



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

Information Note on the Court's case-law 116

February 2009

Nolan and K. v. Russia - 2512/04

Judgment 12.2.2009 [Section I]

Article 9

Article 9-1

Freedom of religion

Exclusion of foreign Unification Church activist from country on national security grounds: *violation*

Article 8

Article 8-1

Respect for family life

Refusal without valid reason or advance notice to allow single parent to return to country of residence with consequence that he was unable to rejoin his infant child: *violation*

Article 38

Obligation to furnish all necessary facilities

Refusal to communicate classified report to Court regarding reasons for denying entry to a resident foreign national: *failure to comply with Article 38*

Article 1 of Protocol No. 7

Procedural safeguards relating to expulsion of aliens

Lack of procedural guarantees to contest decision to refuse entry to lawfully resident foreign national: *violation*

Facts: The first applicant, an American citizen, had sole custody of his eleven-month-old son (the second applicant). He was a member of the Unification Church founded by Sun Myung Moon and had been living in Russia on a renewable one yearly visa since 1994 after the said Church invited him to assist with its activities there. In January 2000 the Concept of National Security of the Russian Federation was amended to include "opposing the negative influence of foreign religious organisations and missionaries". In May 2002, the first applicant went on a trip to Cyprus leaving his son behind in the care of a nanny. On his return to Russia, he was taken aside by passport control officers at Moscow Airport and locked overnight in a small room. After being told that his visa had been cancelled and he would not be allowed to re-enter the country, he left on a flight to Estonia. A month later he was again denied entry to Russia without explanation after

trying to re-enter on a new multiple-entry visa he had obtained following various complaints to the Russian authorities. A challenge to the decision to refuse him entry was dismissed by a regional court on national-security grounds on the basis of a classified report issued in February 2002 by the Russian Federal Security Service (FSB). The regional court further found that the Russian authorities had not prevented the first applicant from being reunited with his son in a country other than Russia and that his overnight stay at the airport did not amount to deprivation of liberty. An appeal by the first applicant to the Supreme Court was dismissed. He was not reunited with his son until April 2003, when the boy's nanny brought him to Ukraine.

Law: Article 9 – (a) Interference: Immigration controls had to be exercised consistently with Convention obligations. Accordingly, in so far as a measure relating to residence in a State was imposed in connection with the exercise of the right to freedom of religion, it could disclose an interference with that right. The Russian Government had consistently maintained that the threat to national security had been posed by the first applicant's "activities" rather than his "religious beliefs", but had never specified the nature of those activities and had refused to produce the FSB report, which might have helped substantiate that claim. Further, the unqualified description in the Concept of National Security of the activities of foreign religious missionaries as harmful to national security indicated that the first applicant's religious beliefs and status as a foreign missionary of a foreign religious organisation may have been at the heart of the authorities' decision to prevent his return. In sum, since he had not been shown to have engaged in any non-religious activities and since there was a general policy that foreign missionaries posed a threat to national security, the first applicant's exclusion from Russia had been designed to repress the exercise of his right to freedom of religion and so constituted interference with his rights guaranteed under Article 9.

(b) Justification for the interference: There had been no evidence in the domestic proceedings to show that it was necessary to ban the applicant from entering Russia. Counsel for the FSB had not made any specific submissions on the factual circumstances underlying the findings in its report and the domestic courts had not reviewed whether the conclusion that the applicant constituted a danger to national security had a reasonable basis in fact. In any event, Article 9 of the Convention did not allow restrictions on the ground of national security. That was not an accidental omission, but reflected the primordial importance of religious pluralism. The interests of national security could not, therefore, serve as a justification for the measures taken by the Russian authorities against the first applicant. Nor was there any indication that his religious activities had affected the rights and freedoms of others. The Government had, therefore, not put forward any plausible legal and factual justification for his exclusion from Russia.

Conclusion: violation (unanimously).

Article 5 § 1 – The absence of any administrative or criminal detention procedure in the first applicant's case was not relevant to the Court's assessment of whether or not there had been a *de facto* deprivation or restriction of his liberty. The conditions of his overnight stay in the transit hall (in a locked room under constant supervision) were equivalent in practice to a deprivation of liberty, for which the Russian authorities were responsible. Indeed, the Border Crossing Guidelines actually provided for persons in the first applicant's situation to be escorted to "isolated premises" and placed "under guard" until such time as they left Russian territory. As to whether the deprivation of liberty was in accordance with a procedure prescribed by law, the Government had not referred to any domestic legal provisions; the Border Crossing Guidelines, on whose basis it might have been effected, had never been published or made accessible to the public and so were not sufficiently accessible and foreseeable to satisfy the "quality of law" requirement.

Conclusion: violation (unanimously).

Article 5 § 5 – The first applicant had been denied an enforceable right to compensation by the national courts' finding that he had not been deprived of his liberty.

Conclusion: violation (unanimously).

Article 8 – The first applicant's ten-month physical separation from his infant son was the direct consequence of a combination of the decision to exclude him from Russia and of the failure to notify him of that decision and to take measures to enable his son to leave Russia. The first applicant was the only parent and legal guardian of the boy, who was at a vulnerable and formative age. The only justification the Government had put forward for severing their contact was national security, a ground which the Court had found unsubstantiated and which could not therefore outweigh the applicants' legitimate interest in staying together. The authorities had compounded matters by not giving the first applicant advance notice of the decision to exclude him or facilitating his son's exit from Russia and their reunion elsewhere. Their manifest failure to assess the impact of their decisions and actions on the boy's welfare fell outside any acceptable margin of appreciation.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 7 – (a) *Applicability:* In determining whether this provision was applicable the Court had to consider whether the first applicant had been "resident" in Russia, whether his residence was "lawful" and whether he had been "expelled" from Russia. Like the autonomous concept of "home" developed under Article 8 of the Convention, the notion of "residence" was not limited to physical presence but depended on the existence of sufficient and continuous links with a specific place. The first applicant had been continuously resident in Russia since 1994 and had not established his residence elsewhere. His absence abroad had been short and he had expected to return, especially since he had left his infant son there. He was therefore "resident" in Russia at the material time. As to the question of lawfulness, the first applicant had been lawfully resident in Russia for over seven years and at the material time possessed a valid multiple-entry annual visa. The Government had not explained why they considered his visa invalid. The cancellation of his visa on his arrival from Cyprus could not have deprived him of his status as a "lawful resident" as otherwise a decision to expel would in itself remove the individual from the protection of Article 1 of Protocol No. 7. The notion of "expulsion" was also an autonomous concept. With the exception of extradition, any measure compelling the alien's departure from the territory where he was lawfully resident constituted "expulsion". The decision to bar the first applicant from returning to Russia had prevented him from re-entering the territory and so amounted to "expulsion".

(b) *Compliance:* Under Article 1 of Protocol No. 7 lawfully resident aliens could be expelled only in pursuance of a decision reached in accordance with law and subject to certain procedural guarantees, although those guarantees did not apply when expulsion was necessary in the interests of public order or national security. As the Government had not established that the first applicant's expulsion had been necessary on those grounds, the exception did not apply and he should have benefited from the procedural safeguards prior to his expulsion. These had, however, been deficient in three respects: the time it had taken to communicate the decision to expel him (more than three months), his inability to submit reasons opposing his expulsion and the denial of a review of his case with the participation of counsel.

Conclusion: violation (unanimously).

Article 38 § 1 (a) – The Government had refused to produce a copy of the FSB report on the grounds that there was no established procedure for making documents containing State secrets available to international organisations. However, the Convention obligation to furnish all necessary facilities for the effective conduct of the Court's investigation implied putting in place any procedures necessary for the unhindered communication and exchange of documents with the Court. In these circumstances, a mere reference to a structural deficiency of the domestic law which made it impossible to communicate sensitive documents to international bodies was insufficient to justify the withholding of key information requested by the Court. Furthermore, the fact that the report had been examined in the domestic proceedings and the applicant's representative had been given access to it subject to signing a confidentiality undertaking indicated that the nature of the information it contained did not require a wholesale exclusion on access. Any legitimate State security concerns could have been addressed by editing out the sensitive passages or supplying a summary of the relevant factual grounds.

Conclusion: failure to comply (six votes to one).

Article 41 – EUR 7,000 to the first applicant in respect of non-pecuniary damage.

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