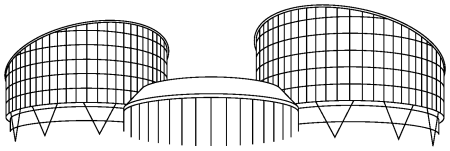

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ZEZEV v. RUSSIA

(Application no. 47781/10)

JUDGMENT

STRASBOURG

12 June 2018

FINAL

08/10/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zezev v. Russia,

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

Helena Jäderblom, *President,*
Branko Lubarda,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Jolien Schukking,
María Elósegui, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 22 May 2018,

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

PROCEDURE

1. The case originated in an application (no. 47781/10) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Kazakh national, Mr Aleksandr Anatolyevich Zezev ("the applicant"), on 11 August 2010.

2. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged under Article 8 of the Convention that his exclusion from Russia had violated his right to respect for his family life.

4. On 28 June 2016 the complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's residence in Russia

5. In 2005 the applicant, an information technology specialist, moved from Kazakhstan to the Krasnodar Region in Russia to live with his parents

and brother, O.Z., who were Russian citizens. He resided there on the basis of visas and temporary residence permits.

6. In January 2007, the applicant married Ms M.K., a Russian national, with whom he had a son in June 2009.

7. On 23 December 2008 the Kazakh authorities provided the applicant, upon his request, with an official statement certifying that he had no criminal record in Kazakhstan. The applicant had requested the document with view to applying for Russian nationality through the simplified procedure for spouses of Russian nationals.

8. In January 2009 the applicant submitted his application for Russian nationality to the Federal Migration Service in the Krasnodar Region (*Управление Федеральной миграционной службы по Краснодарскому краю* (*ФМС*)) (hereinafter "the Krasnodar FMS").

9. In May 2009 the Krasnodar FMS rejected the application, referring to information provided by the Federal Security Service (*Федеральная Служба Безопасности* (*ФСБ*)) (hereinafter "the FSB") that the applicant posed a threat to Russia's national security.

10. On 13 August 2009 the FSB informed the applicant about a decision it had made on the undesirability of his presence (residence) in Russia and on prohibiting him from re-entering the country until July 2014 (hereinafter "the exclusion order"). The applicant was to leave Russia within fifteen days of receipt of the letter. He was not provided with the reasons for the decision, its date or number.

B. The applicant's appeals against the exclusion order

11. On 13 November 2009 the applicant appealed against the exclusion order to the Oktyabrskiy District Court in Krasnodar, which forwarded it for examination to the Krasnodar Regional Court (hereinafter "the Regional Court"), which had jurisdiction under domestic legislation to look at cases involving State secrets. In his complaint, the applicant alleged, *inter alia*, that the exclusion order was arbitrary, that it had been taken on the basis of undisclosed information and that his removal from Russia would disrupt his family life. In particular, the applicant stated that he was ethnically Russian, had no connection with Kazakhstan and that his wife and child, as well as his brother and parents, were Russian nationals residing in Russia. He was the family breadwinner and his exclusion would entail distress and financial hardship for his wife and son.

12. On 24 March 2010 the Regional Court examined the applicant's appeal in camera. The applicant testified before the court and stated that in 1999 his brother O.Z. had been prosecuted by the United States' authorities for a computer crime perpetrated in that country; after serving his sentence in the United States, in 2004, his brother had returned to Russia, of which he was a national, and had been offered a job by the FSB. Meanwhile, the

applicant and his parents had been pressured by the Kazakh security services to convince his brother to return to Kazakhstan and collaborate with them. Shortly thereafter, in 2005, the Kazakh authorities had opened a criminal case against the applicant on suspicion of computer fraud. Later that year, due to the Kazakh authorities' pressure and his Russian ethnic origin, the applicant had decided to move to Russia. In 2006, the Kazakh authorities had pardoned the applicant and his criminal record had been expunged. The applicant stressed that throughout his time living in Russia he had been a law-abiding person, had been in full compliance with immigration regulations and had a wife and child who were Russian nationals. He pointed out that he was an ethnic Russian, that he did not speak Kazakh, had no family in that country, and that he had neither a place to live in Kazakhstan nor the financial means to move there with his wife and infant son.

13. Also at the hearing on 24 March 2010, the applicant's counsel requested that the court examine the factual grounds for the exclusion and allow him to access the documents which had served as its basis. He stressed that the FSB had failed to produce a single item of evidence to substantiate their allegations about the threat the applicant posed for national security. Referring to the case of *Liu v. Russia* (no. 42086/05, 6 December 2007), he pointed out that the authorities had to provide evidence proving the applicant was a threat to national security, given that the sanction against him, the five-year exclusion, would lead to the disruption of his family life. The court examined and dismissed the request, stating that as the matter was within the FSB's exclusive competence it fell outside the scope of judicial review. From the documents submitted to the Court, it is unclear whether the FSB presented the Regional Court with any evidence concerning the applicant's case, other than its letter to the applicant of 13 August 2009 (see paragraph 10 above) and copies of the relevant legal provisions governing the activities of the FSB and the applicable immigration regulations.

14. On the same date, 24 March 2010, the Regional Court rejected the applicant's appeal and upheld the exclusion order. Its decision stated, amongst other things, the following:

> " ... in July 2009 the Federal Security Service took a decision on the undesirability of Mr Zezev's presence (residence) in the Russian Federation and on prohibiting his re-entry into the country until July 2014 ...
>
> In his complaint, Mr Zezev seeks to have the decision of the Federal Security Service declared unlawful and for it to be overruled, referring to the following:
>
> He has resided in the Russian Federation for five years. He has never committed any crime, either in Russia or Kazakhstan. He does not have a criminal record. His character has been described in positive terms. He does not represent a threat to the security of the Russian Federation. He does not have a place to live in Kazakhstan. He is ethnically Russian and wants to work and live in Russia. The FSB's decision is unlawful and unsubstantiated ...

> ... [According to the applicant] the court should examine [his] case in the light of the right to respect for his private and family life and respect for a citizen's choice of the place for his family life. There is no evidence of any alleged criminal activities ...
>
> ... the FSB decided on the undesirability of Mr Zezev's presence (residence) in Russia and on prohibiting his re-entry into the country until July 2014.
>
> The application of such preventive measures is within the Federal Security Service's scope of discretion.
>
> The decision [in respect of the applicant] was taken by FSB officials within the scope of their authority and the procedure defined by federal legislation and was approved by the competent official.
>
> Given the circumstances, Mr Zezev's request to have the FSB's decision on the undesirability of his presence (residence) in Russia and on the prohibition on his re-entry until July 2014 declared unlawful should be rejected ..."

15. On 5 April 2010 the applicant appealed against the above decision to the Supreme Court of the Russian Federation (hereinafter "the Supreme Court"). He referred, in particular, to the Court's case-law on Article 8 of the Convention concerning the right to respect for family life. He stated that the Regional Court had failed to examine whether the FSB decision had been substantiated by proof. He pointed out that the FSB had not furnished any evidence to the court of alleged activities by him that posed a threat to national security. The applicant further stated that even though he was a Kazakh national he was an ethnic Russian, did not speak Kazakh, and had nowhere to live in Kazakhstan as his parents had also moved to Russia in 2005. He further stressed that he had married a Russian national in 2007 with whom he had had a son in 2009 and that all his family members were Russian nationals. Lastly, the applicant pointed out that he was the sole breadwinner for his wife and infant child.

16. On 2 June 2010 the Supreme Court upheld the Regional Court's judgment stating, amongst other things, the following:

> "...On 22 July 2009 the Federal Security Service issued a decision on the undesirability of the presence (residence) of the Kazakh national Mr Zezev in the Russian Federation and on the prohibition of his re-entry ...
>
> In the cassation appeal Mr Zezev seeks to have the judgment of the Krasnodar Regional Court overruled as unlawful.
>
> The court sees no basis for granting that request ...
>
> When deciding to reject Mr Zezev's request, the Regional Court had in its possession information which served as the basis for the [FSB] order.
>
> Mr Zezev's arguments concerning the unlawfulness of the FSB order were examined by the Regional Court.
>
> In those circumstances, the Chamber finds that the applicant's right to a proper defence was fully complied with and that the reasons for the decision concerning the undesirability of his presence (residence) in Russia and on the prohibition of his re-entry, which was taken owing to the real threat he posed to national security, have been confirmed by concrete facts.

> As for the applicant's arguments concerning a violation of his private interests as a result of the decision on the undesirability of his presence (residence) in Russia and on the prohibition of his re-entry, the Chamber does not agree with him as it finds that in the circumstances of the case public interests should outweigh private interests.
>
> In those circumstances, the decision of the Krasnodar Regional Court should remain unchanged ..."

C. Subsequent developments

17. On 17 August 2010 the FMS issued an order for the applicant's deportation. It appears from the case file that the sanction was not enforced as, according to the applicant, he informed the local authorities that he had an application pending before the Court. He continued to reside in Russia.

18. In May 2011 the applicant and his wife had another child.

19. On 19 November 2013 the police arrived at the applicant's home and fined him for a breach of immigration regulations under Article 18.8 of the Code of Administrative Offences ("the COA"). Then the police detained him on the spot and took him to the court.

20. The applicant was then taken to the Sovetskiy District Court in Krasnodar, which on 21 November 2013 ordered his deportation and placed him in a special centre for the detention of foreigners.

21. On 26 December 2013 the applicant was deported from Russia.

22. On an unspecified date in February 2014 the applicant attempted to re-enter Russia but was informed at the border that he was banned from entering until 31 July 2014.

23. The applicant has submitted that on 30 July 2014 police officers arrived at his wife's home in Russia and informed her that he was wanted on suspicion of a crime. The applicant's wife explained that he had been deported from Russia in December 2013.

24. It is unclear whether the applicant returned to Russia after the expiry of his re-entry ban on 31 July 2014. According to the Government, the applicant neither applied for a temporary residence permit nor sought Russian nationality between 2014 and 2016.

25. In their submission to the Court, the Government stated that on 12 December 2008 and 25 November 2012 the applicant was fined for being intoxicated in public and then on 19 November 2013 for a violation of immigration regulations (see paragraph 19 above). The Government further stated that on 31 July 2014 the police in Krasnodar had opened a criminal case against the applicant on suspicion of involvement in computer fraud. As of October 2016 the criminal proceedings against the applicant were still pending.

26. In reply to a request by the Court for a copy of the documents which served as the basis for the decision to exclude the applicant, the Government only furnished a thirteen-page copy of the transcript of the hearing of the

applicant's appeal by the Krasnodar Regional Court on 24 March 2010 (see paragraphs 12-14 above).

II. RELEVANT DOMESTIC LAW

27. For the relevant domestic law and practice, see *Liu v. Russia (no. 2)*, no. 29157/09, §§ 45-52, 26 July 2011.

III. RELEVANT COUNCIL OF EUROPE MATERIAL

28. For the relevant Council of Europe material, see *Gablishvili v. Russia*, no. 39428/12, § 37, 26 June 2014.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that his exclusion from Russia had violated his right to respect for his family life as provided in 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 not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

31. The Government contested that the applicant's exclusion from Russia had violated his right to respect for his family life. They submitted that the interference with the applicant's right had complied with Article 8

of the Convention. In particular, the decision to exclude him had been taken within the competence of the Federal Security Service and had been dictated by the need to protect Russia's national security. The relevant procedure had also been complied with. They stated in general terms that "in refusing to grant the appeal, the courts had information which served as the basis for the decision [to exclude the applicant]". They further stressed that the applicant's exclusion for five years was not disproportionate as such a ban appeared reasonable in comparison with the one of ten years imposed on the applicant in *Lupsa v. Romania* (no. 10337/04, ECHR 2006-VII). Furthermore, referring to the cases of *Samsonnikov v. Estonia* (no. 52178/10, 3 July 2012) and *Senchishak v. Finland* (no. 5049/12, 18 November 2014), the Government argued that the applicant was not a long-term migrant as he had not grown up in Russia. Therefore his move to Kazakhstan had not represented an extreme hardship for him.

32. The applicant maintained his complaint. He stressed, in particular, that he was not questioning the lawfulness of his exclusion, but the lack of proof justifying that measure. The applicant pointed out that the Russian courts which had examined his appeals against the exclusion had not allowed for the relevant procedural guarantees as no evidence had been presented and examined by them in order to verify the Federal Security Service's claim of his being a threat to national security. Referring to the cases of *Boultif v. Switzerland* (no. 54273/00, ECHR 2001-IX) and *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002), the applicant submitted that his exclusion had been disproportionate and had failed to balance the interests of the State against his right to respect for his family life. He stressed that the exclusion had had the effect of disrupting his family life with his wife and children, who were minors.

2. The Court's assessment

(a) General considerations and relevant principles

33. States are entitled to control the entry and residence of aliens on their territories (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, § 67, 28 May 1985, 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, for example, 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 *Mehemi v. France*, 26 September 1997, § 34, *Reports* 1997-VI; *Dalia*

v. France, 19 February 1998, § 52, Reports 1998-I; *Boultif*, cited above, § 46, ECHR 2001-IX; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

34. Where immigration is concerned, Article 8 cannot be considered as imposing a general obligation on a State to respect the choice of married couples of the country of their matrimonial residence and to authorise family reunion on its territory (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports* 1996‑I). However, the removal of a person from a country where close family members are living may amount to an infringement of the right to respect for family life, as guaranteed by Article 8 § 1 of the Convention (see *Boultif*, cited above, § 39). Where children are involved, their best interests must be taken into account and national decision-making bodies have a duty to assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 109, 3 October 2014).

35. Turning to the case at hand, the Court notes that prior to the decision on his exclusion taken in August 2009 the applicant had resided in Russia since 2005 on the basis of visas and temporary residence permits and that in 2007 he had married Ms M.K., with whom in 2009 he had a son. The applicant's wife and son are Russian nationals who have lived all their lives in Russia. The Court thus considers that the five-year exclusion ordered by the domestic authorities against the applicant constituted an interference with his right to respect for his family life (compare *Liu (no. 2)*, cited above, § 78, with further references).

36. The Court observes that the applicant's complaint concerns the lack of procedural safeguards in the proceedings concerning his exclusion, and, in particular, the lack of reasons from the domestic authorities to justify the sanction imposed on him. Bearing that in mind, the Court may in the present case, as in *Liu (no. 2)*, cited above, dispense with ruling on the "quality of law" requirements. That is because, irrespective of the lawfulness of the measures taken against the applicant, they fell short of being necessary in a democratic society, for the reasons set out below.

37. The Court is prepared to accept that the decision to exclude the applicant for five years may pursue a legitimate aim of protecting national security. It reiterates that a judgment by national authorities in any particular case that there is a danger to national security is one which the Court is not well equipped to review. Mindful of its subsidiary role and the wide margin of appreciation open to States in matters of national security, the Court accepts that it is for each State, as the guardian of its people's safety, to make its own assessment on the basis of the facts known to it. Significant weight must, therefore, attach to the judgment of the domestic authorities, and especially of the national courts, which are better placed to assess the

evidence relating to the existence of a national security threat (see *Liu (no. 2)*, cited above, § 85).

38. The Court further notes that while Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I, and *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports* 1996-IV). Therefore, the Court must examine whether the domestic proceedings were attended by sufficient procedural guarantees. It reiterates in this connection that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see, *mutatis mutandis*, *Regner v. the Czech Republic* [GC], no. 35289/11, §§ 151 and 161, ECHR 2017 (extracts)). The individual must be able to challenge the executive's assertion that national security is at stake. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Nolan and K. v. Russia*, no. 2512/04, § 71, 12 February 2009, and *Al-Nashif*, cited above, §§ 123-24).

(b) Application of these considerations and principles to the present case

39. Turning to the case at hand, the Court observes that the Government's submission neither referred to any Federal Security Service documents describing or substantiating the allegations against the applicant nor specified whether any such documents had been examined by the domestic courts. It is not clear from the case file what documents provided the domestic courts with information about the relevant acts ascribed to the applicant. Moreover, it emerges from the case file that no concrete evidence was examined by the courts in their upholding of the security service's decision to exclude the applicant on national security grounds. In their submissions to the Court, the Government neither gave an outline of the possible basis for the security services' allegations against the applicant (see, by contrast, *Regner*, cited above, §§ 156-157; *Liu (no. 2)*, cited above, § 75 and *Amie and Others v. Bulgaria*, no. 58149/08, §§ 12-13 and 98, 12 February 2013), nor furnished documents supporting those allegations (see paragraph 26 above).

40. The Court also notes that the information submitted by the Government concerning the administrative sanctions imposed on the applicant for violations occurring in 2008, 2012 and 2013 were not subject

to examination by the domestic courts (see paragraph 14 above) and, therefore, those details are immaterial for the proceedings before the Court.

41. Irrespective of the nature of the acts attributed to the applicant and the alleged danger he posed to national security, the Court notes that the domestic courts confined the scope of their examination to ascertaining that the FSB's report had been issued within its administrative competence, without carrying out an independent review of whether its conclusion had a reasonable basis in fact. They thus failed to examine a critical aspect of the case, namely whether the FSB had been able to demonstrate the existence of specific facts serving as a basis for its assessment that the applicant presented a national security risk (see, by contrast, *Regner*, cited above, § 154). Those elements lead the Court to conclude that the national courts confined themselves to a purely formal examination of the decision concerning the applicant's exclusion from Russia (see, for similar reasoning, *Liu (no. 2)*, cited above, § 89, and *Kamenov v. Russia*, no. 17570/15, § 36, 7 March 2017). As a result, this rendered it impossible to duly balance the interests at stake, taking into account the general principles established by the Court (see paragraphs 33-34 and 36-38 above) and applying standards in conformity with Article 8 of the Convention.

42. Furthermore, it appears from the documents submitted to the Court that no confidential material was disclosed to the applicant's representative despite a direct request to that end (see paragraph 13 above). Moreover, the applicant was not even given an outline of the national security case against him. The allegations against him were of an undisclosed nature, making it impossible for him to challenge the security service's assertions by providing exonerating evidence, such as an alibi or an alternative explanation for his actions (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 220-24, ECHR 2009).

43. Therefore, the Court finds that the domestic court proceedings concerning the examination of the applicant's exclusion order – and its effects on his family life – were not attended by sufficient procedural guarantees.

44. There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant did not make a claim in respect of pecuniary damage, costs or expenses. As for non-pecuniary damage, he claimed 100,000 euros (EUR) and requested that the award be paid to the account of his wife, Ms M.K., as indicated in his submission to the Court.

47. The Government submitted that the claim was excessive and unreasonable.

48. Regard being had to the documents in its possession and its findings in the present case, and making its assessment on an equitable basis, the Court finds it reasonable to award the applicant EUR 12,500 in respect of non-pecuniary damage, plus any tax which can be chargeable on this amount.

B. Default interest

49. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 8 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the amount of EUR 12,500 (twelve thousand five hundred euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement. This amount is to be paid to the account of the applicant's wife Ms M.K.;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Helena Jäderblom President