



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

FIRST SECTION

Application no. 51699/12
Rukhiyya Mikail Kyzy ISMAILOVA
against Russia
lodged on 23 July 2012

STATEMENT OF FACTS

The applicant, Ms Rukhiyya Mikail-kyzy Ismailova, is an Azerbaijani national, who was born in 1980 and is currently detained in Norilsk.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a mother of three children born in 2001, 2003 and 2006 respectively. All children are Azerbaijani nationals and lived with their mother in Azerbaijan. The father of the children is the applicant's husband. They married in 2000 in Azerbaijan. The husband subsequently went to Russia and since 2001 had been working in Norilsk as an individual entrepreneur. It appears that he regularly visited his family in Azerbaijan. In 2005 the husband obtained Russian citizenship and subsequently bought a flat in Norilsk.

On 30 November 2011 the applicant, accompanied by her children, went to Russia. She arrived by plane in Moscow and obtained a migration card there ("the residence permit"). From Moscow they went by plane to Norilsk. According to the applicant, she sold her house in Azerbaijan and decided, together with her husband, to live in Norilsk with the children in the husband's flat permanently.

On 2 December 2011 the applicant with the children arrived at the airport of Norilsk. The applicant's documents were checked by the police and it was discovered that she did not have a special permit necessary to enter Norilsk, a restricted area for foreign nationals. The police proposed that the applicant leave Norilsk. However, the applicant refused to do so. The police drew up a report of an administrative offense under Article 18.8 of the Code

of Administrative Offences (violation of residence regulations by a foreign national) and arrested the applicant.

On 5 December 2011 the Norilsk Town Court examined the applicant's case. The applicant argued that she had been unaware that a special permit was necessary to enter Norilsk. Her husband submitted that he had been aware of it but did not have time to make necessary arrangements.

The Town Court found that the applicant had entered the restricted area unlawfully and had refused to leave it voluntarily. The court observed that the Governmental Decree which had included Norilsk in the list of restricted areas had been published ten years ago; therefore, the limitation at issue was foreseeable for the applicant. The court took into account that the applicant had no record of administrative offences, that she acknowledged the facts imputed to her, that she had minor children and that her husband, a Russian citizen, lived in Norilsk in his own flat, worked as an individual entrepreneur and was able to support and take care of children. Having regard to the above, the court found the applicant guilty of the administrative offence, imposed on her an administrative fine in the amount of 2,500 Russian roubles (about 60 euros), ordered her expulsion (administrative removal) from Russia and placed her in detention pending expulsion. No specific time-limit of the applicant's detention was indicated by the court.

On 8 December 2011 the applicant appealed against the first-instance judgment. She sought her release and quashing of the expulsion order. She did not deny that she had breached rules restricting the freedom of movement of foreigners in Russia. However, she referred to the mitigating circumstances, i.e. that she was a mother of three minor children and that she committed an administrative offence for the first time. She argued that the court gave in the judgment no reason for the additional punishment in form of her expulsion. She submitted that the expulsion and her detention pending expulsion were not in the best interests of the children and contrary to Article 8 of the Convention.

On 12 January 2012 the Krasnoyarsk Regional Court examined the applicant's appeal. It appears that no oral hearing had been held. The court mentioned in its decision that the parties to the case had been duly summonsed but had failed to appear and had not insisted on their personal attendance. It found that the applicant's expulsion and detention pending expulsion were in line with Article 8 of the Convention and had been well justified by the first-instance court. The court dismissed the appeal and upheld the first-instance judgment in a summary fashion. According to the applicant, she received the judgment only on 12 March 2012.

The applicant's supervisory review complaint lodged on 15 March 2012 was dismissed as unfounded on 18 May 2012.

It appears that since 2 December 2011 the applicant remained in detention pending expulsion. It further appears that the children are with their father. According to the applicant, during her detention she has not been allowed to see her husband and the children.

B. Relevant domestic and international law and practice

1. International law and practice

(a) Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan of 3 July 1997

The Agreement provides for reciprocal visa-free travel of citizens of the Russian Federation and the Republic of Azerbaijan.

(b) Conclusions and Recommendations of the UN Committee Against Torture with regard to Russia (CAT/C/RUS/CO/4) of 6 February 2007

In this document the UN Committee condemned the widespread and broad use of administrative expulsion according to Article 18.8 of the Code of Administrative Offences for minor violations of immigration rules (§ 15). It recommended the Russian Federation to further clarify the violations of immigration rules which may result in administrative expulsion and establish clear procedures to ensure they are implemented fairly. It also called for an independent, impartial and effective administrative or judicial review of the decision to expel (*ibid.*).

2. Domestic law and practice

(a) Constitution of the Russian Federation of 12 December 1993

Article 19 provides for the equality of all before the law and courts of law, and equality of rights and liberties.

Article 22 provides that everyone has the right to liberty and security.

Article 27 provides that everyone staying lawfully on the territory of the Russian Federation shall have the right to move freely and choose his or her place of stay or residence.

Article 55 § 3 provides that the constitutional rights and freedoms can be limited by a federal statute in so far as it is necessary to protect the constitutional regime, morals, health or rights or interests of others, to ensure defence of the country and security of the State.

(b) Foreigners' Act (Federal Law no. 115-FZ of 25 July 2002)

Article 2 § 1 of the Act provides that a “migration card” is a document confirming the entitlement of a foreign national from a country with the visa-free travel regime to temporarily stay in Russia

Article 11 § 1 of the Act provides that foreigners have the right to freedom of movement for personal and business purposes within the territory of the Russian Federation on the basis of documents issued in accordance with the present Federal Law, except visiting areas, organisations and facilities for which a special permit is necessary. The list of such areas, organisations and facilities should be approved by the Government of the Russian Federation.

Article 5 of the Act provides that a foreigner should leave Russia after the expiry of the authorised period, except when on the date of expiry he has already obtained an authorisation for extension or renewal, or when his

application for extension and the relevant documents have been accepted for processing. An expellee should bear the costs of his or her expulsion unless he has no means (Article 34 §§ 1 and 2 of the Act). The expellee should be detained under a court order in a specialised detention facility until expulsion (Article 34 § 5).

Article 7 § 1 (3) of the Act provides that a temporary residence permit could not be issued to a foreigner who had been expelled from Russia within the previous five years.

(c) Code of Administrative Offences

Article 18.8 of the CAO provides that a foreign national who infringes residence regulations of the Russian Federation will be liable to punishment by an administrative fine of RUB 2,000 to 5,000 with or without expulsion (administrative removal) from the Russian Federation. Under Article 28.3 § 2 (1) a report on the offence described in Article 18.8 is drawn up by a police officer. Article 28.8 requires such a report to be transmitted within one day to a judge or to an officer competent to examine administrative matters. Article 23.1 § 3 provides that the determination of any administrative charge that may result in removal from the Russian Federation shall be made by a judge of a court of general jurisdiction.

Article 3.10 provides for two types of administrative removal, namely “controlled independent exit” and “controlled forced removal”.

Article 32.10 § 5, as in force at the material time, allowed domestic courts to order a foreign national’s detention with a view of administrative removal.

Article 27.3 § 1 provides that administrative detention can be authorised in exceptional cases if it is necessary for the fair and speedy determination of the administrative charge or for execution of the penalty. Federal Law no. 410-FZ of 6 December 2011, which amended certain provisions of the CAO, introduced Article 27.19, specifies that administrative detention can be authorised in the case of controlled forced removal.

Article 30.1 § 1 guarantees the right to appeal against a decision on an administrative offence to a court or a higher court.

Article 31.9 § 1 provides that a decision imposing an administrative penalty could not be enforced after the expiry of a two-year period since the date on which this decision had become final.

Article 3.9 provides that an administrative offender can be penalised with administrative arrest only in exceptional circumstances with a maximum term of 30 days.

(d) Entry and Leave Procedures Act (Federal Law no. 114-FZ of 15 August 1996)

Under section 27 of the Act re-entry should be refused to a foreign national for five years of the date on which he or she has been previously subject to administrative removal from Russia.

(e) Government Decree no. 470 of 4 July 1992

The Government Decree approved a list of areas for which a special permit for foreigners is necessary. According to the Government Decree

no. 755 of 30 October 2001, an area in the Krasnoyarsk Region around the town of Norilsk has been included in section 4 of the list.

(f) Internal Regulations of Special Facilities for Persons Arrested in Administrative Proceedings, enacted by Ministry of Interior order no. 605ДП of 6 June 2000

The Regulations do not provide for family visits of persons detained in the special facilities.

(g) Judgment no. 6-P of 17 February 1998 of the Constitutional Court

In judgment no. 6-*P* of 17 February 1998 the Russian Constitutional Court held, with reference to Article 22 of the Russian Constitution, that detention of a person with a view of his removal from Russia requires a court decision if that detention exceeds forty-eight hours. Such decision must establish whether the detention is necessary for the purposes of enforcing the removal. The court should also assess the lawfulness and reasons for detention. Detention for an indefinite period of time is not acceptable since it may become a form of punishment, which was not provided under Russian law and which was incompatible with the provisions of the Constitution.

(h) Case law of the Supreme Court

In decision no. 86-*A*/05-2 of 7 December 2005, the Supreme Court of Russia considered that it was incumbent on a national court to examine whether enforcement of an expulsion order was compatible with Article 8 of the Convention. Given that section 7 of the Foreigners Act prevented an expellee from claiming a temporary residence permit for five years, “a serious issue [could] arise as to an interference with [the persons’] right for respect of their family life”. In another decision the Supreme Court varied its reasoning stating that enforcement of an expulsion order “results in the violation of fundamental family ties and impedes the family’s reunification” (decision no. 18-*A*/05-13 of 24 January 2006). The Supreme Court subsequently considered that an expulsion order should be based on considerations which confirm the necessity of such a measure “as the only possible way of ensuring a fair balance between public and private interests” (decision no. 86-*A*/06-1 of 29 March 2006).

COMPLAINTS

1. The applicant complains under Article 8 that her expulsion and detention pending expulsion were disproportional in comparison to the offence committed and not in the best interests of the children. She also complains that she has not been allowed to see her children as well as the husband during detention which lasted for a long period of time.

2. The applicant complains under Article 2 of Protocol no. 4 about violation of her freedom of movement and freedom to choose her residence by the special regime of entering Norilsk for foreign nationals.

3. The applicant complains under Article 4 of Protocol no. 7 that she was punished twice for the same offence, i.e. with the administrative fine and with the expulsion.

QUESTIONS TO THE PARTIES

1. On what date was the applicant placed in detention in the special facility («спецприемник») in the town of Norilsk? Has she been released from it? If so, what was the exact date of the release?

2. Did the applicant comply with the six-month rule in this case, insofar as her expulsion is concerned? When was the applicant served with the appeal judgment of 12 January 2012? The Government are invited to produce a document confirming the date of the receipt of the copy of that judgment by the applicant. Was the supervisory review complaint an effective remedy for the purposes of the six months rule under Article 35 § 1 of the Convention? Is the six-months' period relevant for the admissibility of her complaints insofar as they concerned her detention?

3. Was there a breach of Article 5 § 1 (f) of the Convention as regards the applicant's detention with a view to her expulsion? In particular, on what date did the expulsion proceedings against the applicant end? Where the expulsion proceedings "in progress" between 12 January 2012 and the present time?

4. Has there been a violation of the applicant's right to respect for her family life, contrary to Article 8 of the Convention? More specifically:

(a) Did the rules of the special facility provide for family visits? Was a room for family visits available in the facility? Did the applicant or her relatives request family visits? Was the applicant allowed to see her children and husband while in detention and if yes, how often (cf. *Vlasov v. Russia*, no. 78146/01, §§ 121-127, 12 June 2008)?

(b) Was the special regime established by the legislation for entering Norilsk in public interests and necessary in a democratic society, given the applicant's personal situation? What are the reasons for introducing and maintaining the special regime of the area, given that between 1991 and 2001 no restrictions for foreigners had been in place? How big is the restricted area around the town of Norilsk (in square kilometres)? How many people live there? What is the procedure for obtaining a special permit to enter the restricted area around the town of Novosibirsk? Was it possible for the applicant to seek such a special permit before and after her arrest and did the applicant have a reasonable chances of success for obtaining such a permit?

(c) Was the applicant's sanction of expulsion necessary in a democratic society, having regard her family relationships with the husband and the best interests of their children (cf. *Nunez v. Norway*, no. 55597/09, §§ 84-85, 28 June 2011)? Did the applicable rules provide for the possibility of obtaining the residence permit for Russia or the special residence permit

for Norilsk while in detention in connection with an administrative offence under Article 18.8 of the Code of Administrative Offences?

(d) Was her detention pending expulsion a proportionate measure, if compared to the gravity applicant's administrative offense, her family situation and other interests at stake?

(e) Is it possible for the applicant to, first, re-enter Russia and live there, and, second, to obtain a special residence permit for Norilsk now, after she had been found guilty of the breach of the rules of entry?

5. Had the applicant been residing "lawfully" on the territory of the Russian Federation, within the meaning of Article 2 of Protocol No. 4 to the Convention? In respect of the ban on entering the town of Norilsk for the applicant, has there been a violation of her right to liberty of movement and the freedom to choose her residence, contrary to Article 2 of Protocol No. 4 to the Convention? In particular, was the special regime for entering Norilsk in public interests and necessary in a democratic society, given the applicant's personal situation? Was the sanction of expulsion and the detention pending expulsion a proportionate measure in respect of the applicant's administrative offense, in the light of Article 2 of Protocol No. 4?

The parties are requested to submit relevant documents supporting their arguments.