

December 2007

Liu v. Russia - 42086/05

Judgment 6.12.2007 [Section I]

Article 8

Article 8-1

Respect for family life

Respect for private life

Lack of procedural safeguards in deportation proceedings: *violation*

Article 8

Expulsion

Lack of procedural safeguards in deportation proceedings: *violation*

Facts: The first applicant – a Chinese national – and the second applicant – a Russian national – have been married since 1994 and have two children. The second applicant and the two children have lived in Russia all their lives. The first applicant lived legally in Russia until August 2003 on the basis of renewable work permits. In November 2002 he applied for a residence permit, but his application was eventually rejected without any reasons being given. The applicants appealed unsuccessfully to the Russian courts. In November 2004 the competent district court found that, on the basis of certain classified information, the first applicant posed a national security risk. However, that information was a State secret and could not be made public, nor was there any indication in the judgment that the district court had ever had access to the classified information in question. In March 2005 a new application for a residence permit was rejected by the Department of Internal Affairs. The applicants' attempts to have that decision overturned failed. On several occasions between 2003 and 2005 the first applicant was administratively fined for living in Russia without a valid residence permit. However, the domestic courts reversed most of those decisions, finding them procedurally defective or time-barred. In November 2005 the competent court held that the first applicant had infringed the residence regulations and ordered his detention pending deportation. On the same day he was placed in a detention centre and was released on 13 December 2005, when the decision to detain him was quashed owing to a lack of reasoning. The administrative proceedings against him were eventually discontinued as being time-barred. In November 2005 the head of the Federal Migration Service ordered the first applicant's deportation under the Law on the Procedure for Entering and Leaving the Russian Federation. No further reasons were provided. In December 2006 the court ordered his placement in a detention centre with a view to deporting him. The deportation order appears not to have been enforced and the first applicant apparently continued to live with his family in Russia.

Law: Article 8 – The applicants’ relationship clearly amounted to family life and the refusal to grant the first applicant a residence permit and to order his deportation constituted an interference with the right to respect for their family life which had a basis in domestic law. However, the domestic courts were not in a position to assess effectively whether the decisions to reject the first applicant’s request for a residence permit were justified because they were based on classified information. Even though the use of confidential material might be unavoidable where national security was at stake, it did not mean that the national authorities could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. There were ways to deal with legitimate security concerns about the nature and sources of intelligence information while providing the individual with a substantial measure of procedural justice. The failure to disclose the relevant information to the courts had deprived them of the power to assess whether the conclusion that the first applicant constituted a danger to national security had a reasonable basis in the facts. It followed that the judicial scrutiny was limited in scope and did not provide sufficient safeguards against arbitrary exercise of the wide discretion conferred by domestic law on the Ministry of Internal Affairs in cases involving national security.

The relevant provisions of the Foreign Nationals Act allowed the Ministry of Internal Affairs to refuse residence permits and to require a foreign national to leave the country on national security grounds without giving any reasons and without effective scrutiny by an independent authority. The decisions ordering the first applicant’s detention had been taken by the Federal Migration Service on the initiative of a local police department. Both agencies were part of the executive and took such decisions without hearing the foreign national concerned. It was not clear whether there was a possibility of appealing against those decisions to a court or other independent authority offering guarantees of an adversarial procedure and being competent to review the reasons for the decisions and relevant evidence. Furthermore, the Administrative Offences Code provided for a different procedure for the removal of foreign nationals unlawfully residing in Russia, with substantial procedural safeguards. In particular, the power to order administrative removal belonged exclusively to a judge and the order was subject to appeal to a higher court. It followed that Russian law established two parallel procedures for expulsion of foreign nationals whose residence in Russia had become unlawful. In one of those procedures deportation of a foreign national could be ordered by the executive without any form of independent review or adversarial proceedings, while the other procedure (administrative removal) provided for judicial scrutiny. Domestic law permitted the executive to choose between those procedures at their discretion. The enjoyment of procedural safeguards by a foreign national was therefore in the hands of the executive. The Court concluded that the first applicant’s deportation had been ordered on the basis of legal provisions that did not afford an adequate degree of protection against arbitrary interference.

Conclusion: violation, if the deportation order were to be enforced (unanimously).

Article 5 § 1 – The Court considered whether the detention order of 21 November 2005 had constituted a lawful basis for the first applicant’s detention until it was quashed in December 2005 on account of the court’s failure to give reasons justifying the need to hold him in custody. It considered that that flaw did not amount to a “gross or obvious irregularity”. The town court had not acted in bad faith and had attempted to apply the relevant legislation correctly. The fact that certain flaws in the procedure had been found on appeal did not in itself mean that the detention was unlawful.

Conclusion: no violation (unanimously).

Article 41 – EUR 6,000 in respect of non-pecuniary damage.

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