



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

THIRD SECTION

CASE OF ZAKHARCHUK v. RUSSIA

(Application no. 2967/12)

JUDGMENT

Art 8 • Respect for private life • Expulsion • Eight-year exclusion of a long-term migrant after criminal conviction for serious crime • Ties with receiving country • Situation not comparable to that of a juvenile offender • Fair balance struck between competing interests at stake

STRASBOURG

17 December 2019

FINAL

11/05/2020

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

In the case of Zakharchuk v. Russia,

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

Paul Lemmens, *President*,
Paulo Pinto de Albuquerque,
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
María Elósegui,
Gilberto Felici, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 26 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 2967/12) 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 Polish national, Mr Yan Zakharchuk (“the applicant”), on 20 December 2011.

2. The applicant was represented by Ms O. Tseytlina, a lawyer practising in St Petersburg. 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 that his exclusion from Russia following his criminal conviction violated his right to respect for private and family life under Article 8 of the Convention.

4. On 28 June 2016 the application was communicated to the Government. On 5 July 2016, under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court, the Polish Government were invited to intervene as third party in the proceedings. On 7 September 2016 they informed the Court that they refrained from exercising their right to intervene.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Bialystok, Poland.

A. Background information

6. The applicant was born in February 1980 in Leningrad, in the former USSR (since 1992 the city has been called St Petersburg or St Peterburg) to a mother who was a Soviet citizen and a father who was Polish. In May 1980 the applicant's parents officially chose Polish nationality for the applicant.

7. After his birth, the applicant lived in the former Soviet Union with his mother and then in 1985 moved with her to Poland. In 1988 they returned to the USSR. In 1988 the applicant's parents divorced.

8. In August 1991 the applicant obtained a Polish passport, but continued to reside in Russia with his mother. Between December 1994 and June 1995 he spent six months with her in Poland visiting his father, and after his return to Russia he continued to reside in St Petersburg. According to the applicant, after that he lost contact with his father. The applicant resided in Russia as a foreign national based on a regularly extended five-year residence permit.

9. According to the Government, on 16 September 1999 the St Petersburg Military Garrison Court found the applicant guilty of aggravated theft and gave him a suspended sentence of four years' imprisonment with two years' probation. From the documents submitted it transpires that this criminal record was subsequently expunged.

10. In the spring of 2003, the applicant applied for yet another five-year residence permit, which was granted to him and remained valid until May 2008. In June or July 2004 the applicant graduated from university in St Petersburg and in October 2004 started working as a physical education teacher in a college.

11. According to the applicant's submission, he does not speak Polish, has no family or social ties with Poland and has not visited the country for a number of years. Referring to records of border crossings, the Government partially contested that submission, stating that the applicant had visited Poland in the years preceding his conviction. They pointed out, in particular, that the applicant had crossed the "Brest" border checkpoint between Belorussia and Poland on 14 July 2004.

B. The criminal proceedings leading to the applicant's exclusion from Russia and relevant events

12. On 22 December 2004 the St Petersburg Military Garrison Court found the applicant guilty under Article 111 § 3 of the Russian Criminal Code of causing grievous bodily harm to a military officer in the course of a group attack. The applicant and his two friends, who had all been drunk, had entered a shop, where the shop owner had asked them to leave owing to their behaviour. Then the applicant and his two friends had waited for the owner to come out from the shop and had then attacked him, causing him serious bodily harm – including fracturing the base of his skull, causing second-degree brain concussion, and breaking his upper jaw. The court convicted the three men of the assault and sentenced each of them to a term of imprisonment in a strict-regime correctional colony. The applicant was sentenced to six years' imprisonment. In the text of the sentence, it was stated that the applicant had no criminal record at the time of the sentencing.

13. On 4 May 2010 the Tosnenskiy Town Court in the Leningrad Region decided that the applicant should be released on parole as he had served more than two-thirds of his sentence. On 12 May 2010 the applicant was released; about seven and half months before the completion of his prison sentence. He was ordered to find employment and to visit the parole officer at regular intervals for the remainder of his sentence until 21 December 2010.

14. On 16 March 2011 the applicant obtained a renewed Polish passport from the Polish consulate in St Petersburg which was valid until 16 March 2021.

15. On 11 April 2011 the applicant lodged a request with the Dzerzhinsky District Court in St Petersburg seeking recognition of his right to Russian nationality by birth and asking to be provided with a Russian passport. On 12 October 2011 the court rejected his claim, finding that he did not have that right as he had never been a Soviet citizen.

C. The applicant's exclusion from Russia and his appeals against it

16. On 9 March 2009 the head of correctional colony no. 3 of the Main Department for the Execution of Punishments in St Petersburg and the Leningrad Region concluded that a decision should be taken concerning the undesirability of the applicant's remaining in Russia.

17. On 25 March 2009 the Federal Service for the Execution of Punishments asked the Russian Ministry of Justice to issue a decision on the undesirability of the applicant's residence in Russia.

18. On 11 August 2010 the Russian Ministry of Justice issued decision no. 6204-p on the undesirability of the applicant's presence (residence) in Russia and his exclusion from the country until 21 December 2018

following his criminal conviction (hereinafter “the exclusion order”). The decision stated that, given the applicant’s conviction for a particularly serious crime, his presence or residence in Russia represented a threat to public order. The applicant was informed of the decision on 30 November 2010.

19. On 17 February 2011 the applicant lodged an appeal against the exclusion order with the Kirov District Court in St Petersburg. In it he argued that his exclusion from Russia would violate his right to respect for private and family life. He stated, in particular, that he had lived all his life in Russia, and that he had no relationship with his Polish father and had never resided in Poland. He also stated in general terms that the exclusion would have an adverse effect on his family life with his mother, with whom he had lived all his life and who was his only relative. As for the issue concerning the seriousness of the crime he had committed, the applicant stated as follows;

“3. I am obliged to comply with the conditions of the release on parole that is to remain in the Russian Federation due to the decision of the Tosnenskiy Town Court of 4 May 2010. Taking this decision [on my exclusion] represents a repeated additional punishment for me, which is not envisaged by the law. There are no grounds [to believe] that I represent threat to the public order, rights and lawful interests of Russian citizens.”

20. On 9 March 2011 the applicant was informed in writing that he must leave Russia within three days, or face deportation.

21. On 12 April 2011 the Kirov District Court dismissed the applicant’s appeal against the exclusion order. In its decision, the court stated, *inter alia*, that the applicant, being a Polish national, had failed to provide any evidence of Russian nationality, despite the fact that as a person who had been born in the USSR he could have applied for it. It further stated that the applicant had lived in Russia since 1980 and on 1 May 2003 he had been provided with a Russian residence permit valid until 1 May 2008. Despite his submission to the contrary, the applicant had indeed visited Poland, as he had crossed the state border with Poland on 14 July 2004. On 22 December 2004 the applicant had been convicted and sentenced to six years’ imprisonment in a strict-regime correctional colony and then on 4 May 2010 he had been released on parole, 7 months and 17 days prior to completion of the full sentence. On 11 August 2010 the Ministry of Justice had issued decision no. 6204-p excluding him from Russia until 21 December 2018. The court stated further that the decision had been taken due to the applicant’s conviction for commission of a premeditated serious offence and the danger he posed for public order, which was demonstrated by the crime he had committed – causing grievous bodily injuries to the victim. The applicant’s reference to his release on parole for good behaviour and the fact of his mother’s residence in Russia were not sufficient to outweigh the threat he represented to public order. The court also stated that

even though the applicant had been released on 4 May 2010, he had not tried to apply for Russian nationality until almost a year later, on 11 April 2011. Since his release from prison in May 2010, the applicant had failed to find employment, despite that being one of the conditions of his parole, and although his positive character references had been of significance for his release on parole, they did not amount to convincing evidence that he would pose no threat to public order were he to continue to reside in Russia. The applicant's need to comply with the requirements of his parole was not a valid reason for remaining in Russia, given that the relevant period had passed. As for the seriousness of the offence committed by the applicant, the court stated as follows:

“... by sentence of the St Petersburg Military Garrison Court of 22 December 2004 Y. Zakharchuk was convicted for crime punishable under Article 111 § 3 of the Russian Criminal Code [causing grievous bodily harm] and sentenced to 6 years of imprisonment in a strict regime correctional colony.

On the basis of decision of the Tosnenskiy Town Court in the Leningrad Region of 4 May 2010 Y. Zakharchuk was absolved from serving the rest of the punishment imposed by the sentence of St Petersburg Military Garrison Court of 22 December 2004 of 7 months and 7 days and granted parole ...

On 11 August 2010 the Ministry of Justice issued decision no. 6204-p on the undesirability of Y. Zakharchuk's presence (residence) in Russia ...

The decision was taken ... as Y. Zakharchuk had been sentenced by St Petersburg Military Garrison Court to deprivation of liberty for the commission of a premeditated particularly serious crime ... of causing grievous bodily harm.

Therefore, presence of Y. Zakharchuk in the Russian Federation creates a real threat to public order, rights and lawful interests of Russian citizens ...

At present, Y. Zakharchuk's criminal record for the commission of this particularly serious crime is not expunged.

The positive character reference of Y. Zakharchuk from the place of serving the sentence and the circumstances due to which he had been released on parole represent the basis for the assessment of the convicted person's behaviour and taking decision concerning the necessity of serving the sentence fully and does not serve as the evidence of the lack of a real threat to public order, rights and lawful interests of Russian citizens while Y. Zakharchuk is in the Russian Federation.

Decision of the Tosnenskiy Town Court in the Leningrad Region of 4 May 2010 according to which Y. Zakharchuk was released on parole does not provide him with the right to be present in the Russian Federation ...”

22. The applicant appealed against the above decision to the St Petersburg City Court, stressing that the exclusion order was not sufficiently clear, as it did not specify the nature of the threat he posed to public order, that it was not supported by evidence, and that the fact that he had been released on parole for good behaviour had been completely disregarded by the District Court. The applicant further stated that he had lived all his life in Russia with his mother, that he had no other relatives,

that he had not ever lived in Poland, had no ties with this country and had no relationship with his Polish father. Finally, the applicant stressed that the first-instance court had failed to examine his arguments concerning his right to Russian citizenship by birth.

23. On 20 June 2011 the St Petersburg City Court endorsed the findings of the District Court. Its decision stated the following:

“... the first-instance court established that Yan Zakharchuk was a Polish national ... On 11 August 2010 the Russian Ministry of Justice issued decision no. 6204-P concerning the undesirability of his presence (residence) ... and obliging him to leave the Russian Federation ...

... [when] examining the applicant’s submission concerning the absence of grounds for the decision prohibiting his entry into the Russian Federation, the [first-instance] court established that the decision had been taken to ensure safety for the State.

The first-instance court correctly concluded that the decision on the undesirability of the applicant’s presence in the Russian Federation had been taken lawfully and had been confirmed by specific facts. At the same time, Mr Zakharchuk had fully exercised his right to have legal counsel.

The decision by the Ministry of Justice was taken within its sphere of competence.

As for the applicant’s argument concerning his Russian citizenship, the court finds it unsubstantiated [as] ... given that Mr Zakharchuk’s parents had chosen citizenship of the Polish People’s Republic for him, his USSR citizenship has been lost ... The applicant has not renounced his Polish citizenship and he has been provided with a Polish passport. Moreover, while residing in the Russian Federation, Mr Zakharchuk had acted as a foreign citizen, which was demonstrated by the fact that he repeatedly applied for residence permits and not for Russian nationality ...

The court finds that the decision of the first-instance court is lawful and substantiated ...”

24. On 26 July 2011 the applicant married a Russian national, Ms T.Sh., in St Petersburg.

25. On 29 July 2011 the applicant was deported to Poland. The term of his expulsion from Russia expired on 21 December 2018.

II. RELEVANT DOMESTIC LAW

A. Foreign Nationals Act (no. 115-FZ of 25 July 2002)

26. Section 9 of the Act contains a list of grounds for refusing a residence permit or revoking a previously issued residence permit. In particular, a residence permit will be revoked if a decision is issued pronouncing the foreigner’s presence in Russia undesirable (paragraph 2).

B. Entry and Exit Procedures Act (no. 114-FZ of 15 August 1996)

27. A competent authority may issue a decision stating that a foreign national's presence on Russian territory is undesirable (an "exclusion order"). Such a decision may be issued if the foreign national is unlawfully residing on Russian territory or if his or her residence is lawful but represents a real threat to public order, in particular. If such a decision has been taken, the foreign national must leave Russia or will otherwise be deported. That decision also forms the legal basis for subsequent refusal of re-entry into Russia (section 25.10).

28. If a competent authority has issued a decision declaring that a foreigner's presence on Russian territory is undesirable, that foreigner will be refused entry into Russia (sections 25.10 and 27(7)(7)).

29. Entry into the Russia is not allowed if a foreign national has a criminal conviction which has not been expunged or cancelled (section 27 (3)).

C. Criminal Code of 13 June 1996

30. Article 58 (Choice of penal establishments for persons sentenced to imprisonment):

"1. [Persons sentenced to imprisonment shall serve their respective sentences, depending on the gravity of the crimes that they have committed, in:

- Strict-regime correctional colonies (*исправительная колония строгого режима*), for those who have been sentenced to imprisonment for the commission of a particularly grave crime ...;

31. Article 79 (Release on parole)

"3. A person serving a sentence may be released conditionally and prior to expiry of the sentence if a court finds that he no longer needs to endure the punishment and if he has already served no less than two thirds of the sentence for the commission of a particularly serious crime ..."

32. Article 86 (conviction)

"A person convicted for commission of a crime is considered convicted from the day of entering into force of the conviction until the expunging or cancellation of the criminal record ...

3. Conviction is expunged:

d) in respect of persons convicted for commission of a particularly serious crime-after eight years since the completion of serving the sentence ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

33. The applicant complained that his eight-year exclusion from Russia following a criminal conviction violated his right to respect for his private life and his family life with his mother under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

34. The Court notes that the application 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

(a) The Government

35. The Government submitted that the alleged interference had been lawful, proportionate and necessary. The interference had been based on domestic legislation, aimed at ensuring public safety, and served to prevent disorder and crime. They referred, in particular, to the Entry and Exit Procedures Act (no. 114-FZ of 15 August 1996), according to which a foreign national could be excluded from Russia if his or her residence was lawful but posed a real threat to public safety or the prevention of disorder and crime. They stressed that the foreign national concerned could appeal before the domestic courts against the exclusion, which the applicant had done.

36. The Government also referred to the criteria cited by the Court in *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII and argued that the applicant's exclusion had complied with them. In particular, they stated that between 1999 and 2004 the applicant had been convicted on two occasions, which demonstrated his criminal propensities. Unlike the case of *Gablishvili v. Russia*, no. 39428/12, 26 June 2014, where the applicant had

not committed crimes using violence, in the present case both of the applicant's convictions had involved the use of violence and the second one had caused grievous bodily harm to the victim. Furthermore, at the time of the decision regarding his exclusion, the applicant had not had any family, as he was not married and had no children. In addition, the length of his exclusion from Russia until 21 December 2018 in fact comprised not eight years, as alleged, but – given his deportation date of 29 July 2011 – only seven years and four months, which was less than the applicant's exclusion of ten years in the case of *Üner*, cited above.

37. Referring to the case of *Khan v. Germany*, no. 38030/12, 23 April 2015, the Government stated that the applicant did not have a family life with his mother as he was an adult and failed to demonstrate any factors of dependency other than normal emotional ties. For instance, contrary to the applicant's submission, he had not resided with his mother all his life and had not taken care of her for at least five and half years between 2004 and 2010 while he was serving his prison sentence. In any case, the applicant's mother would be able to maintain contact with him by phone calls, letters and visits to Poland, given that this country was not far away from Russia. In addition, the applicant had relatives in Poland, including his father, and his claims of having no contact with him or other relatives in that country were untruthful as, according to the border crossing records, the applicant had visited Poland since the time of his last six-month residence there in 1995 (see paragraph 11 above), including one visit on 14 July 2004, that is to say not long before his conviction in December 2004. Therefore, the applicant would be able to integrate into Polish society and would not face insurmountable difficulties in that country.

38. The Government further submitted that the applicant had never applied for Russian nationality, whereas after having obtained his Polish passport in August 1991, he had twice applied for the extension of its validity – in April 2001 and then in March 2011. Furthermore, although aware of the possibility of applying for Russian nationality through the simplified procedure as a family member of a Russian national, the applicant had opted to keep foreign status by applying for an extension of his residence permit on three occasions, in 1996, 2001 and 2003. As for the applicant's request for recognition of his Russian nationality lodged on 11 April 2011 (see paragraph 15 above), it had been rejected as groundless.

39. Finally, as for the applicant's allegation concerning his inability to comply with the terms of his release on parole, it was untruthful, as that obligation had ended in December 2010 whereas the applicant had remained in Russia until 29 July 2011.

(b) The applicant

40. The applicant submitted that when upholding the exclusion order the domestic courts had failed to balance the interests involved and that their

examination of his appeals had been purely formalistic. He argued that the Government's submission before the Court represented the balancing exercise which should have been carried out by the domestic courts, but it had been "belated, done by the incorrect body, based on wrong or irrelevant facts, and [was] unable to remedy the violation of Article 8 of the Convention which had already taken place."

41. The applicant pointed out that, despite his submission that he had lived all his life in Russia and had neither contact with his Polish father nor social connections in Poland, the domestic courts had ignored his arguments. The District Court had limited itself to formally establishing that he had a criminal record and that the issuance of the exclusion order had complied with the relevant instructions. The court had not examined the actual existence and degree of danger he allegedly posed for the public and it had not explained why his situation warranted expulsion. The applicant's good behaviour in prison and his release on parole had been disregarded, as well as the fact that he had committed the crime "in his early adulthood."

42. Referring to the cases of *Üner*, cited above, and *Maslov v. Austria* [GC], no. 1638/03, § 62, ECHR 2008 the applicant asserted that he "was a settled migrant who had lawfully spent the major part of his childhood and his youth in the host country." The domestic authorities had therefore been under an obligation to provide good reasons to justify his expulsion, but they had failed to do so. In particular, just like the applicant in *Maslov*, he had also been a young adult who had not yet founded a family and his relationship with his mother had constituted his family life. He also argued that the domestic authorities should have taken into account his right to the Russian nationality by birth and should not have excluded him as he was someone who had been born in the USSR.

43. Furthermore, the applicant had had his personal life in Russia as he had been born there, and had attended kindergarten, school and then university there. His only close relative, namely his mother, also lived there. The applicant had resided with his mother in Poland as a child and had returned to Russia in 1987, at the age of seven, and not in 1988, as alleged by the Government. His parents had divorced in 1988. Subsequently, the applicant had spent only a period of six months in Poland from December 1994 to June 1995, but he had not maintained any ties with his father since then. Therefore, his deportation to Poland presented serious hardships in terms of adjusting to life there.

44. Finally, referring to *Liu v. Russia*, no. 42086/05, 6 December 2007, the applicant stated that the legal provisions governing the deportation procedure did not meet the "quality of law" requirements as in his case the domestic courts were not "in a position to request from the authorities and analyse specific evidence concerning the reality and the degree of danger [he posed] to public safety".

2. *The Court's assessment*

(a) **General principles**

45. On a number of occasions the Court has stated that the existence of “family life” cannot be relied on by applicants in relation to elderly parents, that is to say adults who do not belong to the core family, unless they have been shown to be dependent on the members of their family (see *Senchishak v. Finland*, no. 5049/12, § 58, 18 November 2014, and *Sapondzhyan v. Russia* (dec.), no. 32986/08, 21 March 2017, with further references).

46. Moreover, the Court reiterates that it is for the Contracting States to maintain public order, in particular by exercising their right to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences (see *Maslov*, cited above, § 76). 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 *Üner*, cited above, § 54).

47. In their assessment of the proportionality of the interference, the national authorities enjoy a certain margin of appreciation (see *Berrehab v. the Netherlands*, 21 June 1988, § 28, Series A no. 138). In *Üner*, cited above, §§ 57-60, the Court set forth the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued:

- 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 elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled ...
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination ...

... Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there.

60. In the light of the foregoing, the Court concludes that all the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction ...”

48. Where applicable, these criteria are relevant regardless of the age of the person concerned or his or her length of residence in the expelling State, as the Grand Chamber also confirmed in *Üner*, cited above:

“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.”

49. However, the age of the person is of significant relevance when applying certain of the criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, account must be taken of whether he or she committed them as a juvenile or as an adult. The age at which the person entered the host country is also of relevance, as is the question of whether they spent a large part or even all of their childhood in that country (see *Maslov*, cited above, §§ 72-73). The Court has previously found that 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).

(b) Application of the general principles to the present case

(i) Whether there was an interference with the applicant's right to respect for his private and family life

50. From the documents submitted by the applicant it is apparent that he obtained Polish nationality in 1980 and that prior to the issuance of the exclusion order in August 2010 he had not applied for a Russian passport (see paragraphs 8 and 15 above). Therefore, the Court does not find that the

applicant's assertion concerning the relevance of his right to Russian nationality by birth has any bearing on the examination of the present case.

51. The Court also observes that the applicant's first conviction, which was subsequently expunged, was not subject to examination by the domestic courts examining his appeals against the exclusion (see paragraphs 9, 12, 21 and 23 above) and those details are therefore immaterial for the proceedings before the Court.

52. The Court also notes that the applicant concluded his marriage with Ms T. Sh. after his exclusion had been upheld by the domestic courts (see paragraph 24 above). He neither brought the fact of having the relationship with Ms T.Sh. to the attention of domestic authorities nor did he raise it in his appeals against his exclusion. The applicant's marriage to Ms T.Sh. two days prior to his deportation is therefore likewise immaterial for the proceedings before the Court.

53. As for the applicant's allegation concerning the adverse effect of his exclusion on his family life with his mother, the Court notes that the applicant furnished no documents, financial, medical or otherwise, substantiating the alleged dependency on him of his mother, who was resident in Russia. On the basis of the case file, and given that the applicant was thirty years old at the time of the issuance of the exclusion order, the Court does not find that there are any elements of dependency apart from the normal emotional ties between the applicant and his mother capable of bringing their relationship into the protective sphere of family life under Article 8 of the Convention (see, for comparison, *Sapondzhyan*, cited above).

54. As for the alleged interference with the applicant's right to respect for his personal life, it should be noted that as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8 of the Convention. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life (see *Üner*, cited above, § 59). To this end, the Court also notes that the factors to be examined in order to assess the proportionality of the deportation measure are essentially the same whether family life or private life is engaged (see *Samsonnikov v. Estonia*, no. 52178/10, § 82, 3 July 2012, with further references).

55. The Court observes that the applicant was born in the former USSR in 1980 and has lived all his life in Russia, except for a few years in his childhood (see paragraphs 7-8 above), until his expulsion in 2011. It therefore finds that the measure complained of by the applicant interfered with his right to respect for his private life.

(ii) Whether the interference was in accordance with the law

56. Referring to the case of *Liu*, cited above, the applicant submitted that the legal provisions concerning his exclusion did not meet the “quality of law” requirement. The Court notes that the applicant’s reference to the case of *Liu*, cited above, – where the applicant was excluded from Russia on undisclosed national security grounds – is misplaced, and in respect of the lawfulness requirement, it reiterates the following. The requirement that any interference is “in accordance with the law” is met when three conditions are satisfied: the impugned measure must have some basis in domestic law; the domestic law must be compatible with the rule of law and accessible to the person concerned; and the person concerned must be able to foresee the consequences of the domestic law for him (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008; and *Iordachi and Others v. Moldova*, no. 25198/02, § 37, 10 February 2009).

57. In the present case it is not in dispute that the decision on the applicant’s exclusion was taken in accordance with the domestic legislation. The regulations concerning post criminal exclusions, the Entry and Exit Procedures Act and the Criminal Code, were easily accessible to public by being available on various resources, including the internet. As to whether the consequences of the applicant’s conviction on his immigration status were foreseeable for him, the regulations referred to stipulated clearly the type of the sanction and its duration in case of a foreigner’s conviction for a particularly serious crime (see paragraphs 29 and 32 above). This being so, the Court accepts that the relevant domestic law was adequately accessible and foreseeable for the applicant for the purposes of Article 8 of the Convention.

(iii) Whether the interference pursued a legitimate aim

58. The Court is prepared to accept that the measure imposed on the applicant pursued the legitimate aim of preventing disorder and crime. It remains to be ascertained whether the interference was proportionate to the legitimate aim pursued, in particular whether the domestic authorities struck a fair balance between the respective interests, namely the prevention of disorder and crime on the one hand, and the applicant’s right to respect for his private life on the other.

(iv) Whether the interference was necessary in a democratic society

59. The Court observes at the outset that the applicant lived the vast majority of his life in Russia. He was born there, attended school and then university there, and worked there until his deportation at the age of thirty-one. His mother, who was his only relative and a Russian national,

also resided there with him. Considering this, the Court does not doubt that the applicant was fully integrated into Russian society (see, by contrast, *Mutlag v. Germany*, no. 40601/05, §§ 58-59, 25 March 2010).

60. At the same time, the Court notes that the applicant spent several years of his childhood and then six months at the age of fifteen in Poland (see paragraph 8 above). It would be reasonable to assume that during that the last stay, the applicant, who was at the age of schooling, must have spoken the basics of the Polish language. The Court also notes that the applicant, contrary to his submission, visited Poland afterwards, in the years preceding his conviction in 2004 (see paragraphs 11 and 21 above). Furthermore, despite his residency in Russia, the applicant remained a Polish national and took conscientious steps to maintain that status by regularly renewing his Polish passport. Prior to his expulsion, the applicant never showed a desire to become a Russian national when he was entitled to do so. Thus, the Court is not convinced by the applicant's arguments to the contrary and finds that the applicant had ties with Poland (see *Baghli v. France*, no. 34374/97, § 48, ECHR 1999-VIII, and *Samsonnikov*, cited above, § 88).

61. Turning to the applicant's criminal conviction, which served as the basis for his exclusion, the Court notes that the offence committed by the applicant was of a very serious nature (see paragraph 12 above). The Court also notes the applicant's reference to release on parole and the fact that from the time of his release in May 2010 until his deportation in July 2011 he complied with its conditions. However, the Court also notes that despite the direct orders of the Tosnenskiy Town Court, the applicant failed to find employment or justify the lack thereof (see paragraph 13 above). The Court further observes that at the time of the commission of the assault in 2004, the applicant was twenty-four years old, unlike the sixteen-year old applicant in the case of *Maslov*, cited above. Therefore, it cannot be said that he was in a situation comparable to that of a juvenile.

62. From the documents submitted, it transpires that before imposing on the applicant such an extreme measure as eight-year exclusion, the domestic courts noted the length of his residence in Russia, his integration in its society as well as the fact that he maintained ties with Poland by taking regular steps to maintain his Polish nationality and visit the country (see paragraph 21 above). The courts also noted that the applicant had been convicted for a premeditated particularly serious crime and that his danger to the society could be demonstrated by its nature, which involved causing grievous bodily harm to the victim. Therefore, the courts took into account the necessary relevant factors when examining the applicant's appeals against the eight-year exclusion order.

63. In such circumstances, the Court finds that the domestic courts conducted a thorough examination of the applicant's appeals against the impugned measure and weighed up all the relevant factors. The Court

therefore concludes that the domestic authorities struck a fair balance between the competing interests when issuing the exclusion order against the applicant and subsequently expelling him.

64. In the light of the above, the Court considers that in the given circumstances there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by four votes to three, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 17 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, a joint separate opinion of Judges Lemmens, Pinto de Albuquerque and Elósegui is annexed to this judgment.

P.L.
J.S.P

JOINT DISSENTING OPINION OF JUDGES LEMMENS, PINTO DE ALBUQUERQUE AND ELÓSEGUI

Introduction

1. To our regret we are unable to agree with the majority's view that there has been no violation of Article 8 of the Convention.

Unlike the majority, we consider that the domestic courts' reasoning was insufficient and unconvincing. In particular, we think that the domestic courts did not carefully examine the facts and that they did not apply the relevant human rights standards consistently with the Convention and its case-law. More specifically, in our opinion, they did not adequately balance the applicant's personal interests against the more general public interest in the case (compare, for example, *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017, and *I.M. v. Switzerland*, no. 23887/16, §§ 72-73, 9 April 2019).

2. The basis for the applicant's expulsion was his conviction for assault in the context of a brawl (see paragraph 12 of the judgment). According to the Kirov District Court, the crime committed was a "premeditated serious offence" which was sufficient to demonstrate that the applicant posed a "danger ... for public order" (see paragraph 21 of the judgment). While the applicant on appeal argued that the threat he allegedly posed to public order was not supported by evidence (see paragraph 22 of the judgment), the Saint Petersburg City Court merely stated that the first-instance court had established that the exclusion order "had been taken to ensure safety for the State" (see paragraph 23 of the judgment).

The courts' reasoning does not reflect a balancing of the conviction and the ensuing public safety concern against the applicant's individual rights and interests under Article 8 of the Convention. It seems to us that the applicant's expulsion after his conviction for a crime was rather ordered automatically, taking advantage of the fact that he did not have Russian citizenship.

The *Üner-Maslov* criteria

3. As is acknowledged by the majority, the criteria to be generally applied in the case of the expulsion of an alien who has been convicted of a criminal offence are those that were set forth in *Üner v. the Netherlands* ([GC], no. 46410/99, §§ 57-58, ECHR 2006-XII). Where the person to be expelled is a young adult who has not yet founded a family of his own, as in the present case, the relevant criteria are those that were specified in *Maslov v. Austria* ([GC], no. 1638/03, § 71, ECHR 2008):

- 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 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 our view the domestic courts failed to give due weight to any of these criteria.

The assessment of the applicant’s situation by the domestic authorities

4. With respect to the first criterion, the nature and seriousness of the offence committed by the applicant, we acknowledge that the crime committed, involving grievous bodily harm, was a serious one.

However, we note that the applicant was 24 years old when he committed the offence. Admittedly, he was not a juvenile at that time, but nevertheless still a young man. Moreover, he was in the company of two friends and they were all drunk (see paragraph 12 of the judgment). The criminal court at the time considered that there had been a “group attack” (*ibid.*), and the Kirov District Court characterised the offence as a “premeditated” one (see paragraph 21 of the judgment). It seems to us that such statements do not reflect a careful and nuanced assessment of the nature of the offence committed.

Moreover, the courts did not pay any attention to the fact that the applicant had no criminal record at the time of the sentencing (see paragraph 12 of the judgment and contrast it with paragraphs 21 and 23). This should, however, have been an element to be taken into account when assessing the degree of threat posed by the applicant at the time of the exclusion order.

5. With respect to the second criterion, the length of the applicant’s stay in the country from which he was expelled, we note that the applicant was born in Leningrad in the former Soviet Union (today Saint Petersburg) in 1980. When he was expelled in 2011, he was 31 years old. He had lived the whole time in Russia, except for the period between 1985 and 1988 (that is: between the ages of 5 and 8) when he stayed with both parents in Poland (see paragraph 7 of the judgment), and again for the period between December 1994 and June 1995 (that is, at the age of 14-15) when with his mother he visited his father in Poland (see paragraph 8 of the judgment).

It would thus seem to us that the applicant was to be considered “a settled migrant who [had] lawfully spent all or the major part of his ... childhood and youth in the host country”. This should have prompted the domestic authorities to ascertain whether there were “very serious reasons ... to justify expulsion” (*Maslov*, cited above, § 75).

6. With respect to the third criterion, the time which had elapsed since the offence was committed and the applicant's conduct during that period, we note that the crime was committed in 2004. In December of that year the applicant was sentenced to six years' imprisonment.

In May 2010 the applicant was released on parole, about seven and a half months before the completion of his prison sentence (see paragraph 13 of the judgment). Before the domestic courts the applicant argued that his release on parole had been ordered because of his good behaviour (see in particular paragraph 22 of the judgment). The Kirov District Court gave only a cursory explanation as to why this argument was not relevant, stating that "[the] applicant's reference to his release on parole for good behaviour and the fact of his mother's residence in Russia were not sufficient to outweigh the threat he represented to public order" (see paragraph 21 of the judgment). The Saint Petersburg City Court merely endorsed this view (see paragraph 23 of the judgment).

In our opinion, however, this was a highly relevant argument. Rehabilitation is one of the penological grounds for incarceration of a wrongdoer (see, among others, *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, § 111, ECHR 2013 (extracts); *Murray v. the Netherlands* [GC], no. 10511/10, § 100, 26 April 2016; and *Hutchinson v. the United Kingdom* [GC], no. 57592/08, § 42, 17 January 2017), and the applicant's good behaviour should have been attributed due weight with a view to assessing whether he, after leaving prison, would still constitute a threat to public order.

Moreover, the position of the first-instance court, confirmed by the second-instance court, was contradictory as a matter of logic. On the one hand, the Kirov District Court admitted that "the circumstances due to which [the applicant] had been released on parole represent[ed] the basis for the assessment of the convicted person's behaviour and taking decision [*sic*] concerning the necessity of serving the sentence fully" (see paragraph 21 of the judgment). In other words, there was no preventive penological need to serve the entire penalty because the applicant had shown good behaviour and constituted no threat to society. But on the other hand, the same Kirov District Court concluded that the above mentioned good behaviour "d[id] not serve as the evidence of the lack of a real threat to public order, rights and lawful interests of Russian citizens while Y. Zakharchuk [was] in the Russian federation" (*ibid.*). The two logically untenable statements provide a clear indication of the superficial character of the evaluation of the facts of the case by the Russian courts.

After his release in May 2010, the applicant spent a further year in Russia before being deported in July 2011 (see paragraph 25 of the judgment). This was admittedly a relatively short period. However, we note that during that period there does not seem to have been anything that would

demonstrate, or confirm, that the applicant still constituted a serious threat to public security, or that he had not been rehabilitated in prison.

The majority refer to the fact that “despite the direct orders of the Tosnenskiy Town Court, the applicant failed to find employment or justify the lack thereof” (see paragraph 61 of the judgment). We have difficulty in seeing how this could be a relevant consideration. There may be many reasons why a person did not find employment after being released from prison. In any event, the fact that the applicant did not find any employment can hardly be interpreted as an indication that he continued to be a threat to public order.

7. We now turn to the fourth and last criterion, the solidity of social, cultural and family ties with the host country and with the country of destination. It is especially with respect to this criterion that we are unable to agree with the majority’s finding that the assessment by the domestic courts satisfied the requirements of the Convention.

8. To begin with the ties of the applicant with the host country, Russia, we note that the applicant was living with his mother until he was sent to prison.

The majority downplay the importance of the family relationship between the applicant and his mother. They state that there are no “elements of dependency apart from the normal emotional ties between the applicant and his mother” (see paragraph 53 of the judgment). We are aware of the Court’s case law according to which the absence of “dependency” may lead to the conclusion that there is no “family life” within the meaning of Article 8 of the Convention (see the case law referred to in paragraph 45 of the judgment). However, there have been cases in which the Court did accept that the relationship between a young adult and his parents constituted “family life” (see *Bouchelkia v. France*, 29 January 1997, § 41, *Reports of Judgments and Decisions* 1997-I, and *Maslov*, cited above, § 62). The criterion of dependency cannot be taken in an isolated manner without having regard to the rest of the circumstances of the concrete case.

In the present case, it is a fact that the applicant was living with his mother until he was sent to prison. According to the uncontested statement of the applicant, his mother was the only relative with whom he had contact (see paragraph 22 of the judgment). “Normal emotional ties” are important for a person’s life and for the development of a life with roots. They are also important for an offender who is to be resocialised. For these reasons, we consider that it is not enough to affirm that the applicant’s complaint should be examined under the head of his private life and not of his family life for the sole reason that no special dependency factors were evident in his adult relationship with his mother. In our opinion, family life is an important element in this case.

Besides the family relationship with his mother, the applicant had all his other relations with people living in Russia. Apart from the short period of

time that he lived in Poland, he had resided the whole time in Saint Petersburg (see paragraph 8 of the judgment). He had attended university in that city, where he had graduated in 2004. He had then started to work as a physical education teacher in a college (see paragraph 10 of the judgment). While not being a Russian citizen, he was not an immigrant but a permanent resident in Russia. In our opinion, there is clear evidence in the file that the “totality of [the applicant’s] social ties” were with “the community in which [he was] living” (compare paragraph 54 of the judgment), namely Russia. In any event, the majority admit that “the applicant was fully integrated into Russian society” (see paragraph 59 of the judgment).

9. As for ties with the country of destination, Poland, the majority considered that the domestic courts had noted “the fact that [the applicant] maintained ties with Poland by taking regular steps to maintain his Polish nationality and visit the country” (see paragraph 62 of the judgment). With all due respect, we consider this a too general, and even a too generous, assessment of how the domestic courts examined the solidity of the applicant’s ties with Poland.

First of all, it was the applicant’s parents who chose Polish nationality for him at birth (see paragraph 6 of the judgment). The applicant himself later regularly applied for the renewal of his Polish passport. The decisions taken by the Russian authorities seem to show a certain negative predisposition based on the fact that the applicant did not apply for Russian citizenship while he was allegedly in a position to do so (see paragraphs 21 and 23 of the judgment). However, we cannot see why the applicant should be blamed for keeping Polish nationality. He was not going to take the risk of becoming stateless by opting for Russian citizenship in case it was denied. In fact, when he asked for Russian citizenship in 2011, admittedly after the exclusion order had been issued, his request was rejected on the ground that he had never been a Soviet citizen (see paragraph 15 of the judgment). The fact that the applicant was a Polish citizen who, until the exclusion order, had not applied for Russian citizenship should not, in our opinion, have been an argument for expelling him from Russia. It appears, however, to have been an argument not only for the Russian authorities but also for the majority in the present case (see paragraph 60 of the judgment).

Second, there is the issue of the applicant’s visits to Poland. The Kirov District Court had noted that, “despite [the applicant’s] submission to the contrary, [he] had ... visited Poland, as he had crossed the state border with Poland on 14 July 2004” (see paragraph 21 of the judgment). The Saint Petersburg City Court did not seem to pay any particular attention to such visits, or to the applicant’s ties with Poland in general (see paragraph 23 of the judgment). The majority refer to this visit as a relevant fact (see paragraph 60 of the judgment). We fail to see how visits to a neighbouring country, of which one is a national, should be used as an argument in favour of an eight-year expulsion to that country.

Third, and more generally, the question to be examined by the Russian authorities concerned the solidity of the applicant's ties with Poland. As far as family ties were concerned, the applicant argued that he had no contact with any family member in Poland. We know from the facts of the case that he had a Polish father, and that the family spent some three years in Poland, when the applicant was a young child (see paragraphs 6-7 of the judgment). But we also know that the applicant's parents divorced in 1988, when he was eight years old (see paragraph 7 of the judgment). The applicant and his mother returned to Poland in 1994-95 to stay for six months with the father, but according to the applicant he lost contact with his father thereafter (see paragraphs 8 and 43 of the judgment). There is nothing in the file to suggest that the applicant had kept family or social ties with Poland.

The majority assume that, since the applicant spent six months at the age of fifteen in Poland, during the age of schooling, he "must have spoken the basics of the Polish language" (see paragraph 60 of the judgment). We consider, however, that the Court should not rely on mere assumptions. The domestic authorities did not establish that the applicant was capable of speaking Polish. We do not know whether the applicant ever attended school in Poland. Even assuming that he did, his mother tongue was Russian. The applicant himself states that "he does not speak Polish" (see paragraph 11 of the judgment). It was then for the domestic authorities to find out about his knowledge of Polish and, more generally, about the possibility for him to adjust to life in Poland after having spent practically all his life in Russia. Yet the domestic authorities failed to consider these aspects of the case.

Conclusion

10. We acknowledge that it may be a difficult task for member States of the Council of Europe with a great number of so-called second- or third-generation migrants, born in their countries but not having their nationality, to educate them and to resocialise them after they have committed offences and put public order at risk. However, before considering the expulsion of such a person, it is necessary to evaluate carefully the extent to which he or she may or may not be expected to continue to cause disorder or to engage in further criminal activities (see *Maslov*, cited above, § 70). That careful evaluation should also take into account the existence of social, cultural and family ties with both the host country and the country of destination. Where there are strong ties with the host country, and no ties – or only weak ones – with the country of destination, expulsion cannot be decided lightly.

It is for the domestic authorities to balance the individual's right to respect for his or her private and family life against the general interest of protecting the community from criminal acts. The Court must make sure that the domestic authorities did so thoroughly. Their assessment will not

comply with the requirements of the Convention if they adopt a general or formalistic approach, arriving almost automatically at their conclusion.

11. In the recent case of *Saber and Boughassal v. Spain* (nos. 76550/13 and 45938/14, 18 December 2018), the Court was faced with a somewhat similar situation of expulsion following a criminal conviction. In that case the Court concluded that, when examining the appeals against the applicants' expulsion following their conviction for drug trafficking, the domestic courts had failed to properly apply the *Üner* criteria and to balance all the competing interests (*ibid.*, § 51). More specifically, the Court found that the national authorities had failed to examine the nature and seriousness of the criminal convictions in question, or any of the other criteria established by the case-law of the Court, in order to assess the necessity of the expulsion and exclusion orders. Thus, the competent court had not taken into consideration the length of the applicants' residence in Spain (including the fact that they had gone to school in Spain since at least the age of twelve and that they had spent a major part of their adolescence and youth there), the family situation of one of the applicants, or the solidity of the applicants' social, cultural and family ties to their host country, Spain, and the country of destination, Morocco (*ibid.*, § 50).

In our opinion, in the Russian case at hand it does not appear that the examination carried out by the authorities of the applicant's situation (see paragraphs 18, 21 and 23 of the judgment) was more detailed or more thorough. We respectfully disagree with the majority's finding "that the domestic courts conducted a thorough examination of the applicant's appeals against the impugned measure and weighed up all the relevant factors" (see paragraph 63 of the judgment).

Accordingly, we conclude that there has been a violation of Article 8 of the Convention.

12. We finally note that the applicant was excluded from Russia for a period ending on 21 December 2018 (see paragraph 18 of the judgment). Even if the present judgment has concluded with a finding of no violation of Article 8, the applicant should now be able to re-enter Russia, if he so wishes.