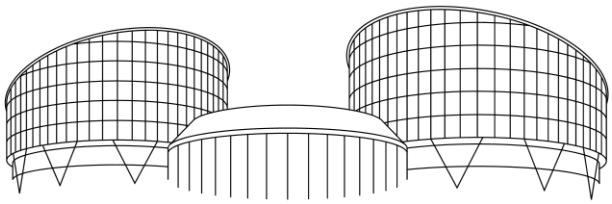

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LIU v. RUSSIA (No. 2)

(Application no. 29157/09)

JUDGMENT

STRASBOURG

26 July 2011

FINAL

08/03/2012

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

In the case of Liu v. Russia (no. 2)**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Elisabeth Steiner,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 5 July 2011,

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

PROCEDURE

1. The case originated in an application (no. 29157/09) 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 Chinese national, Mr Liu Jingcai ("the first applicant"), and three Russian nationals, Ms Yulia Aleksandrovna Liu (the second applicant"), Ms Regina Liu ("the third applicant") and Mr Vadim Liu ("the fourth applicant"), on 3 June 2009.

2. The applicants, who had been granted legal aid, were represented by Mr M. Rachkovskiy, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that the refusal of a residence permit to the first applicant and his administrative removal to China had violated their right to respect for family life.

4. On 26 February 2010 the President of the First Section decided to give notice of the application to the Government. He made a decision to give the application priority treatment (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are a family comprising the husband and wife (the first and second applicants) and their two children (the third and fourth applicants). They were born in 1968, 1973, 1996 and 1999 respectively and live in the town of Sovetskaya Gavan in the Khabarovsk Region.

A. The first applicant's arrival in Russia

6. In 1994 the first applicant arrived in Russia with a valid visa and married the second applicant. In November 1996, after his visa had expired, the first applicant was deported to China.

7. In 2001 the first applicant obtained a work visa valid until 1 August 2002 and resumed his residence in Russia. The visa was later extended until 1 August 2003.

B. Refusal of a residence permit and deportation proceedings

8. On 24 July 2003 the first applicant applied for a residence permit.

9. On 22 July 2004 the police department of the Khabarovsk Region rejected his application by reference to section 7 § 1 (1) of the Foreign Nationals Act (see paragraph 47 below). No further reasons were provided.

10. The first and the second applicants challenged the refusal before a court. They complained, in particular, that the police department of the Khabarovsk Region had not given any reasons for the refusal. The first applicant had never been charged with any criminal offence or engaged in any subversive activities. The applicants also claimed that the refusal had interfered with their right to respect for their family life and had caused them non-pecuniary damage.

11. On 4 November 2004 the Tsentralniy District Court of Khabarovsk found that the decision of 22 July 2004 had been lawful and rejected the applicants' claim in respect of non-pecuniary damage. It found that the police department of the Khabarovsk Region had received information from the Federal Security Service that the first applicant posed a national security risk. That information was a State secret and could not be made public.

12. On 18 January 2005 the Khabarovsk Regional Court upheld the judgment of 4 November 2004 on appeal. It reiterated that, according to the information from the Federal Security Service, the first applicant posed a national security risk. That information was a State secret and was not subject to judicial scrutiny.

13. On 3 February 2005 the police department of the Khabarovsk Region prepared a decision that the first applicant's presence on Russian territory was undesirable and submitted it to the head of the Federal Migration Service for approval. The draft decision indicated that the first applicant had been unlawfully resident on Russian territory and had been repeatedly fined under Article 18.8 of the Administrative Offences Code (see paragraph 50 below) for his failure to leave Russia after the expiry of the authorised residence period. On 22 March 2005 the head of the Federal Migration Service confirmed the decision and it became enforceable.

14. On 22 August 2005 the police department of the Khabarovsk Region asked the Federal Migration Service to order the first applicant's deportation. On 12 November 2005 the head of the Federal Migration Service ordered the first applicant's deportation by reference to section 25.10 of the Entry Procedure Act (see paragraph 51 below). No further reasons were provided. The applicants were not informed of the decision until 12 December 2005.

C. Application no. 42086/05 and the Court's judgment of 6 December 2007

15. On 25 November 2005 the first and second applicants lodged an application with the Court under Article 34 of the Convention. They complained, in particular, that the refusal to grant a residence permit to the first applicant and the subsequent decision to deport him to China had entailed a violation of the right to respect for their family life.

16. In its judgment of 6 December 2007 the Court found a violation of Article 8 of the Convention (see *Liu v. Russia*, no. 42086/05, 6 December 2007). It found that the applicants' relationship amounted to family life and that the refusal to grant the first applicant a residence permit and his deportation order constituted interference with the applicants' right to respect for their family life. That interference had a basis in domestic law, namely section 7 § 1 (1) of the Foreign Nationals Act and section 25.10 of the Entry Procedure Act.

17. However, the Court noted that the domestic courts were not in a position to assess effectively whether the decision to reject the first applicant's application for a residence permit was justified, because it was based on classified information. The failure to disclose the relevant information to the courts deprived them of the power to assess whether the conclusion that the first applicant constituted a danger to national security had a reasonable basis in fact. It followed that the judicial scrutiny was limited in scope and did not provide sufficient safeguards against arbitrary exercise of the wide discretion conferred by domestic law on the Ministry of Internal Affairs and the Federal Security Service in cases involving national security.

18. As to the deportation order against the first applicant, the Court observed that it had been issued by the Federal Migration Service on the initiative of a local police department. Both agencies were part of the executive and took such decisions without hearing the foreign national concerned. It was not clear whether there was a possibility of appealing against those decisions to a court or other independent authority offering guarantees of an adversarial procedure and competent to review the reasons for the decisions and relevant evidence.

19. The Court concluded that the interference with the applicants' family life was based on legal provisions that did not give an adequate degree of protection against arbitrary interference and therefore did not meet the Convention's "quality of law" requirements. Accordingly, in the event of the deportation order against the first applicant being enforced, there would be a violation of Article 8.

20. On 2 June 2008 the judgment became final.

D. Subsequent proceedings before the Russian authorities

1 Annulment of the deportation order

21. On 4 August 2008 the Federal Migration Service annulled the decision of 22 March 2005 stating that the first applicant's presence on Russian territory was undesirable, and the decision of 12 November 2005 ordering his deportation.

22. By letter of 21 August 2008, the head of the local department of the Federal Migration Service notified the first applicant of the decision of 4 August 2008. She further reminded the first applicant that he was unlawfully residing on Russian territory. To make his residence lawful, he had to leave for China, obtain a Russian entry visa and then apply for a residence permit. If he failed to leave, he would be fined and administratively removed to China under Article 18.8 of the Administrative Offences Code.

2. Re-examination of the application for a residence permit

23. On 23 September 2008 the first and the second applicants applied to the Tsentralniy District Court of Khabarovsk for a reconsideration of the judgment of 4 November 2004, as upheld on 18 January 2005, referring to the Court's judgment of 6 December 2007.

24. On 2 December 2008 the Tsentralniy District Court of Khabarovsk allowed their request, quashed the judgment of 4 November 2004 and ordered a reconsideration of the case.

25. On 15 December 2008 the first and the second applicants submitted an amended statement of claim, asking that the first applicant be issued with

a residence permit and that compensation in respect of non-pecuniary damage be paid to each of the applicants. The statement of claim mentioned that the first and the second applicants were acting on their own behalf and on behalf of their minor children, the third and the fourth applicants.

26. On 6 February 2009 the Tsentralniy District Court of Khabarovsk relinquished jurisdiction in favour of the Khabarovsk Regional Court. The judge noted that one of the main criticisms of the European Court expressed in the judgment of 6 December 2007 was the failure by the District Court to review documents containing classified information. This factor had prevented an effective assessment of whether the finding that the first applicant constituted a danger to national security had a reasonable basis in the facts and, consequently, of whether the decision to reject his application for a residence permit was justified. The judge concluded that the case should be referred to the Regional Court which, unlike the District Court, had competence to review documents containing State secrets.

27. During the hearing the Khabarovsk Regional Court examined the classified documents from the Federal Security Service containing information about the security risks allegedly posed by the first applicant. The first and second applicants were informed of the contents of those documents after they had undertaken not to disclose that information. They asked the court to call the police informants who had accused the first applicant of subversive activities to the witness stand and have them questioned. Their request was however refused.

28. On 17 March 2009 the Khabarovsk Regional Court found that the refusal of a residence permit to the first applicant had been lawful. It referred, in particular, to section 7 § 1 (1) of the Foreign Nationals Act and held as follows:

> "... if the security services discover that certain actions [of a foreign national] create a threat for the security of the Russian Federation or for the citizens of the Russian Federation, they are bound [by law] to inform the local department of the Federal Migration Service of [the existence of such threat]. [The law] does not require that the security services reveal the substance of the threat.
>
> The procedure for the preparation and approval of the materials in respect of a specified foreign national to whom a Russian three-year residence permit is to be refused is established by [unpublished] Instruction no. 0300, "On organisation of the activities of the Federal Security Service in respect of the examination of materials concerning residence permits for foreign nationals", of 4 December 2003.
>
> During the hearing the court examined the requirements contained in the Instruction and the 'classified' documents which had formed the basis for the refusal, by the security services, of permission to grant a three-year residence permit to Chinese national Liu Jingcai. It finds that the Khabarovsk Regional Department of the Federal Security Service complied with the requirements contained in the Instruction.
>
> The court has established that the security service revealed circumstances and discovered factors representing a danger for the vital interests of individuals, society

and the State. The security service made the finding that there were circumstances warranting the refusal of a Russian three-year residence permit to Liu Jingcai on the basis of information obtained in the course of its intelligence activities conducted in accordance with the procedure established by the laws of the Russian Federation, when discharging its [the security service's] duties and within its competence.

The court takes into account that issues relating to national security are special, in particular because the factors that represent a threat to national security are assessed by the competent authorities on the basis of information received from various sources, including sources not subject to judicial scrutiny.

Moreover, section 7 § 1 (1) of [the Foreign Nationals Act] does not specify which actions may be qualified as representing a threat for the security of Russia or its citizens. This means that the competent security services have discretion in classifying various actions of a foreign national as a threat [to national security].

Thus, there are no reasons to hold that the refusal by the Khabarovsk Regional Department of the Federal Security Service of permission to grant a three-year residence permit to Liu Jingcai was unlawful.

After the receipt of news of the refusal of permission by the security service, the application of Liu Jingcai for a three-year residence permit was rejected by the police department of the Khabarovsk region, by decision no. 401 of 22 July 2004, on the basis of section 7 § 1 (1) of [the Foreign Nationals Act].

The court concludes from the above that the mentioned decision of the police department of the Khabarovsk Region was lawful and justified...”

29. The court then cited Article 8 of the Convention and certain paragraphs of the Court's judgment of 6 December 2007 reiterating the general principles under Article 8. It continued as follows:

“Given that the instant case does not concern an expulsion order against Liu Jingcai and that during the court hearing statutory circumstances warranting a restriction of the right of Chinese national Liu Jingcai to obtain a Russian three-year residence permit have been established, the court does not see any grounds to satisfy the plaintiffs' request for an injunction to examine Liu Jingcai's application for a three-year residence permit and grant such residence permit on the basis of the UN Convention on the Rights of the Child.”

30. Finally, referring to section 8 of the Foreign Nationals Act (see paragraph 49 below), the Regional Court found that the first applicant was not entitled to receive a five-year residence permit either. A five-year residence permit could be issued only to a person who had lived in Russia for at least a year on the basis of a three-year residence permit. As the first applicant had never had a three-year residence permit, he was not eligible for a five-year residence permit.

31. The Regional Court dismissed the applicants' claims in full.

32. The first and second applicants appealed to the Supreme Court of the Russian Federation. They complained, in particular, that they had not been given access to the classified materials but merely informed about their

contents in general terms. They had therefore been denied an opportunity to contest the accusations levelled at the first applicant. They referred to the cases of *Edwards and Lewis v. the United Kingdom* ([GC], nos. 39647/98 and 40461/98, ECHR 2004-X), and *A. and Others v. the United Kingdom* ([GC], no. 3455/05, ECHR 2009-), claiming that the refusal to disclose the relevant evidence had violated their right to a fair trial. They also argued that by refusing to provide the first applicant with a residence permit the authorities had showed disrespect for their family life.

33. A representative of the local department of the Federal Migration Service commented on the applicants' appeal submissions. He submitted, in particular, that the decision to refuse a residence permit to the first applicant had been lawful and had been taken in accordance with the procedure established by law, in particular Instruction no. 0300. That instruction and the classified materials from the security services had been examined by the Regional Court in the applicants' presence and had been attached to the case file. Accordingly, the applicants had had full access to those materials.

34. On 20 May 2009 the Supreme Court upheld the judgment of 17 March 2009 on appeal, finding that it had been lawful, well-reasoned and justified. The Regional Court had examined the classified materials in the applicants' presence. The Supreme Court was therefore convinced that the security services' assertion that the first applicant was a danger to national security had a basis in the facts. In those circumstances the public interest had absolute priority over any private interests that might be involved. There was no reason to depart from the findings made by the Regional Court, as those findings had been compatible with the domestic and international law. The applicants had been given access to all relevant evidence and materials and no other procedural defects had been established. Accordingly, their right to a fair trial had not been violated.

3. Administrative removal proceedings

35. On 2 June 2009 several policemen went to the second applicant's place of work in search of the first applicant. They took the first applicant to the nearby police station. An officer from the local department of the Federal Migration Service drew up a report on the commission of an offence under Article 18.8 of the Administrative Offences Code and ordered that the first applicant pay a fine of 2,000 Russian roubles (RUB). The first applicant was then released.

36. The applicants challenged the decision of 2 June 2009 before the Sovetskaya Gavan Town Court.

37. On 7 July 2009 the Sovetskaya Gavan Town Court reversed the decision of 2 June 2009. It observed that the statutory limitation period for continuous administrative offences was one year starting to run from the day the offence was discovered. In the first applicant's case the continuous offence of living in Russia without a valid residence permit had been first

discovered in December 2004. Accordingly, the administrative offence proceedings were time-barred. The parties did not appeal and the decision became final.

38. On 28 August 2009 the prosecutor's office asked the Khabarovsk Regional Court to quash the decision of 7 July 2009 as incorrect.

39. On 5 October 2009 the Khabarovsk Regional Court found that the Town Court had incorrectly interpreted and applied the legal provisions concerning limitation periods and that the administrative offence proceedings against the first applicant were not time-barred. However, the Administrative Offences Code did not provide for a procedure for quashing or reconsidering a court decision that had become final. It therefore rejected the prosecutor's office's application.

40. On 22 October 2009 several policemen went to the second applicant's place of work and arrested the first applicant. He was taken to the police station, where an officer from the local department of the Federal Migration Service drew up a report on the commission of an offence under Article 18.8 of the Administrative Offences Code. The report was transmitted to a judge.

41. On the same day the Sovetskaya Gavan Town Court held that the first applicant had infringed the residence regulations by living in Russia without a valid residence permit. It further held as follows:

> "The offender's arguments that some members of his family (his wife and children) are living in the Russian Federation have been discussed. It has been found that these circumstances cannot prevent an administrative removal, as in the judgments mentioned above [the judgments of 17 March and 20 May 2009] the same circumstances were considered insufficient for granting Liu Jingcai a residence permit..."

42. The Town Court ordered the first applicant's administrative removal and detention pending removal. It also ordered that he pay a fine of RUB 2,000. The first applicant was placed in a detention centre in Khabarovsk.

43. On 25 November 2009 the Khabarovsk Regional Court upheld the decision of 22 October 2009 on appeal.

44. On 27 November 2009 the first applicant was expelled to China.

II. RELEVANT DOMESTIC LAW

A. Residence permits for foreign nationals

45. 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.

46. 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)).

47. 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)).

48. 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).

49. During the validity of the three-year residence permit a foreign national may apply for a renewable five-year residence permit (*"вид на жительство"*). Such application is possible only after the foreign national has lived in Russia for at least a year on the basis of a three-year residence permit (section 8 §§ 1-3).

B. Administrative removal of foreign nationals

50. 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.

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

51. 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 a 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").

52. 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).

D. Representation of minors in civil proceedings

53. The Civil Procedure Code provides that only those persons who have reached the age of eighteen may participate in civil proceedings. Minors participate in civil proceedings through their parents or guardians (Articles 37 § 1and 52 § 1).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. The applicants complained that the refusal to grant a residence permit to the first applicant and his subsequent administrative removal to China had entailed a violation of the right to respect for their family life. They relied on 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

1. Submissions by the parties

(a) The Government

55. The Government submitted that the Court had no jurisdiction *ratione materiae* to examine the applicants' complaints. It had already examined an application lodged by the same persons and relating to the same facts and the same complaints. In their further submissions they conceded that the applicants in the two applications were not the same, but argued that the third and fourth applicants had not taken part in the domestic proceedings.

56. The Government further submitted that the Court's judgment of 6 December 2007 was pending before the Committee of Ministers, which was overseeing its execution. The present case was therefore different from the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) ([GC], no. 32772/02, ECHR 2009-...), where the Committee of Ministers had ended its supervision of the execution of the Court's judgment by a final resolution. The Committee of Ministers had been informed of the developments following the adoption by the Court of the judgment in the applicants' favour, in particular concerning the new round of judicial proceedings and the new refusal of an application for a residence permit. Those developments had occurred in the framework of the execution process and had not entailed any new violations of the Convention.

57. Finally, the Government submitted that in its judgment the Court had found that in the event of the deportation order against the first applicant being enforced, there would be a violation of Article 8 of the Convention, and ordered that the Government pay 6,000 euros (EUR) to the applicants. If the Court found a violation of Article 8 in the present case as well, the Government would be held liable for a second time for the same acts for which they had already been held liable.

(b) The applicants

58. The applicants submitted that the present application had been lodged by four persons, two of whom, the third and fourth applicants, had not participated in the previous proceedings before the Court. The applicants in the two applications were therefore not the same. Secondly, they argued that the present application concerned new facts, namely a new round of judicial proceedings concerning the refusal of a residence permit to

the first applicant and, in particular, his administrative removal to China. These facts had occurred after the adoption of the Court's judgment of 6 December 2007 and had therefore never been examined by the Court.

2. The Court's assessment

59. The Court notes that it has already examined whether the refusal of a residence permit to the first applicant and the decision to deport him infringed Article 8. In its judgment of 6 December 2007 the Court found a violation of Article 8 (see *Liu v. Russia*, cited above). After that judgment became final, the Russian authorities, under the supervision of the Committee of Ministers, annulled the decisions criticised by the Court, re-examined the first applicant's application for a residence permit, rejected it with reference to national security considerations and ordered his administrative removal to China. It must be ascertained whether the Court has jurisdiction to examine the applicants' complaints concerning the new developments which occurred after the Court's judgment had become final while the implementation of that judgment is being supervised under Article 46 by the Committee of Ministers.

60. In its recent judgment *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) (cited above) the Grand Chamber summarised the applicable principles as follows:

> "61. The Court reiterates that findings of a violation in its judgments are essentially declaratory (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; and *Krčmář and Others v. the Czech Republic* (dec.), no. 69190/01, 30 March 2004) and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).
>
> 62. The Committee of Ministers' role in this sphere does not mean, however, that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV, with references to *Pailot v. France*, 22 April 1998, § 57, *Reports* 1998-II; *Leterme v. France*, 29 April 1998, *Reports* 1998-III; and *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000) and, as such, form the subject of a new application that may be dealt with by the Court. In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (see *Lyons and Others*, cited above, and also *Hertel v. Switzerland* (dec.), no. 3440/99, ECHR 2002-I).
>
> 63. Reference should be made in this context to the criteria established in the case-law concerning Article 35 § 2 (b), by which an application is to be declared inadmissible if it "is substantially the same as a matter that has already been examined by the Court ... and contains no relevant new information". The Court must therefore ascertain whether the two applications brought before it by the applicant association relate essentially to the same person, the same facts and the same complaints (see,

mutatis mutandis, *Pauger v. Austria*, no. 24872/94, Commission decision of 9 January 1995, DR 80-A, and *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006)."

61. The Court does not consider it necessary to examine whether the present application relates to the same persons and the same complaints as in the previous application examined by it because it finds that the developments that occurred after the adoption of its judgment of 6 December 2007 constitute relevant new information capable of giving rise to new issues under Article 8 of the Convention.

62. Indeed, in the judgment of 6 December 2007 the Court found a violation of Article 8 because the contested decisions (namely, the decision rejecting an application for a residence permit, and a deportation order) had been procedurally defective. Firstly, the classified materials from the Federal Security Service which had served as a basis for rejecting the first applicant's application for a residence permit had not been disclosed to the courts. Secondly, the deportation order had not been amenable to judicial review. The Court found that neither the residence permit nor the deportation proceedings had been attended by sufficient procedural safeguards against arbitrariness. Accordingly, the first applicant's deportation, if enforced, would constitute an unlawful interference with the first and second applicants' right to respect for their family life. In the light of that conclusion, the Court did not examine whether the interference pursued a legitimate aim and was "necessary in a democratic society".

63. After the judgment of 6 December 2007 became final, the domestic decisions criticised by the Court were annulled and the application for a residence permit was examined in a new set of domestic proceedings. The new examination of the application for a temporary residence permit resulted in a fresh refusal. Afterwards, a separate set of proceedings was instituted against the first applicant under the Code of Administrative Offences and his administrative removal was ordered. The administrative removal order was enforced and the first applicant was removed to China. Those developments constitute new facts permitting to differentiate the present application from the one examined by the Court on 6 December 2007.

64. The Court takes note of the Government's argument that it does not have jurisdiction *ratione materiae* to examine the present application because the judgment of 6 December 2007 is still pending before the Committee of Ministers, which supervises its execution. In that connection, the Court would first reiterate that by Article 32 § 1 of the Convention its jurisdiction extends "to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47". Article 32 § 2 provides that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide".

65. The Court reiterates in this connection that the powers assigned to the Committee of Ministers by Article 46 are not being encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), cited above, § 67). It also notes that in the case of *Mehemi v. France (no. 2)*(no. 53470/99, ECHR 2003-IV) it examined a new application while its first judgment in respect of the same applicant was still pending before the Committee of Ministers under Article 46 of the Convention. In particular, it examined whether new measures taken after its judgment in respect of an alien previously removed from the respondent State complied with his right to a family life under Article 8 (see *Mehemi v. France (no. 2)*, cited above, §§ 52-56, and Resolution DH(2009)1 adopted by the Committee of Ministers in that case). The Court therefore considers that it is not prevented from examining the applicants' complaints concerning the new developments which occurred after the Court's judgment of 6 December 2007 became final while that judgment is still pending before the Committee of Ministers under Article 46.

66. Indeed, the Committee of Ministers is empowered *inter alia* to examine whether the respondent State has taken individual measures to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention (Rule 6.2b of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements). In so doing the Committee takes into account the respondent State's discretion to choose the means necessary to comply with the judgment (ibid.). It is noteworthy that following the Court's judgment of 6 December 2007 the relevant domestic decisions were annulled and the applicants' case was re-examined. The Court's criticisms were taken into account in the course of the fresh examination of the case by the domestic authorities. In particular, the classified materials were disclosed to the courts and the administrative removal order, unlike the deportation order criticised by the Court in its judgment of 6 December 2007, was reviewed judicially.

67. At the same time, the domestic re-examination of the case gave rise to new issues under the Convention which, in the absence of any assessment by the Court, may not be resolved in the context of the Committee of Ministers' current supervision. In particular, a new question arises as to whether the extended procedural guarantees afforded to the applicants during the fresh examination were adequate and sufficient. In addition, it has to be ascertained whether the first applicant's removal from Russia pursued a legitimate aim and was "necessary in a democratic society", issues which were not examined in the judgment of 6 December 2007 and have therefore to be determined by the Court in the context of the present application.

68. It follows that the Court has jurisdiction to examine whether the new judicial proceedings which resulted in the first applicant's removal to China gave rise to a fresh violation of Article 8.

69. As regards the Government's argument that the third and the fourth applicants were not parties to the domestic proceedings, which may be interpreted as an objection as to non-exhaustion of domestic remedies by these applicants, the Court notes that the statement of claim indicated that the first and the second applicants acted on their own behalf and on behalf of their minor children, the third and the fourth applicants (see paragraph 25 above). Given that according to domestic law minors could participate in civil proceedings only through their parents or guardians (see paragraph 53 above), the Court is satisfied that the third and the fourth applicants raised complaints about a violation of their right to respect for family life before the appropriate domestic bodies and in compliance with the formal requirements laid down in domestic law.

70. In the light of the foregoing, the Court dismisses the Government's objections and finds that this complaint 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. Submissions by the parties

(a) The applicants

71. The applicants submitted that the refusal of a residence permit to the first applicant and his subsequent administrative removal to China had been unlawful and had not been "necessary in a democratic society". Firstly, Instruction no. 0300 of 4 December 2003, which provided a legal basis for the Federal Security Service's refusal of permission to grant a residence permit and on which the domestic courts relied in their judgments, had not been published. Secondly, a residence permit had been refused by reference to national security considerations. To establish the risk to national security, the domestic courts had relied on classified materials from the Federal Security Service. However, they had declined to examine any evidence confirming the information contained in those materials, finding that the Federal Security Service's sources of information were not subject to judicial scrutiny. Nor had the courts verified whether the alleged actions indeed presented a danger to national security, finding that the security services had unfettered discretion in such matters. Accordingly, in the

applicants' opinion, the judicial scrutiny had been excessively restricted in scope.

72. Further, the applicants claimed that they had not been given access to the classified materials submitted by the Federal Security Service to the domestic courts. The judge had read some extracts to them. Those extracts, however, had been very generic. They did not mention the dates on which the acts imputed to the first applicant had been committed, or the names of the witnesses. In the absence of that information, the first applicant had been unable to refute the accusations against him by, for example, providing an alibi or cross-examining the witnesses against him. Accordingly, the applicants had not been provided with adequate procedural guarantees.

73. Finally, the applicants submitted that the domestic courts had not struck the requisite balance between the need to protect national security and the applicants' right to respect for their private life. In particular, they had not taken into account such factors as the length of the first applicant's stay in Russia, the nature and gravity of the offences imputed to him, his conduct and his family situation, and in particular the fact that he had minor children.

(b) The Government

74. The Government submitted that the first applicant had been refused a residence permit and had been administratively removed from Russia because he presented a danger to national security. They refused to produce copies of the materials from the Federal Security Service which had served as a basis for the refusal of a residence permit or copies of the minutes of the domestic hearings, stating that these were confidential documents. They submitted that the confidential materials had been examined by the domestic courts, which had found that certain factors warranting the refusal of a residence permit to the first applicant had indeed been uncovered by the security services. The sources of the security services' information had not, however, been subject to judicial review.

75. The Government further submitted that all the documents from the case file had been read out during the hearing in the applicants' presence. The applicants had been informed that the first applicant was accused of aiding the Chinese security services to collect information about the political, social and economic situation in the Khabarovsk Region, as well as information about military facilities situated in that region, and of taking pictures of the seaport, railway crossings and railway branch lines leading to Russian Pacific Fleet bases. The applicants had been given an opportunity to make submissions in reply.

76. The Government concluded from the above that the applicant's administrative removal from Russia had been lawful and proportionate to the legitimate aim of protecting national security because the public interest prevailed over the applicants' private interests. In any event, the second,

third and fourth applicants were free to leave Russia if they wanted to reunite with the first applicant.

2. The Court's assessment

77. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. 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 *Dalia v. France*, 19 February 1998, § 52, *Reports* 1998-I; *Mehemi v. France*, 26 September 1997, § 34, *Reports* 1997-VI; *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX; and *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, § 113).

78. The Court observes that the first applicant was refused a residence permit by reference to national security considerations. As a consequence of that refusal, his residence in Russia became unlawful. He was found guilty of an administrative offence – a breach of residence regulations – and administratively removed from Russia. He was thereby separated from his wife and two children, the second, third and fourth applicants. There is accordingly no doubt that there has been an interference with the applicants' right to respect for their family life protected by Article 8 of the Convention. In fact, the existence of an interference in the present case is not in dispute between the parties.

79. The parties disagreed as to whether the interference was prescribed by law and, in particular, whether the domestic legal provisions met the Convention's "quality of law" requirements. However, the Court may dispense with ruling on these points because, irrespective of the lawfulness of the measures taken against the second applicant, they fell short of being necessary in a democratic society, for the reasons set out below. To the extent that the lawfulness issues are relevant to the assessment of the proportionality of the interference they will be addressed in paragraphs 80 to 96 below (see *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 53, ECHR 2006-II).

80. The Court is prepared to accept that the measures taken against the first applicant pursued the legitimate aims of protection of national security and prevention of disorder and crime. It remains to be ascertained whether

the interference was proportionate to the legitimate aims pursued, in particular whether the domestic authorities struck a fair balance between the relevant interests, namely the prevention of disorder and crime and protection of national security, on the one hand, and the applicants' right to respect for their family life, on the other.

81. The Court notes with concern the domestic courts' finding that in cases involving national security considerations "the public interest had absolute priority over any private interests that might be involved" (see paragraph 34 above). By this assertion the domestic courts explicitly refused to balance the different interests involved. They failed to take into account the various criteria elaborated by the Court (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 57-58, ECHR 2006-XII) and to apply standards which were in conformity with the principles embodied in Article 8.

82. The Court will now assess the proportionality of the interference by balancing the interests of protecting national security and preventing disorder and crime against the applicants' right to respect for family life.

(a) Assessment of the seriousness of the offence committed by the first applicant and establishment of a threat to national security

83. The Court notes at the outset that the offence for which the first applicant was expelled consisted in unlawfully residing in Russia without a valid visa or residence permit. This offence is punishable under the Code of Administrative Offences by a fine of RUB 2,000 to 5,000 (about EUR 50 to 125) and possible administrative removal. The Court considers that the offence was not a particularly serious one (see, *mutatis mutandis*, *Zakayev and Safanova v. Russia*, no. 11870/03, § 42, 11 February 2010). It further notes that the first applicant's residence became unlawful after the domestic authorities rejected his application for a residence permit, relying on confidential information from the Federal Security Service that the first applicant presented a national security risk.

84. The Court observes that the precise contents of the Federal Security Service's information have not been revealed to it. The domestic judgments did not contain any indication why the first applicant was considered a danger to national security, let alone mention any facts on the basis of which that finding had been made. In their submissions to the Court, the Government briefly outlined the security services' allegations against the first applicant, refusing at the same time to submit any supporting documents (see paragraphs 74 and 75 above).

85. The Court takes note of the Government's argument that the security services' report describing the allegations against the first applicant had been examined by the domestic courts, which had found that it provided sufficient justification for the refusal of a residence permit to the first applicant on national security grounds. The judgment by the national authorities in any particular case that there is a danger to national security is

one which the Court is not well equipped to challenge. Mindful of its subsidiary role and the wide margin of appreciation open to the States in matters of national security, it accepts that it is for each Government, as the guardian of their people's safety, to make their own assessment on the basis of the facts known to them. Significant weight must, therefore, attach to the judgment of the domestic authorities, and especially of the national courts, who are better placed to assess the evidence relating to the existence of a national security threat.

86. The principle of subsidiarity, however, does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance. In that connection it should be reiterated that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 192, ECHR 2006-V). Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I, and *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports* 1996-IV).

87. It follows from the above that, before accepting the judgment of the domestic courts that the applicant presented a national security risk, the Court must examine whether the domestic proceedings were attended by sufficient procedural guarantees. It reiterates in this connection that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 123 and 124, 20 June 2002).

88. The Court considers that in the present case sufficient procedural guarantees were not afforded to the applicants. It notes, firstly, that the domestic courts refused to examine whether the actions imputed to the first applicant were indeed capable of endangering national security, finding that in the absence of a definition of the notion of "national security" in

domestic law, the security services had unfettered discretion in determining what amounted to a danger to it (see paragraph 28 above). The Court accepts that the notion of "national security" is not capable of being comprehensively defined. It may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, that does not mean that its limits may be stretched beyond its natural meaning (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 43, 24 April 2008). While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the courts reviewing the executive's decisions must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary (see *Al-Nashif*, cited above, § 124). In the present case, however, the national courts did not subject to any meaningful scrutiny the executive's assertion that national security might be endangered by the actions imputed to the first applicant.

89. Secondly, the Court observes that the domestic judgments concerning the refusal of a residence permit to the first applicant made no mention of the factual grounds on which they were made. They simply referred to the applicable legal provisions, some of which, in particular Instruction no. 0300, had never been published, as well as to unspecified information contained in a confidential report by the security services. It is noteworthy that the domestic courts explicitly declined to verify the factual basis for the allegations against the first applicant, finding that the security services' sources of information were not subject to judicial scrutiny (see paragraph 28 above). The domestic courts confined the scope of their inquiry to ascertaining that the security services' report had been issued within their administrative competence, without carrying out an independent review of whether the conclusion that the applicant constituted a danger to national security had a reasonable basis in fact. They rested their rulings solely on uncorroborated information provided by the security services and did not examine any other pieces of evidence to confirm or refute the allegations against the first applicant. They thus failed to examine a critical aspect of the case, namely whether the authorities were able to demonstrate the existence of specific facts serving as a basis for their assessment that the first applicant presented a national security risk. These elements lead the Court to conclude that the national courts confined themselves to a purely formal examination of the decision to refuse a residence permit to the first applicant (see, for a similar reasoning, *C.G. and Others*, cited above, §§ 46 and 47, and *Nolan and K. v. Russia*, no. 2512/04, §§ 71 and 72, 12 February 2009).

90. Furthermore, the parties have disputed whether the applicants had access to the full text of the report by the Federal Security Service or only to certain extracts. Given that the Government refused to submit a copy of that

report or a copy of the minutes of the court hearings, the Court is unable to establish which part of the confidential materials was disclosed to the applicants. It transpires from the submissions by both parties, however, that the applicants were given only an outline of the national security case against the first applicant. The disclosed allegations against him were of a general nature, principally that he was aiding the Chinese security services to collect information about the political, social and economical situation in the Khabarovsk Region, as well as information about the military facilities situated in that region and the roads leading to them. No specific allegations mentioning the locations and dates of the actions allegedly committed by the first applicant were divulged to the applicants, making it impossible for them to effectively challenge the security services' assertions by providing exonerating evidence, for example an alibi or an alternative explanation for the first applicant's actions (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 220-224, ECHR 2009-...).

91. Although the Court observes that some of the procedural defects indicated in its judgment of 6 December 2007 were corrected during the new examination of the applicants' case, it cannot but note that when correcting those defects, the domestic authorities preferred an approach which might be described as formalistic. Thus, it is satisfied that the classified materials from the Federal Security Service were disclosed to the domestic courts and, at least in part, to the applicants. However, the analysis of the domestic judgments reveals that the courts considered themselves incompetent to verify the factual basis for the finding contained in those materials that the first applicant constituted a danger to national security. It also appears that, given the general nature of the allegations against the first applicant, the applicants were not in a position effectively to challenge them. The Court therefore considers that, although during the new examination of their case the applicants were afforded certain procedural guarantees against arbitrariness, those guarantees were not adequate and sufficient to satisfy the procedural requirements of Article 8.

92. Given that the domestic proceedings were not attended by sufficient procedural guarantees, the Court is unable to accept the judgment of the national courts that the first applicant was a danger to national security.

(b) Assessment of the strength of the first applicant's family ties to Russia

93. Balanced against the public interests of protecting national security and preventing disorder and crime was the applicants' right to respect for their family life.

94. It is relevant in this connection that the first and second applicants have been married since 1994 and have had two children. During most of that time, with the exception of the period from 1996 to 2001, the first applicant lived in Russia with his wife and children. The Court attaches considerable weight to the solidity of the first applicant's family ties in

Russia and the difficulties that his family would face were they to relocate to China. The Court is mindful of the fact that the second, third and fourth applicants are Russian nationals who were born in Russia and have lived there all their lives. They have never lived in China and have no ties with that country. Even though the case file does not contain any information about whether they speak any Chinese, there is little doubt that in any case it would be difficult for them to re-adjust to life in China if they were to follow the first applicant there. Their resettlement would mean a radical upheaval for them, especially for the third and fourth applicants who are not of an adaptable age and who are attending school in Russia. The first applicant's family can, of course, continue to contact him by letter or telephone, and they may also visit him in China from time to time, but the disruption to their family life should not be underestimated. It is also relevant that under Russian law the first applicant may not re-enter Russia for a period of five years after his administrative removal (see paragraphs 47 and 52 above).

95. The national courts did not give any consideration to the above factors during the residence permit or administrative removal proceedings. Accordingly, the domestic proceedings did not provide an opportunity for a tribunal to examine whether the first applicant's removal to China was proportionate under Article 8 § 2 to the legitimate aims pursued. The first applicant was removed to China without any possibility to have the proportionality of the measure determined by a tribunal and was therefore deprived of adequate procedural safeguards required by Article 8 (see, *mutatis mutandis*, *McCann v. the United Kingdom*, no. 19009/04, §§ 52-55, 13 May 2008).

(c) Conclusion

96. It follows from the above that the refusal of a residence permit to the first applicant and his subsequent removal to China was not attended by adequate procedural safeguards and was not "necessary in a democratic society". Taking into account that the offence committed by the first applicant was a minor one, that the threat to national security was not convincingly established, and that, on the other hand, the first applicant's family ties to Russia were very strong, the Court finds that his administrative removal from Russia was not proportionate to the legitimate aims pursued.

97. There has therefore been a violation of Article 8 of the Convention in the instant case.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

98. The applicants complained that the judicial review proceedings in their case had been limited in scope because the domestic courts had no

competence to verify the Federal Security Service's sources of information. Moreover, the applicants had been informed in general terms only about the accusations levelled at the first applicant and had had no opportunity to refute those accusations. They relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

99. The Court reiterates that in immigration matters, where there is an arguable claim that expulsion may infringe an alien's right to respect for his or her family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging expulsion or refusal-of-residence orders and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality. Even where an allegation of a threat to national security has been made, the guarantee of an effective remedy requires as a minimum that the competent appeals authority be informed of the reasons grounding the expulsion decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative following security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for his or her family life and, if so, whether a fair balance has been struck between the public interest involved and the individual's rights must be examined (see *C.G. and Others*, cited above, §§ 56 and 57).

100. The Court notes that in the present case the complaint under Article 13 largely overlaps with the procedural aspects of Article 8. Given that the complaint under Article 13 relates to the same issues as those examined under Article 8, it should be declared admissible. However, having regard to its conclusion above under Article 8 of the Convention, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

101. Lastly, the Court has examined the other complaints submitted by the applicants. However, having regard to all the material in its possession, and in so far as these complaints fall within the Court's jurisdiction, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part

of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

103. The applicants claimed 3,000,000 euros (EUR) in respect of non-pecuniary damage.

104. The Government submitted that the claim was excessive and unsubstantiated. The finding of a violation would in itself constitute sufficient just satisfaction.

105. The Court considers that the applicants must have suffered distress and frustration resulting from the first applicant's administrative removal from Russia in breach of Article 8 of the Convention. In these circumstances, the Court considers that the applicants' suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, the Court awards the applicants jointly EUR 1,800 for non-pecuniary damage, plus any tax that may be chargeable on the above amount.

B. Costs and expenses

106. The applicants did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

107. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning the alleged violation of the applicants' right to respect for family life and the absence of an effective remedy admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;

3. *Holds* unanimously that there is no need to examine the complaint under Article 13 of the Convention;

4. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Kovler is annexed to this judgment.

N.A.V.
S.N.

DISSENTING OPINION OF JUDGE KOVLER

In the previous case of *Liu v. Russia* (no. 42086/05, 6 December 2007) I voted without any hesitation in favour of finding that in the event of the deportation order against the first applicant being enforced, there would be a violation of Article 8 of the Convention. The main reason was that the order for the first applicant's deportation was not attended by sufficient safeguards against arbitrariness. The failure of the State agencies to disclose the relevant information to the courts deprived the latter of the power to assess whether the conclusion that Mr Liu constituted a danger to national security had a reasonable basis in the facts.

The annulment of the deportation order after the Court's judgment became final and the re-examination of the application for a residence permit with sufficient procedural guarantees radically changed the first applicant's situation and provided sufficient safeguards against arbitrariness despite the fact that the outcome of the new set of proceedings was unfavourable to the first applicant.

The Court has reiterated on many occasions that any interference with an individual's right to respect for his private and family life will constitute a breach of Article 8, unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Slivenko v. Latvia* [GC], no. 48321/99, § 99, ECHR 2003-X). The Court reaffirms in this case that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. It also reiterates that 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 paragraph 77 of the judgment with relevant references).

A. Whether the interference was "in accordance with the law"

The domestic authorities based their decisions on two legal provisions, namely section 7 § 1 (1) of the Foreign Nationals Act, which provided that a residence permit could be refused if the foreign national posed a threat to the security of the Russian Federation or its citizens, and Article 18.8 of the Administrative Offences Code, which provided that a foreign national living in Russia without a valid residence permit could be administratively removed from Russia. Thus, the refusal to grant the first applicant a residence permit and the administrative removal order had a basis in domestic law.

The Court has consistently held that the expression "in accordance with the law" does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures. In addition, domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention (see *Lupsa v. Romania*, no. 10337/04, §§ 32 and 34, ECHR 2006-VII; *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002; and *Malone v. the United Kingdom*, 2 August 1984, §§ 67 and 68, Series A no. 82).

The Foreign Nationals Act and the Administrative Offences Code had been officially published and were accessible to the applicants. They define the circumstances in which an application for a residence permit can be rejected and administrative removal can be ordered. In particular, the Acts provide that such measures can be taken against a foreign national if he presents a national security risk or unlawfully resides in Russia. The Foreign Nationals Act also provides that the security services must inform the authority responsible for issuing residence permits of any circumstances within their knowledge which might warrant refusal of a residence permit. Although it is true that Instruction no. 0300, "On organisation of the activities of the Federal Security Service in respect of the examination of materials concerning residence permits for foreign nationals", has not been published, this fact is not sufficient to render domestic law inaccessible or unforeseeable. The Instruction seems to be a purely technical document describing the internal organisation of the work of the security services without conferring on them any new powers not already provided for by the publicly accessible Foreign Nationals Act. The Court could therefore have considered that the relevant Russian legal provisions were sufficiently accessible to satisfy the requirements of Article 8 § 2.

Further, the Foreign Nationals Act leaves the authorities a wide degree of discretion in determining which acts constitute a threat to national security. However, a law which confers discretion is not in itself inconsistent with the requirement of "foreseeability" (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 61, Series A no. 130). This requirement does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on national security grounds. At the same time, it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed

in terms of unfettered power. Consequently, the law must provide for sufficient procedural safeguards to ensure that the discretion left to the executive is exercised without abuse (see *Al-Nashif*, cited above, §§ 121-124).

The issue of procedural safeguards against abuse under the Convention's "quality of law" requirements overlaps with similar issues analysed in the examination of the decision-making process by means of the proportionality test under Article 8 § 2.

B. Whether the interference pursued a legitimate aim

The Court is prepared to accept the Government's argument that the measures taken against the first applicant pursued the legitimate aims of protection of national security and prevention of disorder and crime (see paragraph 80 of the judgment), but at the same time, in contradiction with that acceptance, concludes that the domestic courts explicitly refused to balance the different interests involved (see paragraph 81).

C. Whether the interference was "necessary in a democratic society"

In assessing the question of necessity, the Court could have had regard to the various criteria set out in the judgment of *Üner v. the Netherlands* ([GC], no. 46410/99, §§ 57-58, ECHR 2006-XII).

The Court notes at the outset that the offence for which the first applicant was expelled consisted in unlawfully residing in Russia without a valid visa or residence permit (see paragraph 83 of the judgment). It further notes that the first applicant's residence became unlawful after the domestic authorities rejected his application for a residence permit, relying on confidential information from the Federal Security Service that he presented a national security risk.

It is important to bear in mind in this connection that in the present case the issue of the risk to national security was examined by domestic courts at two levels of jurisdiction, that is the Khabarovsk Regional Court and the Supreme Court. The procedural defects indicated in the Court's judgment of 6 December 2007 were corrected during the fresh examination of the applicants' case. In particular, the classified materials from the Federal Security Service were disclosed to the domestic courts. It is of decisive importance that the judges were able to study the confidential material from the security services and had the power to quash the decision refusing a residence permit to the first applicant if they considered that decision to be unlawful. It is also significant that the applicants attended the hearings, were informed of the contents of confidential documents after they had undertaken not to disclose that information and were given an opportunity to present their case before the courts.

Given that the decision to refuse a residence permit to the first applicant was subject to adversarial proceedings before independent domestic courts competent to review the reasons for the decision and the relevant evidence and that the applicants were given an opportunity to challenge the security service's assertion that the first applicant constituted a danger to national security, it is evident that sufficient procedural guarantees were afforded in the present case.

Balanced against the important public interests of protecting national security and preventing disorder and crime was the applicants' right to respect for their family life. One can acknowledge that the refusal to grant a residence permit to the first applicant and his subsequent administrative removal to China greatly affected his relationship with his wife and children. It is true that the second, third and fourth applicants would probably experience some difficulties and inconveniences in settling in China. In any event, even if they do not wish to follow the first applicant to China, there is nothing to prevent the children, accompanied by their mother, from visiting the first applicant in that country, to the extent their financial situation would allow. Moreover, regular contact between the applicants would be possible through letters and telephone calls.

Against this background, it is difficult to find that the national authorities of the respondent State acted arbitrarily or otherwise overstepped their margin of appreciation when deciding to expel the first applicant. Given the importance of the public interests involved and the wide margin of appreciation open to the States in matters of national security, I believe that the first applicant's expulsion must be considered to have been justified and that, notwithstanding the resulting implications for his relationship with his wife and children, it cannot be regarded as disproportionate to the legitimate aim of protecting national security. In other words, the refusal to grant the residence permit to the first applicant and his subsequent administrative removal from Russia struck a fair balance between the interests involved and could reasonably have been considered "necessary" within the meaning of Article 8 § 2 of the Convention.

Lastly, taking into account the fact that in the 2007 judgment the Court awarded the first and second applicants jointly 6,000 Euros in respect of non-pecuniary damage, the finding of a violation in relation to practically the same issue in this second case would in itself have been sufficient.