HØJESTERETS DOM
afsagt mandag den 3. oktober 2022

Sag 33/2022
(1. afdeling)

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

I tidligere instanser er afsagt dom af Københavns Byret den 8. januar 2021 (SS 2-11230/2020) og af Østre Landsrets 19. afdeling den 2. september 2021 (SS-224-21).

I pådømmelsen har deltaget fem dommere: Thomas Rørdam, Jens Peter Christensen, Hanne Schmidt, Jan Schans Christensen og Jørgen Steen Sørensen.

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

Anklagemyndigheden har påstået stadfæstelse, subsidiært udvisning med indrejseforbud af kortere varighed end fastsat, mere subsidiært advarsel om udvisning.

Supplerende sagsfremstilling
Af en erklæring af 7. september 2022 fra overlæge A, Psykiatrisk Center Sct. Hans, fremgår bl.a.:

> ”*Konklusion*
> Patienten er i stabil psykisk tilstand. Han misbruger ikke.
>
> Han samarbejder fint omkring alle behandlingsindtag.

> Han er velmedicineret. Han overholder husorden og aftaler, og benytter sig af terapeutiske samtaler.
>
> Han er meget social og deltager i flere aktiviteter både på og udenfor afsnittet.
>
> Patienten vurderes aktuelt i LAV risiko for vold.
>
> Patienten lider af paranoid skizofreni og skal regelmæssigt (hver dag) behandles med antipsykotisk virkende medicin, også efter udskrivelse. Antipsykotiske lægemidler er lægemidler, der er rettet mod behandling af personer med symptomer på sindssygdom, især hallucinationer og forfølgelsesforestillinger. Skizofreni er en alvorlig psykisk lidelse, som præges af psykotiske symptomer, social tilbagetrækning og svækket evne til at fungere i sociale sammenhænge.
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> Patienten skal behandles med antipsykotisk medicin resten af hans liv. Ophører pt. med medicinen stiger risikoen for forværring af hans psykiske tilstand som kunne føre til fornyet kriminalitet."

Udover hvad der fremgår af byrettens dom, er T tidligere straffet adskillige gange, herunder for overtrædelser af våbenlovgivningen og lovgivningen om euforiserende stoffer.

Retsgrundlag

Den 7. december 2021 afsagde Den Europæiske Menneskerettighedsdomstol (Storkammeret) dom i sag 57467/15 (Savran mod Danmark). I sagen havde landsretten efter udlændingelovens § 50 a opretholdt en tidligere bestemt udvisning for bestandig i et tilfælde, hvor den pågældende efter straffelovens § 16, stk. 2, var straffri. Menneskerettighedsdomstolen fandt, at der ved opretholdelsen af udvisningen forelå en krænkelse af Den Europæiske Menneskerettighedskonventions artikel 8 om ret til respekt for privatliv, og anførte om spørgsmålet bl.a.:

> "*ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION*
> …
>
> *a) General principles*
> 181. The Court first reiterates the following fundamental principles established in its case-law as summarised in Üner (cited above, § 54) and quoted in Maslov (cited above, § 68):
>
> > '54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 67, Series A no. 94, and Boujlifa v. France, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of

their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see Dalia v. France, 19 February 1998, § 52, Reports 1998-I; Mehemi v. France, 26 September 1997, § 34, Reports 1997-VI; Boultif, cited above, § 46; and Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003-X).

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, inter alia, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.'

182. In Maslov (cited above, § 71) the Court further set out the following criteria as relevant to the expulsion of young adults, who have not yet founded a family of their own:

– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time that has elapsed since the offence was committed and the applicant's conduct during that period; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

In addition, the Court will have regard to the duration of the exclusion order (ibid., § 98; see also Külekci v. Austria, no. 30441/09, § 39, 1 June 2017, and Azerkane v. the Netherlands, no. 3138/16, § 70, 2 June 2020). Indeed, the Court notes in this context that the duration of a ban on re-entry, in particular whether such a ban is of limited or unlimited duration, is an element to which it has attached importance in its case-law (see, for example, Yilmaz v. Germany, no. 52853/99, §§ 47-49, 17 April 2003; Radovanovic v. Austria, no. 42703/98, § 37, 22 April 2004; Keles v. Germany, no. 32231/02, §§ 65-66, 27 October 2005; Külekci v. Austria, cited above, § 51; Veljkovic-Jukic v. Switzerland, no. 59534/14, § 57, 21 July 2020; and Khan v. Denmark, no. 26957/19, § 79, 12 January 2021).

183. All of the relevant criteria established in the Court's case-law should be taken into account by the domestic courts, from the standpoint of either "family life" or "private life" as appropriate, in all cases concerning settled migrants who are to be expelled

and/or excluded from the territory following a criminal conviction (see Üner, cited above, § 60, and Saber and Boughassal, cited above, § 47).

184. Where appropriate, other elements relevant to the case, such as, for instance, its medical aspects, should also be taken into account (see Shala v. Switzerland, no. 52873/09, § 46, 15 November 2012; I.M. v. Switzerland, cited above, § 70; and K.A. v. Switzerland, no. 62130/15, § 41, 7 July 2020).

185. The weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case; where the aim is the "prevention of disorder or crime", they are designed to help domestic courts evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities (see Maslov, cited above, § 70).

186. Moreover, for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion (ibid., § 75).

187. National authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued. However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other. Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (ibid., § 76, and the cases cited therein).

188. Domestic courts must put forward specific reasons in the light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, without any real balancing of the interests in issue, this would be contrary to the requirements of Article 8 of the Convention. In such a scenario, the Court will find that the domestic courts failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a "pressing social need" (see El Ghatet v. Switzerland, no. 56971/10, § 47, 8 November 2016).

189. At the same time, 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 balanced 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 Ndidi, cited above, § 76; Levakovic, cited above, § 45; Saber and Boughassal, cited above, § 42; and Narjis, cited above, § 43).

(*b) Application of those principles in the present case*

190. In the present case, it appears that a balancing of the various interests at stake was performed in the light of the relevant Article 8 criteria by the national courts in the context of the criminal proceedings against the applicant, when his expulsion was first ordered. The Court further observes that a significant period elapsed between 10 August 2009 (the date on which the expulsion order became final) and 20 May 2015 (the date of the final decision in the revocation proceedings). Thus, it fell to the national authorities to consider the proportionality of the applicant's expulsion in the revocation proceedings, taking into account any relevant change in his circumstances, notably those pertaining to his conduct and health, that might have taken place during that period (see Maslov, cited above, §§ 90-93). The Court reiterates at this juncture that the crux of the present case is the compliance of the revocation proceedings with the relevant criteria under Article 8 of the Convention established by the Court's case-law (see paragraph 171 above).

191. The Court observes at the outset that, on account of his mental condition, the applicant was more vulnerable than an average "settled migrant" facing expulsion. The state of his health was required to be taken into account as one of the balancing factors (see paragraph 184 above). In this connection, the Court observes that, by virtue of section 50a of the Aliens Act (see paragraph 76 above), the national courts in the revocation proceedings proceeded to determine whether the applicant's state of health made it conclusively inappropriate to enforce the expulsion order. At two levels of jurisdiction, the domestic courts had regard to statements from various experts and relevant information from the country concerned. In particular, they examined information from the social security institution in Turkey, a physician at a rehabilitation clinic in Konya under the auspices of the public hospital, and a public hospital in Konya, which confirmed that it was possible for a patient to receive intensive care in a psychiatric hospital matching the applicant's needs. The courts were thus satisfied that the medication in issue was available in Turkey, including in the area where the applicant would most likely settle down.

192. The Court sees no reason to question that very thorough consideration was given to the medical aspects of the applicant's case at the domestic level. Indeed, the High Court carried out a careful examination of the applicant's state of health and the impact thereon, including the availability and accessibility of the necessary medical treatment, should the removal be implemented. It took into account the cost of medication and care, the distance to be travelled in order to have access to care and the availability of medical assistance in a language spoken by the applicant. However, medical aspects are only one among several factors to be taken into account where appropriate (see paragraph 184 above), as is the case here, in addition to the Maslov criteria outlined in paragraph 182 above.

193. As regards the nature and seriousness of the criminal offence, the Court observes that, while still a minor, the applicant committed a robbery of which he was convicted in 2001 (see paragraph 12 above). In 2006, acting with a group of other people, he participated in an attack on a man which resulted in the latter's death (see paragraph 13 above). The Court notes that those were crimes of a violent nature, which cannot be regarded as mere acts of juvenile delinquency (compare and contrast Maslov, cited above, § 81). At the same time, the Court does not overlook the fact that, in the later criminal proceedings in which the applicant was found guilty of aggravated assault, the medical reports revealed that at the time when he had committed that offence, it was very likely

that he had been suffering from a mental disorder, namely paranoid schizophrenia, threatening and physically aggressive behaviour being symptoms of that disorder in his case (see paragraph 25 above). In accordance with the Maslov criteria (see paragraph 182 above), it needs to be considered whether "very serious reasons" justified the applicant's expulsion and hence, for the purposes of the present case, the refusal to revoke the order in 2015 at the time its execution became feasible. A relevant issue for the purposes of the Article 8 analysis is whether the fact that the applicant, on account of his mental illness, was, in the national courts' view, exempt from punishment under Article 16 § 2 and Article 68 of the Danish Penal Code when convicted in 2009 had the impact of limiting the extent to which the respondent State could legitimately rely on the applicant's criminal acts as the basis for his expulsion and permanent ban on re-entry.

194. In its recent case-law dealing with the expulsion of settled migrants under Article 8 of the Convention (see, for example, paragraph 189 above), the Court has held that serious criminal offences can, assuming that the other Maslov criteria are adequately taken into account by the national courts in an overall balancing of interests, constitute a "very serious reason" such as to justify expulsion. However, the first Maslov criterion, with its reference to the "nature and seriousness" of the offence perpetrated by the applicant, presupposes that the competent criminal court has determined whether the settled migrant suffering from a mental illness has demonstrated by his or her actions the required level of criminal culpability. The fact that his or her criminal culpability was officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act was perpetrated may have the effect of limiting the weight that can be attached to the first Maslov criterion in the overall balancing of interests required under Article 8 § 2 of the Convention.

195. The Court makes clear that in the present case it is not called upon to make general findings in this regard, but only to determine whether the manner in which the national courts assessed the "nature and seriousness" of the applicant's offence in the 2015 proceedings adequately took into account the fact that he was, according to the national authorities, suffering from a serious mental illness, namely paranoid schizophrenia, at the moment when he perpetrated the act in question.

196. In this connection, the Court observes that, in its decision of 13 January 2015 regarding the lifting of the expulsion order, the High Court only briefly referred to the serious nature and gravity of his criminal offence (the first Maslov criterion, see paragraphs 66 and 182 above). No account was taken of the fact that the applicant was, due to his mental illness, ultimately exempt from any punishment but instead sentenced to committal to forensic psychiatric care (see paragraphs 22, 26 and 30 above). The High Court also made only a limited attempt to consider whether there had been a change in the applicant's personal circumstances with a view to assessing the requirements of public order in the light of the information regarding his conduct during the intervening 7-year period (see paragraphs 34-36, 38-40, 43, 51, 54 and 62 above). Against this background, and given the immediate and long-term consequences for the applicant of the expulsion order being executed (see paragraph 200 below in relation to the permanent nature of the ban on re-entry), the Court considers that the national authorities did not give a sufficiently thorough and careful consideration to the Article 8 rights of the applicant, a settled migrant who had resided in Denmark since the age of six, and did not carry out an appropriate balancing exercise with a view to establishing whether

those applicant's rights outweighed the public interest in his expulsion for the purpose of preventing disorder and crime (compare Ndidi, cited above, §§ 76 and 81).

197. In that connection, as follows from the third of the Maslov criteria (see paragraph 182 above), the applicant's conduct during the period that elapsed between the offence of which he had been found guilty and the final decision in the revocation proceedings is particularly important. Thus, the relevant evidence demonstrates that although initially the applicant's aggressive behavioural patterns had persisted, he had made progress during those years (see paragraphs 34-36, 38-40, 43, 51, 54 and 62 above). However, the High Court did not consider these changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence, which had exempted him from punishment, and the apparent beneficial effects of his treatment, which had led to his being discharged from forensic psychiatric care.

198. A further issue to be considered is the solidity of the applicant's social, cultural and family ties with the host country and the country of destination (the fourth Maslov criterion). Whilst the applicant's ties with Turkey seem to have been limited, it cannot be said that he was completely unfamiliar with that country (see paragraphs 30, 59 and 65 above). However, it appears that the High Court gave little consideration to the length of the applicant's stay in and his ties to his host country Denmark (the second and fourth Maslov criteria respectively; see paragraph 182 above), stressing as it did the fact that he had not founded his own family and had no children in Denmark (see paragraph 66 above). As to the latter aspect, the Court reiterates its finding in paragraph 178 above that, even if he had no "family life", the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see Maslov, cited above, § 93). In this regard, the Court attaches particular weight to the fact, also noted by the domestic courts in the criminal proceedings and by the City Court in the revocation proceedings, that the applicant was a settled migrant who had been living in Denmark since the age of six (see paragraph 59 above). Although the applicant's child and young adulthood were clearly difficult, suggesting integration difficulties, he had received most of his education in Denmark and his close family members (mother and siblings) all live there. He had also been attached to the Danish labour market for about five years (see paragraphs 27 and 30 above).

199. Lastly, in order to assess the proportionality of the impugned measure, the duration of the entry ban also needs to be taken into account (see paragraph 182 above). The Court has previously found such a ban to be disproportionate on account of its unlimited duration, whilst in other cases, it has considered the limited duration of the exclusion measure to be a factor weighing in favour of its proportionality (see the authorities cited in paragraph 182 above). The Court has also accepted an expulsion measure as proportionate in a situation where, in spite of the indefinite duration of that measure, possibilities remained for the applicants to enter the returning State (see, for instance, Vasquez v. Switzerland, no. 1785/08, § 50, 26 November 2013, where the applicant could apply for authorisation to enter Switzerland as a tourist), and, even more so, where it was open to the applicants to request the authorities to reconsider the duration of the entry ban (ibid.; see also Kaya v. Germany, no. 31753/02, §§ 68-69, 28 June 2007).

200. In the present case, the Danish courts, in the revocation proceedings, had no discretion under the domestic law to review and to limit the duration of the ban imposed on

> the applicant; nor was it open to him to have the exclusion order reconsidered in any other procedure. As a result of the refusal to lift that measure in the revocation proceedings, he was subjected to a permanent re-entry ban. The Court notes the very intrusive nature of that measure for the applicant. In the light of the Government's submissions regarding the very limited basis on which a visitor's visa may be issued to aliens who have been expelled and permanently banned from re-entry (see paragraph 162 above), it is clear that the possibility of the applicant re-entering Denmark, even for a short period, remains purely theoretical. As a result, he has been left without any realistic prospect of entering, let alone returning to, Denmark.
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> 201. In the light of the above, it appears that in the revocation proceedings, despite the significant period of time during which the applicant underwent medical treatment for his mental disorder, the High Court, apart from briefly referring to his lack of family ties in Denmark and to the serious nature and gravity of his criminal offence, did not consider the changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Nor did it have due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. The Court further notes that under the domestic law, the administrative and judicial authorities had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which was both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considers that, in the particular circumstances of the present case, the domestic authorities failed to duly take into account and to properly balance the interests at stake (see paragraphs 182 and 183 above).
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> 202. Accordingly, there has been a violation of Article 8 of the Convention."

Anbringender

T har anført, at udvisning med sikkerhed vil være i strid med artikel 8 i Den Europæiske Menneskerettighedskonvention.

Det følger af kravet om proportionalitet i konventionens artikel 8, stk. 2, at udvisning af en fastboende udlænding, der er indrejst som barn og har tilbragt det meste af sin barndom og ungdom i landet, forudsætter særligt tungtvejende grunde, f.eks. forebyggelse af uro eller forbrydelse.

Det fremgår af Den Europæiske Menneskerettighedsdomstols praksis, at den pågældendes helbredsmæssige forhold skal indgå i vurderingen. Af Menneskerettighedsdomstolens dom af 7. december 2021 (Savran mod Danmark) følger særligt, at det må indgå, om den pågældende var utilregnelig på det tidspunkt, hvor det strafbare forhold blev begået. Dette kan have betydning for bedømmelsen af karakteren og alvoren af den begåede kriminalitet.

Der skal derfor lægges vægt på, at han er fundet straffri i medfør af straffelovens § 16, stk. 1. Det skal også tillægges betydning, at forholdene er begået for mere end tre år siden, at han trods vide rammer for udgang ikke siden har begået kriminalitet, og at hans psykiske lidelse i dag er velbehandlet. Der skal endvidere lægges vægt på hans stærke familiemæssige, sociale og kulturelle bånd til Danmark og på, at han i realiteten er uden forudsætninger for at etablere et liv i Irak.

Også udvisning med tidsbegrænset indrejseforbud vil være i strid med artikel 8. Han har opholdstilladelse i medfør af udlændingelovens dagældende bestemmelse om familiesammenføring med herboende forældre, og tilladelsen vil bortfalde i tilfælde af udvisning. Hans udsigt til at få opholdstilladelse i Danmark på andet grundlag må anses for helt teoretisk. Udvisning med tidsbegrænset indrejseforbud er derfor i realiteten det samme som udvisning med indrejseforbud for bestandig.

Anklagemyndigheden har anført, at udvisning ikke vil være i strid med Menneskerettighedskonventionens artikel 8.

Det følger af Menneskerettighedsdomstolens dom i sagen Savran mod Danmark, at det i proportionalitetsvurderingen efter artikel 8, stk. 2, skal tillægges betydning, at den pågældende efter straffelovens § 16 er frifundet for straf. Det fremgår imidlertid ikke af dommen, med hvilken vægt forholdet skal indgå. I den foreliggende sag må det tillægges betydning, at T er fundet skyldig i røveri og i legemsangreb af særlig rå, brutal eller farlig karakter – dvs. kriminalitetstyper, som Menneskerettighedsdomstolen ser på med stor alvor. Der må også lægges vægt på, at han siden 2012 er straffet adskillige gange, og at han ved to domme er udvist betinget og derfor var bekendt med konsekvenserne af ny kriminalitet, da han begik de aktuelle forhold.

Det må endvidere indgå, at en række af hans tidligere forhold er begået, før han blev fundet utilregnelig. Risikoen for, at han også fremover vil begå alvorlig kriminalitet i Danmark, afhænger derfor ikke alene af hans sindssygdom, herunder hvor velbehandlet han er. Hertil kommer, at de aktuelle forhold ikke forekommer udelukkende begrundet i f.eks. vrangforestillinger, idet der var tale om et planlagt røveri begået af flere i forening.

T har samlet set stærk tilknytning til Danmark, men han er ikke helt uden forudsætninger for at begå sig i Irak. Han taler stadig lidt arabisk, og det må antages, at han i sin opvækst har fået kendskab til irakisk kultur og skik.

Hvis der ikke er grundlag for udvisning for bestandig, må der ske udvisning med tidsbegrænset indrejseforbud. I givet fald vil han kunne søge opholdstilladelse, når indrejseforbuddet udløber. Det skal ikke på nuværende tidspunkt vurderes, om han faktisk vil kunne få opholdstilladelse, idet dette må bero på forholdene til den tid.

Højesterets begrundelse og resultat

Sagens baggrund og problemstilling
T er fundet skyldig i overtrædelse af straffelovens § 288, stk. 1, nr. 1, og § 245, stk. 1, ved i juni 2019 i forening og efter forudgående aftale eller fælles forståelse med to andre personer at have overfaldet og aftvunget B ca. 59.000 kr. i kontanter og flere gange stukket ham med en kniv. Han er i medfør af straffelovens § 16, stk. 1, frifundet for straf som følge af utilregnelighed på grund af sindssygdom. Han er dømt til anbringelse i psykiatrisk afdeling og udvist af Danmark med indrejseforbud for bestandig.

For Højesteret angår sagen alene spørgsmålet om udvisning.

Udvisning
Som anført af landsretten skal T efter udlændingeloven udvises, medmindre dette med sikkerhed vil være i strid med Danmarks internationale forpligtelser, jf. lovens § 26, stk. 2. Spørgsmålet er, om udvisning med sikkerhed vil være i strid med Den Europæiske Menneskerettighedskonventions artikel 8 om ret til respekt for privatliv og familieliv.

T er 26 år og irakisk statsborger. Han er ikke gift eller samlevende og har ikke børn, men han har haft lovligt ophold i Danmark, siden han var 2 år. Udvisning vil derfor indebære et indgreb i hans ret til privatliv, jf. Menneskerettighedskonventionens artikel 8, stk. 1, og kan kun ske, hvis betingelserne i bestemmelsens stk. 2 er opfyldt. Udvisning har hjemmel i udlændingeloven og har til formål at forebygge uro eller forbrydelse, og det afgørende er herefter, om

udvisning må anses for nødvendig af 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 ung 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. dommens præmis 75.

Særligt med hensyn til tilfælde, hvor den pågældende er frifundet for straf som følge af utilregnelighed på grund af sindssygdom, foreligger nu Menneskerettighedsdomstolens dom af 7. december 2021 i sag 57467/15 (Savran mod Danmark). Den sag, der var indbragt for Domstolen, angik prøvelse efter udlændingelovens § 50 a, men det, der fremgår af dommen, må også finde anvendelse, når spørgsmålet om udvisning første gang skal afgøres.

Det følger af dommen bl.a., at det forhold, at den pågældende er straffri som følge af utilregnelighed, ”may have the effect of limiting the weight that can be attached to the first Maslov criterion [’the nature and seriousness of the offence comitted by the applicant’] in the overall balancing of interests required under Article 8 § 2 of the Convention” (præmis 194). På linje med anden praksis fra Menneskerettighedsdomstolen følger det også af dommen, at det som led i proportionalitetsvurderingen må indgå, hvilken varighed det indrejseforbud, der er knyttet til udvisningen, har, herunder om indrejseforbuddet er for bestandig, eller om det er tidsbegrænset (præmis 199). Ved denne proportionalitetsvurdering ses der ikke i Menneskerettighedsdomstolens praksis grundlag for, at det skal tillægges særskilt betydning, hvilke muligheder udlændingen ved indrejseforbuddets udløb kan antages at ville have for på ny at få

opholdstilladelse. Dette må således bl.a. bero på de relevante regler på det pågældende tidspunkt.

Om den foreliggende sag bemærker Højesteret herefter:

T er som anført straffet for røveri og for legemsangreb af særlig rå, brutal eller farlig karakter begået i forening med andre efter forudgående aftale eller fælles forståelse. Han er også i 2012 straffet for røveri, ligesom han i 2016 er straffet for overtrædelse af straffelovens § 192 a, stk. 1, nr. 1 (overtrædelse af våbenlovgivningen under særligt skærpende omstændigheder) og i 2019 fundet skyldig i overtrædelse af straffelovens § 191, stk. 1 (overtrædelse af lovgivningen om euforiserende stoffer under særligt skærpende omstændigheder). Selv om det tidligere røveri blev begået, mens han var mindreårig, og forholdet vedrørende straffelovens § 191, stk. 1, var straffrit efter lovens § 16, stk. 1, finder Højesteret, at der er betydelig risiko for, at han også fremover vil begå kriminalitet, herunder personfarlig kriminalitet og narkotikakriminalitet, hvis han ikke udvises. De foreliggende oplysninger om hans adfærd under den aktuelle indlæggelse på Psykiatrisk Center Sct. Hans, hvor han er dømt til anbringelse, kan ikke føre til en anden vurdering. Han er ved dommene i 2016 og 2019 udvist betinget og dermed advaret om, at fortsat kriminalitet kan føre til ubetinget udvisning.

Over for det anførte står bl.a., at han i det nu foreliggende forhold er fundet straffri som følge af utilregnelighed på grund af sindssygdom, og at dette efter Menneskerettighedsdomstolens dom af 7. december 2021 skal indgå i den samlede vurdering efter konventionens artikel 8, stk. 2. Han har imidlertid trods sin sindssygdom været i stand til at deltage i røveriet efter forudgående aftale eller fælles forståelse med andre.

Om Ts øvrige personlige forhold fremgår det som anført af landsretten bl.a., at han er født i Irak og kom til Danmark som 2-årig. Han har forklaret, at han ikke har været i Irak siden sin indrejse i Danmark, og at han ikke har familie i Irak. Han har også forklaret, at han som barn talte arabisk, og at han stadig taler det lidt. Det må lægges til grund, at han ikke bor sammen med sin kæreste, men han er efter sin forklaring islamisk gift med hende og har stor tilknytning til hendes søn fra et tidligere forhold. Hans tilknytning til Danmark må således anses for meget stærkere end hans tilknytning til Irak.

Efter en samlet vurdering tiltræder Højesteret, at de hensyn, der taler for udvisning af T, er så tungtvejende, at de har større vægt end de hensyn, som taler imod. Højesteret tiltræder i den forbindelse, at T ikke er helt uden forudsætninger for at klare sig i Irak, idet han har talt arabisk som barn og stadig taler det lidt, ligesom han, uanset at han i en periode af sin barndom var anbragt uden for hjemmet, må antages gennem sin familie i Danmark at have kendskab til skik og kultur i Irak. Det må lægges til grund, at hans familie og pårørende vil have mulighed for at opretholde kontakten med ham, herunder via telefon og internet.

Efter Menneskerettighedsdomstolens praksis har varigheden af et indrejseforbud betydning ved vurderingen af, om udvisning vil indebære et uproportionalt indgreb. T er som anført fundet straffri som følge af utilregnelighed på grund af sindssygdom såvel i den foreliggende sag som i sagen fra 2019, hvor han senest er betinget udvist, og hans tilknytning til Irak må anses for meget begrænset. På den baggrund finder Højesteret, at indrejseforbud for bestandig vil være et uproportionalt indgreb, og at indrejseforbuddets varighed i stedet bør fastsættes til 6 år, jf. udlændingelovens § 32, stk. 5, nr. 1.

Konklusion
Højesteret stadfæster landsrettens dom med den ændring, at indrejseforbuddets varighed fastsættes til 6 år.

Thi kendes for ret:

Landsrettens dom stadfæstes med den ændring, at T udvises af Danmark med indrejseforbud i 6 år.

Statskassen skal betale sagens omkostninger for landsret og Højesteret.