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

Communicated on 26 January 2012[1]

FIRST SECTION

Application no. 2137/12
Dzhalil Akhmad MOKHAMMAD KHAN
against Russia
lodged on 20 December 2011

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Dzhalil Akhmad Mokhammad Khan, is an Afghan national who was born in 1972 and lives in Moscow. He was represented before the Court by Ms Olga Plykina, a lawyer practising in Moscow.

The respondent Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

1. The background of the case

The applicant is an ethnic tajik from Afghanistan. In the 1970s his father was a deputy mayor of the town of Gerat in Afghanistan, a senator and one of the key officials in Parcham, a communist party of Afghanistan.

At the age of 17 the applicant was sent to study in the USSR.

(a) The applicant's stay in Turkmenistan and his trip to Russia

Between 1989 and 1993 he studied in the Turkmen State University and resided in the town of Ashgabat in Turkmenistan, the Turkmen Soviet Socialist Republic and then Turkmenistan.

In 1990, whilst residing in Ashgabat, the applicant met a Russian national E.S. They started living together as a couple and on

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14 February 1992 they had a daughter Z.D. On 27 July 1993 the applicant and E.S. married.

On 3 September 1993 the applicant took a trip to Afghanistan to find his father and family. According to him, he was detained at the border for three days by unidentified armed men, who forced him to pledge that "he would learn Quran". The applicant's search for the family remained unsuccessful and on 2 October 1993 he returned to Turkmenistan.

(b) The applicant's move to Russia and his family situation

Four months later, on 4 February 1994 the applicant moved to the Tula Region in Russia. According to him, he carried a proper entry visa and thus entered the country lawfully. At some point later his visa expired and his stay thus ceased to remain legal (see the relevant domestic law below). He was unable to produce a copy of that visa and it does not appear that he took any steps to make legal his stay in Russia. It appears that his wife E. S. and his daughter Z.D. travelled with him.

Between 1994 and 1997 the applicant resided with his family in the Tula Region.

As of 1997 he has moved to Moscow. In 1998 the applicant's marriage broke down. Since 2000 the applicant has been living with another Russian national E.I. and her son from a previous marriage M.I. The applicant's divorce from E.S. could not be registered until 7 May 2010, because the applicant's former spouse had not had a valid Russian passport. On the latter date the applicant and E.S. divorced. The applicant was unable to receive an official copy of the divorce registration certificate because of the lack of registration in Russia. He has brought court proceedings against the competent authority in this connection.

Since his move to Russia, the applicant has had no contacts with the extended family that he had left behind in Afghanistan.

In the written statement dated 25 October 2010 E.I. stated that she had been living with the applicant as a family for ten years and they had been unable to marry because he resided in Russia illegally. She then stated that they were willing and ready to get married once the applicant's situation was regularised and that she was also willing to register the applicant as a residence in her apartment in Moscow.

On 21 March 2012 the applicant divorced E. S. and on 21 June 2012 he married E. I.

2. The applicant's request of a refugee status and related proceedings

The applicant has been registered as a person seeking asylum with the UN Refugee Agency in Moscow as of 2001.

In 2003 the applicant applied to the Moscow City department in charge of migration matters of the Ministry of the Interior of Russia seeking the status of a refugee.

Having faced a refusal, he then applied to a court, which on 27 June 2003 ordered the respondent authority ought to examine the applicant's request.

In the meantime, the power to decide such questions was transferred to the newly formed Russian Federal Migration Service.

On 23 August 2006 the applicant applied to the Moscow City Department of the Russian Federal Migration Service ("the City Department of the FMS"), seeking the status of a refugee.

By decision of 28 November 2006 the applicant's request for a refugee status was examined and rejected as unfounded. The City Department of the FMS described the applicant's situation, having mentioned that the applicant's main motivation was an economic one and that there had been no credible and specific threats to his life in Afghanistan. The authority addressed his argument concerning the alleged past political affiliations of his family in Afghanistan, having stressed that even on the assumption that this information were true the applicant himself had left the country very early in life and had never been involved in any political activities himself. Overall, the authority concluded that he failed to satisfy the statutory criteria which were required to get the status of the refugee under the applicable domestic law (see the relevant domestic law below).

It does not appear that the applicant challenged this refusal in court.

3. The applicant's request for a temporary asylum and related proceedings

(a) First round of proceedings

By decision of 3 February 2009 the City Department of the FMS examined and rejected the applicant's request for a temporary asylum. Among other things, the decision mentioned that the applicant was living in a couple with E.I.

Having examined the applicant's appeal against the decision of 3 February on 23 November 2009, the FMS of Russia ("the FMS") granted the appeal, quashed the decision at issue and remitted the case for a fresh consideration to the City Department of the FMS.

(b) Second round of proceedings

1. Proceedings before the FMS authorities

On 13 January 2010 the applicant again applied to the City Department of the FMS for a temporary asylum.

By decision of 13 April 2010 the City Department of the FMS rejected the request, having mentioned that under the domestic law the applicant could claim this status only if he qualified for the status of a refugee but for some reason did not want it or if there were compelling humanitarian considerations which made his departure or removal impossible. The authority considered that the applicant did not fall in either of these categories. As regards his fear of being ill-treated in Afghanistan, the authority noted that there were no objective elements which could confirm an individualised and specific risk of ill-treatment or any threat to life in case of his removal to Afghanistan.

By letter of 11 May 2010 the City Department of the FMS notified the applicant of the contents of the decision of 13 April 2010 and informed him that he had the right to appeal against the decision in court. It then explained:

> "... in case your appeal is refused and there are no legal grounds for your further stay on the territory of the Russian Federation, you will be obliged to leave [Russia] within three working days after the notification of the refusal.
>
> We also inform you that the person [whose request and/or subsequent appeal have been refused] and who refuses to leave voluntarily is subject to administrative removal or deportation in the established order along with the family members ...
>
> According to part 2 of Article 27 of Federal Law dated 15 August 1996 no. 114-FZ "On entry and leave procedures" an alien who was subject to administrative removal or deportation is denied entry to Russia for five years as of the date of [such removal]."

Thereafter the applicant unsuccessfully appealed against this decision to the FMS.

By decision of 17 August 2010 the FMS re-examined the applicant's case and rejected his arguments as unfounded. The authority noted that the applicant mentioned that he was sick and that his condition also made his removal from Russia undesirable. It was mentioned that the applicant was suffering from chronic laryngitis, rhinitis and also had been recently operated in respect of a benign tumour in his throat. Having regard to various elements in its possession, the authority concluded that there had been no evidence of credible and specific threats to the applicant's life in Afghanistan.

2. Court proceedings

On 29 October 2010 the applicant lodged an appeal against the decision of 17 August 2010 in court. Among other things, the applicant mentioned his family situation and the implications that the continued unlawful residence and subsequent removal may have on his family life, having relied extensively on Article 8 of the Convention and the Court's case-law on this matter.

By a first instance judgment dated 25 April 2011 the Zamoskvoreckiy District Court of the city of Moscow examined and rejected the applicant's appeal against the decision of 17 August 2010. The court upheld the decision at issue without addressing the applicant's argument concerning his family life in Russia.

The first instance judgment of 25 April 2011 was upheld on appeal by the Moscow City Court on 4 August 2011.

B. Relevant domestic and international law

1. The 1951 Geneva Convention on the Status of Refugees

Article 33 of the UN Convention on the Status of Refugees of 1951, which was ratified by Russia on 2 February 1993, provides as follows:

> "1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

2. Refugees Act

The Refugees Act (Law no. 4258-I of 19 February 1993) incorporated the definition of the term "refugee" contained in Article 1 of the 1951 Geneva Convention, as amended by the 1967 Protocol relating to the Status of Refugees. The Act defines a refugee as a person who is not a Russian national and who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, ethnic origin, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it (section 1 § 1 (1)).

The Act does not apply to anyone believed on reasonable grounds to have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside the country of refuge prior to his admission to that country as a person seeking refugee status (section 2 § 1 (1, 2)).

A person who has applied for refugee status or who has been granted refugee status cannot be returned to a State where his life or freedom would be imperilled on account of his race, religion, nationality, membership of a particular social group or political opinion (section 10 § 1).

If a person satisfies the criteria established in section 1 § 1 (1), or if he does not satisfy such criteria but cannot be expelled or deported from Russia for humanitarian reasons, he may be granted temporary asylum (section 12 § 2). A person who has been granted temporary asylum cannot be returned against his will to the country of his nationality or to the country of his former habitual residence (section 12 § 4).

In its decision of 30 September 2010 the Constitutional Court of Russia ruled as follows regarding section 12 § 2 of the Refugees Act:

> "... [t]emporary asylum ... is a measure of addition protection against the removal (deportation) of individuals having no legal basis for stay [in Russia] but who due to difficult personal circumstances of a temporary nature have to stay on the territory [of Russia]. This institution has extraordinary character and is in place along with general legal grounds for entry and stay of foreigners or individuals without nationality on the territory of Russia.
>
> Temporary asylum cannot be seen as an alternative to the ordinary method[s] of acquisition of [residence or entry permits] if an individual in question can seek regularisation of his stay by way of the ordinary method[s]..."

3. Administrative removal of foreign nationals

Article 18.8 of the Administrative Offences Code of the Russian Federation provides that a foreign national who infringes the residence regulations of the Russian Federation, including by living on the territory of the Russian Federation without a valid residence permit or by non-compliance with the established procedure for residence registration, will be liable to punishment by an administrative fine of RUB 2,000 to 5,000 and possible 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 the 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 30.1 § 1 guarantees the right to appeal against a decision on an administrative offence to a court or to a higher court.

4. Deportation from, or refusal of entry into, the Russian Federation

A competent authority, such as the Ministry of Foreign Affairs or the Federal Security Service, may issue a decision that a foreign national's presence on Russian territory is undesirable. Such decision may be issued if a foreign national is unlawfully residing on Russian territory, or if his or her residence is lawful but creates a real threat to the defensive capacity or security of the State, to public order or health, etc. If such a decision has been taken, the foreign national has to 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 of the Law on the Procedure for Entering and Leaving the Russian Federation, no. 114-FZ of 15 August 1996, as amended on 10 January 2003, "the Entry Procedure Act").

The law of 31 December 2012 amended the Entry Procedure Act so that now a foreign national may be denied entry to the Russian Federation for three years if during his or her previous stay he outstay the sojourn for more than thirty days. The failure could be excused with reference to various exceptional circumstances, such as the need for urgent treatment, serious disease, death of a close person residing in Russia or extraordinary events lying outside of human control (part 8 of section 26).

A deportation order is enforced by transferring the person concerned to the authorities of a foreign State or by the voluntary departure of this person under the supervision of the deporting authority (Article 32.10 § 1 of the Code of Administrative Offences, CAO). A court is empowered to detain the person concerned until his actual deportation (Article 32.10 § 5). The detainee should be kept at the place assigned for this purpose or in specialised detention facilities, which should have appropriate sanitary conditions and prevent voluntary departure (Articles 27.3 and 27.6 of the Code). The detainee should be fed and given medical assistance in compliance with the rules adopted by the Government.

In ruling no. 6-П of 17 February 1998 the Constitutional Court held, with reference to Article 22 of the Russian Constitution, that detention of a person to be removed from Russia for more than forty-eight hours required a court decision, which should establish that detention is indispensable for enforcing the removal; the court should assess the lawfulness and reasons for detention; detention for an indefinite period of time would be unacceptable since it would be capable of amounting to a separate form of punishment, which is not prescribed by the Constitution.

A foreign national who has been deported or administratively removed from Russia may not re-enter it during the five-year period following such deportation or administrative removal (section 27 § 2 of the Entry Procedure Act).

5. Residence permits for foreign nationals

Until 2002 temporary resident foreign nationals were not required to apply for a residence permit. Their presence in Russia was lawful as long as their visa remained valid. On 25 July 2002 Law no. 115-FZ on Legal Status of Foreign Nationals in the Russian Federation ("the Foreign Nationals Act") was passed. It introduced the requirement of residence permits for foreign nationals.

A foreign national married to a Russian national living on Russian territory is entitled to a three-year residence permit (section 6 §§ 1 and 3 (4)).

A three-year residence permit *("разрешение на временное проживание")* may be refused only in exhaustively defined cases, particularly if the foreign national advocates a violent change to the constitutional foundations of the Russian Federation or otherwise creates a threat to the security of the Russian Federation or its citizens (section 7 § 1 (1)). Nor may a three-year residence permit be issued during the five-year period following a person's administrative removal or deportation from Russia (section 7 § 1 (3)).

The local department of the Federal Migration Service (before 2006, the local police department) examines an application for a three-year residence permit within six months. It collects information from the security services, the bailiffs' offices, tax authorities, social security services, health authorities and other interested bodies. Those bodies must, within two months, submit information about any circumstances within their knowledge which might warrant refusal of a residence permit. After receipt of such information the local department of the Federal Migration Service or the local police department decides whether to grant or reject the application for a three-year residence permit (section 6 §§ 4 and 5).

Section 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. A deportee should bear the cost of his or her deportation unless he has no means (section 31 § 5 of the Act). The deportee should be detained under a court order in a specialised detention facility until deportation (section 31 § 9).

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

In decision no. 86-АД05-2 of 7 December 2005, the Supreme Court of Russia considered that it was incumbent on a national court to examine whether enforcement of a deportation order was compatible with Article 8 of the Convention. Given that section 7 of the Foreigners Act prevented a deportee 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 a deportation order "results in the violation of fundamental family ties and impedes the family's reunification" (decision no. 18-АД05-13 of 24 January 2006). The Supreme Court subsequently considered that a deportation 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-АД06-1 of 29 March 2006).

COMPLAINTS

1. The applicant complained under Article 3 of the Convention that he was at a serious risk of ill-treatment in case of his deportation to Afghanistan because of the political affiliations of his family in the 1970s. He also referred to his medical condition, arguing that he would be deprived of proper medical care in that country.

2. Relying on Article 8, the applicant also claims that his removal to Afghanistan would seriously disturb his family life with his daughter Z.D., his wife E.I. and her son M.I.

3. Under Article 13 the applicant was dissatisfied with his inability to regularise his illegal stay in Russia or otherwise escape deportation proceedings with reference to his family situation. He complained specifically about the defects in the rules on deportation procedure which made it impossible to bring effective court proceedings in respect of deportation order.

QUESTIONS

1. The Government are invited to comment on the applicant's allegation that the deportation order is an automatic consequence of the refusal of the refugee status and that effective court appeal against the deportation order is impossible. They are requested to refer to the domestic rules applicable to deportation procedure.

The Government's answers should cover, in particular, the following points:

(a) is the relevant official taking a deportation order under the legal obligation to notify an applicant about such decision in advance?

(b) can the deportation order be appealed against in court and, if so, within what time-limits and under what procedural rules?

(c) is the actual deportation suspended pending the examination of the appeal in court?

2. In view of the answers to the above question, can the applicant be regarded as a victim of the alleged violations of Articles 3, 8 and 13 of the Convention?

3. In view of the answers to the questions in point 1, were the requirements of Article 13 of the Convention respected in so far as the deportation procedure is concerned?

4. Would the three year ban in part 8 of Article 26 of the Entry Procedure Act be applicable to the applicant even if he left Russia voluntarily? If so, would the application of this ban in the applicant's case compatible with Article 8 of the Convention?