 of the Penal Code (carrying a sentence of up to ten years' imprisonment) for being in possession of around 15.7 kg of cannabis intended for distribution. He was also convicted of violence against two individuals whom he had punched several times in the face and elsewhere, possession of a knife, having driven a vehicle without a driving licence and, under another count, being in possession of 54.3 grams of cannabis intended for distribution. The applicant was sentenced to one year and two months' imprisonment and cautioned about the risk of expulsion.

9. The applicant appealed to the High Court of Eastern Denmark (Østre Landsret), before which he stated, among other things, that after his release, that is some time after the District Court's judgment, he had undergone therapy and had also taken up his studies again to become a kindergarten teacher. By a judgment of 28 January 2020, the High Court found the applicant guilty of an additional count of attempted threats, and therefore increased the sentence to one year and three months' imprisonment. Moreover, it issued an expulsion order with a twelve-year re-entry ban…
…

30. As to the criterion "the solidity of social, cultural and family ties with the host country and with the country of destination", the High Court properly took this into account. It accepted that his ties with Denmark were stronger than his ties with Afghanistan, but found that he would not be lacking the basic requirements for establishing a life in his country of origin.

31. Lastly, regard will be had to the duration of the expulsion order, in particular whether the re-entry ban was of limited or unlimited duration. The Court has pre-

viously found such a ban to be disproportionate on account of its unlimited duration, whereas in other cases it has considered the limited duration of the exclusion order to be a factor weighing in favour of its proportionality (see, for example, Savran v. Denmark [GC], no. 57467/15, §§ 182 and 199, 7 December 2021, and the cases cited therein). One of the elements relied on in this connection has been whether the offence leading to the expulsion order was of such a nature that the person in question posed a serious threat to public order (see, among other authorities, Ezzouhdi v. France, no. 47160/99, § 34, 13 February 2001; Keles v. Germany, no. 32231/02, § 59, 27 October 2005; and Bousarra v. France, no. 25672/07, § 53, 23 September 2010, in which the Court found that the persons in question did not pose a serious threat to public order; see also Mutlag v. Germany, no. 40601/05, §§ 61-62, 25 March 2010, and Balogun v. the United Kingdom, no. 60286/09, § 49, 10 April 2012, in which the Court found that the person in question did pose a serious threat to public order).

32. In the present case, the Court does not call into question the finding that the applicant's offence leading to the expulsion order was of such a nature that he posed a serious threat to public order at the time (see also, among other authorities and mutatis mutandis, Abdi, cited above, § 39; Mutlag, cited above, §§ 61-62; and Balogun, cited above, § 53).

33. It notes, however, that, prior to the case at hand, apart from the two offences committed as a minor, which involved violence (see paragraph 6 above), the offences committed by the applicant as an adult concerned vandalism, theft, traffic offences and violations of the legislation on controlled substances (see paragraph 7 above), all of which resulted in fines, and none of which indicated that in general he posed a threat to public order. In this respect the present case resembles the situation in, for example, Ezzouhdi (cited above, § 34) and Abdi (cited above, § 40).

34. The Court also observes that the applicant had not previously been cautioned about the risk of expulsion or given a conditional expulsion order (see, for example, Abdi, cited above, § 41).

35. The Court also notes that the applicant had undergone therapy and taken up his studies again upon being released after serving his sentence (see paragraphs 9 and 29). The High Court appears not to have taken this fact into consideration in its reasoning.

36. Nevertheless, despite the fact that the applicant's previous convictions did not indicate that he in general posed a threat to public order, that he had not received any previous warnings as to the risk of expulsion, that he had attempted to reintegrate himself into Danish society after serving his sentence, and although a relatively lenient sentence was imposed in the present case (compare Abdi, cited above, § 42), the High Court decided, in accordance with the applicable legislation, to combine the expulsion of the applicant with a re-entry ban for twelve years, although it had discretion to reduce the duration of the ban (see paragraph 14 above, and contrast Savran, cited above, § 200).

37. This observation should also be seen in the light of the fact that the applicant had arrived in Denmark at a very young age and had lawfully resided there for approximately eighteen years. He thus had very strong ties with Denmark (see paragraph 30 above), whereas his ties with Afghanistan were virtually non-existent.

38. The Court is therefore of the view, given all the circumstances of the case, that the expulsion of the applicant combined with a re-entry ban for twelve years was disproportionate (see, in particular and mutatis mutandis, Ezzouhdi, cited above, §§ 34-35; Keles, cited above, § 66; Bousarra, cited above, §§ 53-54; and Abdi, cited above § 44, although all the cases cited concerned permanent re-entry bans).

39. It follows that there has been a violation of Article 8 of the Convention."

Anbringender

T har anført navnlig, at der ikke er grundlag for at skærpe straffen, der er fastsat i overensstemmelse med det udgangspunkt, der er angivet i forarbejderne til straffelovens § 216.

En udvisning af ham er uproportional og med sikkerhed i strid med Den Europæiske Menneskerettighedskonventions artikel 8. Der skal efter Den Europæiske Menneskerettighedsdomstols praksis foreligge meget tungtvejende grunde til at udvise en person, der kom til landet som barn, og som har haft mange års ophold i landet, jf. Menneskerettighedsdomstolens dom af 23. juni 2008 i sag 1638/03 (Maslov mod Østrig).

Han kom til Danmark i en ung alder og har således tilbragt det meste af sin barndom og ungdom i Danmark, hvor han også har gennemført folkeskolen. Han er velintegreret i Danmark, hvor han bl.a. er tilknyttet arbejdsmarkedet. Den idømte straf er relativt mild, og der er ikke forhold i sagen, som taler for, at han i fremtiden vil begå ny kriminalitet. Han er i øvrigt ikke tidligere straffet af betydning. Han er ikke blevet advaret om, at han kan udvises af landet, hvis han begår ny kriminalitet. Han har en meget svag tilknytning til Cambodia.

Det beror på en proportionalitetsvurdering, om udvisning med tidsbegrænset indrejseforbud vil være i strid med artikel 8. Det må i denne vurdering indgå, hvad hans aktuelle opholdsgrundlag er, samt hvilke reelle muligheder der er for, at han på ny kan få opholdstilladelse i Danmark.

Hans nuværende opholdstilladelse vil bortfalde i tilfælde af udvisning, og hans udsigt til at få opholdstilladelse i Danmark på andet grundlag må anses for helt teoretisk. Udvisning med

tidsbegrænset indrejseforbud af nok så begrænset varighed er derfor i realiteten det samme som udvisning med indrejseforbud for bestandig.

Han bør herefter alene tildeles en advarsel om udvisning.

Anklagemyndigheden har anført navnlig, at landsrettens udmålte straf på fængsel i 1 år og 2 måneder bør skærpes. Det er en skærpende omstændighed, at voldtægten blev begået af flere i forening, jf. straffelovens § 82, nr. 2. Lovovertrædelsen er desuden forbundet med en særlig krænkelse af den forurettede, jf. straffelovens § 216, stk. 4.

Udvisning af T vil ikke være uforenelig med Danmarks internationale forpligtelser efter Menneskerettighedskonventionens artikel 8. Der er tale om et indgreb i hans privatliv, men indgrebet er proportionalt og retfærdiggjort efter artikel 8, stk. 2.

T er født og har i sine første leveår boet i Cambodia. Han kom til Danmark, da han var 7 eller 8 år. I Danmark er han opvokset med cambodianske forældre i et hjem, hvor der blev talt dansk og cambodiansk. Han har hvert 3.-4. år besøgt Cambodia, hvor hans mormor bor. Han har således samlet set en stærk tilknytning til Danmark, men han er ikke uden forudsætninger for at begå sig i Cambodia.

Det fremgår af Menneskerettighedsdomstolens praksis, at indrejseforbuddets længde tillægges betydning ved proportionalitetsvurderingen, jf. bl.a. dom af 5. september 2023 i sag 44810/20 (Noorzae mod Danmark).

Ts mulighed for på et senere tidspunkt at opnå opholdstilladelse på ny skal derimod ikke indgå i proportionalitetsvurderingen, jf. Højesterets dom af 3. oktober 2022 (UfR 2023.1).

Det følger af udlændingelovens § 32, stk. 4, nr. 6, jf. stk. 1, at T i tilfælde af stadfæstelse af landsrettens strafudmåling skal udvises med et indrejseforbud i 12 år. Hvis et indrejseforbud i 12 år vil indebære, at udvisning med sikkerhed vil være i strid med Danmarks internationale forpligtelser, kan der fastsættes et indrejseforbud af kortere varighed, jf. samme lovs § 32, stk. 5, nr. 1.

Hvis Højesteret ikke finder grundlag for udvisning, skal T tildeles en advarsel om udvisning efter udlændingelovens § 24 b.

Højesterets begrundelse og resultat

Sagens baggrund og problemstilling
T er ved landsrettens dom fundet skyldig i voldtægt efter straffelovens § 216, stk. 1, ved at have skaffet sig samleje med en kvinde, der var i en tilstand, hvor hun var ude af stand til at modsætte sig handlingen, idet hun sov. Han blev ligesom en medgerningsmand, der havde tilskyndet ham til at begå handlingen, straffet med fængsel i 1 år og 2 måneder. T blev desuden udvist af Danmark med indrejseforbud i 12 år.

For Højesteret angår sagen straffastsættelsen og spørgsmålet om udvisning.

Straffastsættelsen
Af de grunde, som landsretten har anført, tiltræder Højesteret, at straffen er fastsat til fængsel i 1 år og 2 måneder.

Udvisning
Det følger af udlændingelovens § 26, stk. 2, jf. § 22, nr. 6, at T skal udvises, medmindre dette med sikkerhed vil være i strid med Danmarks internationale forpligtelser. Spørgsmålet er, om udvisning vil være i strid med Den Europæiske Menneskerettighedskonventions artikel 8 om ret til respekt for privatliv og familieliv.

T er nu 24 år og cambodiansk statsborger. Han indrejste i Danmark, da han var 7 eller 8 år, og har boet her siden. Han er ikke gift eller samlevende og har ingen børn. Udvisning vil indebære et indgreb i hans ret til privatliv, jf. Menneskerettighedskonventionens artikel 8, stk. 1, og kan derfor kun ske, hvis betingelserne i bestemmelsens stk. 2 er opfyldt. Udvisning har hjemmel i udlændingeloven og har til formål at forebygge uro eller forbrydelse. Det afgørende er herefter, om udvisning må anses for nødvendig under hensyn til disse formål. Dette beror på en proportionalitetsvurdering.

De kriterier, der skal indgå i vurderingen, fremgår bl.a. af Den Europæiske Menneskerettighedsdomstols dom af 23. juni 2008 i sag 1638/03 (Maslov mod Østrig), præmis 68. Den vægt, der skal lægges på de enkelte kriterier, afhænger af den konkrete sags omstændigheder, jf. dommens præmis 70. I tilfælde som det foreliggende, hvor der er tale om en udlænding, som ikke har etableret egen familie, skal der lægges vægt på karakteren og alvoren af den begåede kriminalitet, varigheden af udlændingens ophold i værtslandet, tiden efter den begåede kriminalitet og udlændingens adfærd i denne periode samt fastheden af sociale, kulturelle og familiemæssige bånd til værtslandet og modtagerlandet, jf. dommens præmis 71. Der skal foreligge meget tungtvejende grunde for at retfærdiggøre en udvisning, når der er tale om en fastboende udlænding, der er født her i landet eller indrejst som barn, og som har tilbragt det meste af sin barndom og ungdom her, jf. præmis 75.

Om proportionalitetsvurderingen i den foreliggende sag bemærker Højesteret herefter:

T er straffet med fængsel i 1 år og 2 måneder for voldtægt begået den 21. oktober 2020 ved at have skaffet sig samleje med en kvinde, der var i en tilstand, hvor hun var ude af stand til at modsætte sig handlingen, idet hun sov. Landsretten har lagt til grund, at forholdet blev begået efter tilskyndelse fra en kammerat, der gentagne gange opfordrede T til at skaffe sig samleje med kvinden, selv om T var forbeholden.

T er tidligere straffet ved Københavns Byrets dom af 16. december 2020 med bøde for overtrædelse af lov om euforiserende stoffer.

Efter de foreliggende oplysninger om Ts personlige forhold har han gennemført folkeskolen til og med 10. klasse, og siden har han været tilknyttet arbejdsmarkedet, hvor han nu arbejder i restaurationsbranchen. Han har spillet fodbold i en klub og har en dansk omgangskreds.

Han har således gode personlige forhold og må anses for velintegreret. Herefter, og efter de konkrete omstændigheder i forbindelse med den foreliggende kriminalitet, er der ikke grundlag for at fastslå, at der er en risiko for, at han fremover vil begå alvorlig kriminalitet, herunder seksualkriminalitet.

Han kom til Danmark i en alder af 7-8 år og har siden opholdt sig her i landet, hvor hans mor, far og lillebror også bor. Han har som nævnt haft sin skolegang her, og han arbejder nu i restaurationsbranchen. Han er ikke gift eller samlevende og har ikke børn. Han er cambodiansk statsborger. Hans mormor, der er over 80 år, bor i Cambodia, og familien har besøgt Cambodia hvert 3. eller 4. år. Han taler efter sin egen opfattelse dårligt cambodiansk.

Under de foreliggende omstændigheder, hvor der ikke kan antages at være risiko for recidiv til alvorlig kriminalitet, og hvor T har en meget stærk tilknytning til Danmark og en meget begrænset tilknytning til Cambodia, finder Højesteret, at der ikke foreligger sådanne meget tungtvejende grunde, som efter Menneskerettighedsdomstolens praksis kræves for at kunne udvise udlændinge, der er født eller opvokset i værtslandet.

T frifindes herefter for påstanden om udvisning.

Det følger af udlændingelovens § 24 b, at en udlænding skal tildeles en advarsel, hvis der ikke er grundlag for at udvise den pågældende efter udlændingelovens §§ 22-24, fordi dette med sikkerhed vil være i strid med Danmarks internationale forpligtelser.

Konklusion
Højesteret stadfæster landsrettens dom med den ændring, at T tildeles en advarsel om udvisning, jf. udlændingelovens § 24 b.

Thi kendes for ret:

T straffes med fængsel i 1 år og 2 måneder.

T frifindes for påstanden om udvisning.

T tildeles en advarsel om udvisning.

Statskassen skal betale sagens omkostninger for Højesteret.