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

FIRST SECTION

CASE OF LIU v. RUSSIA

(Application no. 42086/05)

JUDGMENT

STRASBOURG

6 December 2007

FINAL

02/06/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Liu v. Russia,

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

Mr C.L. ROZAKIS, *President,*
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr G. MALINVERNI, *judges,*
and Mr S. NIELSEN, *Section Registrar,*

Having deliberated in private on 15 November 2007,

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

PROCEDURE

1. The case originated in an application (no. 42086/05) 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 a Russian national, Mrs Yulia Aleksandrovna Liu ("the second applicant"), on 25 November 2005.

2. The applicants were represented before the Court by Mr M. Rachkovskiy, a lawyer with the International Protection Centre in Moscow. The Russian Government ("the Government") were initially represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their new Representative, Mrs V. Milinchuk.

3. The applicants alleged, in particular, that the first applicant's detention pending expulsion proceedings had been unlawful and that his deportation to China would hamper their family life.

4. On 3 October 2006 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. The President made a decision on priority treatment of the application (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1968. The second applicant was born in 1973. They are husband and wife and live in the town of Sovetskaya Gavan in the Khabarovsk Region.

1. Background information

6. In 1994 the first applicant arrived in Russia on the basis of a valid visa and married the second applicant. In 1996 the second applicant gave birth to a daughter. In November 1996, after his visa had expired, the first applicant was deported to China.

7. In 1999 the second applicant gave birth to a son.

8. 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.

2. Requests for a residence permit

9. In November 2002 the first applicant went to the Khabarovsk department of internal affairs (hereinafter "the Khabarovsk police department") to lodge an application for a residence permit. The Khabarovsk police department did not have the necessary forms; therefore, the first applicant could not lodge his application. It was only on 11 July 2003 that the forms became available.

10. On 24 July 2003 the first applicant applied for a residence permit for a second time. The Khabarovsk police department refused to examine the application and returned the documents to the first applicant.

11. The first applicant challenged the refusal before a court. On 22 October 2003 the Sovetskaya Gavan Town Court found that the refusal to examine the application had been unlawful. It ordered that the Khabarovsk police department examine the first applicant's application for a residence permit.

12. On 22 July 2004 the Khabarovsk police department rejected his application by reference to section 7 (1) of the Foreign Nationals Act (see paragraph 33 below). No further reasons were provided.

13. The applicants challenged the refusal before a court. They complained, in particular, that the Khabarovsk police department 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.

14. 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 Khabarovsk police department 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. There is no indication in the judgment that the information had been made available for judicial scrutiny.

15. The applicants appealed. On 18 January 2005 the Khabarovsk Regional Court upheld the judgment of 4 November 2004. 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.

16. On 4 March 2005 the Khabarovsk police department rejected a new application for a residence permit. It found that the first applicant was unlawfully residing on Russian territory, that he had taken no steps to make his stay legal, and that he would therefore have to leave Russia. The refusal of a residence permit did not hinder his family life.

17. It appears that the applicants did not challenge the refusal of 4 March 2005 before a court. Instead they asked the Khabarovsk Regional Court to direct that the Khabarovsk police department issue the first applicant with a residence permit. They claimed that by refusing to provide the first applicant with a residence permit the authorities had showed disrespect for their family life. They asked for compensation in respect of non-pecuniary damage. On 9 September 2005 the Khabarovsk Regional Court rejected their claims in the last instance as having no basis in domestic law. It referred to the judgment of 4 November 2004 and held that there were no reasons to depart from its findings.

18. On several occasions in 2003, 2004 and 2005 the first applicant was administratively fined for living in Russia without a valid residence permit. However, the domestic courts reversed most of those decisions, finding them procedurally defective or time-barred.

19. It is apparent from a certificate issued by a deputy head of the Sovetskaya Gavan Town prosecutor's office on 15 December 2005 that no criminal proceedings had been brought against the first applicant between 1996 and 2005.

3. Administrative removal proceedings

20. On 18 November 2005 the first applicant was stopped by the police. The police officer drew up a report on the commission of an offence under Article 18.8 of the Administrative Offences Code (see paragraph 34 below). The report was transmitted to a judge.

21. On 21 November 2005 the Sovetskaya Gavan Town Court held that the first applicant had infringed the residence regulations and ordered his

administrative removal and detention pending removal. On the same day he was placed in a detention centre.

22. On 13 December 2005 the Khabarovsk Regional Court quashed the decision of 21 November 2005 on appeal, remitted the case for a new examination by the Town Court, and ordered the first applicant's release. It held that, in accordance with Article 27.3 § 1 of the Administrative Offences Code, detention with a view to administrative removal could only be ordered if there were sufficient reasons to believe that the person would try to avoid execution of the removal order. The Town Court had not given reasons for the detention order and the case file did not contain any information justifying the first applicant's detention. On the same day the first applicant was released.

23. On 28 December 2005 the Sovetskaya Gavan Town Court held that the report of 18 November 2005 did not indicate which residence regulations had been infringed by the first applicant. It returned the report to the local police department for correction.

24. On 3 February 2006 the administrative proceedings against the first applicant were discontinued as time-barred.

4. Deportation proceedings

25. In the meantime, on 3 February 2005, the Khabarovsk police department prepared a decision that the first applicant's presence on the 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 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. The applicants were informed about the decision on 21 April 2005.

26. On 22 August 2005 the Khabarovsk police department 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 Law on the Procedure for Entering and Leaving the Russian Federation (see paragraph 35 below). No further reasons were provided. The applicants were informed of the decision on 12 December 2005.

27. On 15 May 2006 the Sovetskaya Gavan Town Court ordered the first applicant's placement in a detention centre with a view to deporting him. It held that the first applicant was unlawfully residing on Russian territory, and that on 12 November 2005 the Federal Migration Service had ordered his deportation. Therefore, he had to be held in custody until deportation. The first applicant was not present at the hearing. He was informed of the decision on 5 September 2006.

28. On 24 November 2006 the Khabarovsk Regional Court quashed the decision of 15 May 2006 on appeal and remitted the case. It found that the decision had been taken in the first applicant's absence, in breach of Articles 5 and 6 of the Convention.

29. On 25 December 2006 the Sovetskaya Gavan Town Court for a second time ordered the first applicant's placement in a detention centre with a view to deporting him. It referred to the same reasons as in the decision of 15 May 2006.

30. It appears that the deportation order was not enforced. The applicant is at present living with his family in Russia.

II. RELEVANT DOMESTIC LAW

1. Residence permits for foreign nationals

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

32. A foreign national married to a Russian national living on Russian territory is entitled to a residence permit (section 6 § 3 (4)).

33. A residence permit 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)).

2. The procedure for determination of an administrative charge and administrative removal

34. 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 500 to 1,000 Russian roubles 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 such a report to be transmitted within one day to a judge or to an officer competent to examine administrative matters. Article 23.1 § 3 provides that the determination of any administrative charge that may result in removal from the Russian Federation shall be made by a judge of a court of general jurisdiction.

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

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

35. 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").

36. If a police department uncovers circumstances indicated in section 25.10 of the Entry Procedure Act, it must prepare supporting materials, draft a decision that a foreign national's presence on Russian territory is undesirable and send the decision and supporting materials to the Federal Migration Service for approval. The officials of the Federal Migration Service must submit the materials to the head of the Federal Migration Service and must inform the police department of the decision taken. The police department must immediately send the decision to the foreign national whose presence on Russian territory has been declared undesirable (sections 2 to 6 of the Instruction on the organisation of the process of making decisions that a foreign national's presence on Russian territory is undesirable, approved by the Order of the Ministry of Internal Affairs, No. 510 of 17 August 2004).

4. Detention with a view to expulsion

37. Article 32.10 § 5 of the Administrative Offences Code allows domestic courts to order a foreign national's detention with a view to administrative removal. Article 27.3 § 1 provides that administrative detention can be authorised in exceptional cases if it is necessary for fair and speedy determination of the administrative charge or for execution of the penalty.

38. Sections 31 (9) and 34 (5) of the Foreign Nationals Act provide that a foreign national against whom an administrative removal order or deportation order has been made can be held in custody until execution of such order. Detention has to be authorised by a court.

5. Compensation for unlawful deprivation of liberty

39. The State or regional treasury is liable – irrespective of any fault by State officials – for the damage sustained by an individual on account of unlawful criminal prosecution, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence, or an unlawful administrative penalty in the form of detention or community work (Article 1070 § 1 of the Civil Code). Damage sustained by an individual through unlawful acts of the investigation or prosecution authorities in a form other than listed above is compensated for in accordance with the general grounds giving rise to liability for damage, that is on the condition that the fault of the person who inflicted the damage has been proven (Article 1069 read in conjunction with Article 1064).

40. A court may hold the tortfeasor liable for non-pecuniary damage incurred by an individual through actions impairing his or her personal non-property rights, such as the right to personal integrity and the right to liberty of movement (Articles 150 and 151). Non-pecuniary damage must be compensated for irrespective of the tortfeasor's fault in the event of unlawful conviction or prosecution, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence, or an unlawful administrative penalty in the form of detention or community service (Article 1100 § 2).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicants complained under Article 8 of the Convention 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. Article 8 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

42. The Government submitted that the final decision for the purposes of Article 35 § 1 of the Convention had been the judgment of 4 November 2004, by which the refusal to grant the first applicant a residence permit had been declared lawful. The subsequent deportation decision had simply been a consequence of the residence permit refusal. Therefore, the six-month period had started to run from 4 November 2004. The applicants had not lodged their application until 25 November 2005, thereby failing to comply with the six-month rule. Moreover, the applicants had not appealed against the judgment of 4 November 2004. They had not therefore exhausted domestic remedies.

43. The applicants maintained that they had appealed against the judgment of 4 November 2004. They further argued that the final decision for the purposes of Article 35 § 1 of the Convention had been the judgment of 9 September 2005 by which their request for a residence permit and their compensation claim had been rejected.

44. The Court notes that the applicants appealed against the judgment of 4 November 2004 to the Khabarovsk Regional Court, which examined and dismissed their appeal on 18 January 2005 (see paragraph 15 above). It is therefore satisfied that the applicants have exhausted domestic remedies.

45. The Court further observes that the applicants complain about the cumulative effect produced on their family life by several decisions taken by the domestic authorities against the first applicant, namely the refusals to grant a residence permit upheld by the domestic courts on 18 January and 9 September 2005 and the deportation order of 12 November 2005. By lodging their application on 25 November 2005 within six months of the deportation order the applicants complied with the requirements of Article 35 § 1.

46. The Court concludes that the Government's objections must be rejected. It considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Existence of interference

47. The Government contested the allegation that there had been interference with the applicants' family life.

48. The applicants submitted that the first applicant had been residing in Russia since 1994. By marrying the second applicant, a Russian citizen, and by fathering two children with her, he had established family life in Russia.

The refusal to grant him a residence permit and the decision to deport him had interfered with the applicants' family life.

49. The Court observes that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory (see, among other authorities, *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, § 39). Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, § 38). However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention (see *Boultif*, cited above, § 39).

50. As the Court has reaffirmed on several occasions, Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone (see *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 91, ECHR 2007-..., with further references).

51. The applicants have been married since 1994 and have had two children. The Court is satisfied that the applicants' relationship amounted to family life. The second applicant and the children are Russian nationals who were born in Russia and have been living there all their lives. From 1994 to 1996 and from 2001 to August 2003 the first applicant lawfully resided in Russia with his wife and children on the basis of a renewable work visa. In 2003 he applied for a residence permit to which he had become entitled under the new law passed in 2002 (see paragraph 32 above). However, his application was refused by reference to national security considerations and he was required to leave Russia. As he did not leave, his deportation was ordered. The deportation order is still valid and enforceable and the deportation is impending. The Court therefore concludes that the measures taken by the domestic authorities against the first applicant constituted interference with the applicants' right to respect for their family life

(compare *Bashir and Others v. Bulgaria*, no. 65028/01, § 37, 14 June 2007, and *Musa and Others v. Bulgaria*, no. 61259/00, § 58, 11 January 2007).

2. Justification for the interference

52. The Court reiterates 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).

(a) Submissions by the parties

53. The Government argued that the first applicant had applied for a residence permit after his visa had expired and his residence in Russia had become unlawful. The refusal to grant him a residence permit and the subsequent deportation order had been justified by his unlawful residence, which was punishable under the Administrative Offences Code. The domestic courts confirmed that those decisions had been lawful and justified.

54. The applicants submitted that the application for a residence permit had been refused by reference to national security considerations. The first applicant's presence in Russia had become unlawful as a result of that refusal. The refusal of a residence permit and the deportation order had not pursued any legitimate aim. No criminal proceedings had ever been brought against him and there had been no evidence that he had presented a national security risk. Moreover, the deportation had been ordered by the Federal Migration Service in breach of domestic law because the deportation order had not been confirmed by a court in accordance with the procedure established in the Administrative Offences Code.

(b) The Court's assessment

55. The Court will first examine whether the interference was "in accordance with the law". The domestic authorities based their decisions on two legal provisions, namely section 7 (1) of the Foreign Nationals Act providing 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 section 25.10 of the Entry Procedure Act empowering the authorities to issue a decision that a foreign national's presence on Russian territory was undesirable and to order his deportation. The Court is therefore satisfied that the refusal to grant the first applicant a residence permit and the deportation order had a basis in domestic law.

56. 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. In matters affecting fundamental rights 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 indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Lupsa v. Romania*, no. 10337/04, §§ 32 and 34, ECHR 2006-....; *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002; and *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, §§ 67 and 68).

57. The Foreign Nationals Act and the Entry Procedure Act 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 deportation 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 Acts leave 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)*, judgment of 24 March 1988, Series A no. 130, § 61). 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. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance (see *Al-Nashif*, cited above, § 121).

58. It remains to be ascertained whether domestic law provides for sufficient safeguards to ensure that the discretion left to the executive is exercised without abuse (ibid., § 122).

59. The Court reiterates 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. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority 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. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Al-Nashif*, cited above, §§ 123 and 124, and *Lupsa*, cited above, §§ 33 and 34).

60. In the present case the first applicant's application for a residence permit was rejected by reference to national security considerations and he was required to leave Russia. The decision was taken by the local police department pursuant to the Foreign Nationals Act. The local police department did not give any reasons for the decision except the unelaborated reference to section 7 (1) of the Act.

61. It is true that domestic law provided for the possibility of challenging the decision before a court. However, the domestic courts were not in a position to assess effectively whether the decision had been justified, because the full material on which it had been based was not made available to them. The submissions by the local police department were confined to the assertion that it was in possession of information that the first applicant posed a national security risk. The content of the information was not disclosed to the applicants or to the courts on the ground that it was a State secret (see paragraphs 14 and 15 above).

62. The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. There are techniques that can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131).

63. The failure to disclose the relevant information to the courts deprived the latter of the power to assess whether the conclusion that the first applicant constituted a danger to national security had a reasonable basis in the facts. It follows 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 in cases involving national security.

64. The Court concludes that the relevant provisions of the Foreign Nationals Act allow the Ministry of Internal Affairs to refuse residence permits and to require a foreign national to leave the country on national security grounds without giving any reasons and without effective scrutiny by an independent authority.

65. As the first applicant did not leave, his residence in Russia was found to be unlawful, his presence on Russian territory was declared undesirable on that ground and his deportation was ordered. Pursuant to the Entry Procedure Act and the Instruction of the Ministry of Internal Affairs, these decisions were taken by the Federal Migration Service on the initiative of a local police department. Both of these agencies belong to the executive and take such decisions without hearing the foreign national concerned (see paragraphs 35 and 36 above). It is not clear whether there is a possibility of appealing against these 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. The Entry Procedure Act and the Instruction do not mention such a possibility. Nor did the Government in their observations refer to any legal provision for judicial or other independent review of the deportation order or the decision that a foreign national's presence on Russian territory was undesirable.

66. The Court further observes that the Administrative Offences Code provides for a different procedure for removal of foreign nationals unlawfully residing in Russia. This procedure is circumscribed by substantial procedural safeguards. In particular, the power to order administrative removal belongs exclusively to a judge and this order is subject to appeal to a higher court (see paragraph 34 above). It follows that Russian law establishes two parallel procedures for expulsion of foreign nationals whose residence in Russia has become unlawful. In one of these procedures deportation of a foreign national can be ordered by the executive without any form of independent review or adversarial proceedings, while the other procedure (administrative removal) provides for judicial scrutiny. Domestic law permits the executive to choose between those procedures at their discretion. The enjoyment of procedural safeguards by a foreign national is thus dependent on the executive's choice.

67. In the first applicant's case, the local police department initiated both deportation and administrative removal proceedings. In both proceedings it argued that the first applicant had to be removed from Russian territory because he was residing there unlawfully and referred to Article 18.8 of the Administrative Offences Code. After hearing the first applicant, the domestic courts found flaws in the local police department's case and refused to order the first applicant's removal. The administrative removal proceedings were later discontinued (see paragraphs 20 et seq.). At the same time, the deportation proceedings, which were triggered by the same facts and which were conducted without judicial scrutiny, ultimately

resulted in an enforceable deportation order against the first applicant. The Court considers that the first applicant's deportation on the basis of section 25.10 of the Entry Procedure Act was not attended by sufficient safeguards against arbitrariness.

68. In the light of the above considerations, the Court finds that the legal provisions on the basis of which the first applicant's deportation was ordered did not provide for the adequate degree of protection against arbitrary interference.

69. The Court concludes that the interference with the applicants' family life was based on legal provisions which 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. In the light of this conclusion, the Court is not required to determine whether the interference pursued a legitimate aim or aims under paragraph 2 of Article 8 and was "necessary in a democratic society".

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

70. The applicants complained under Article 5 § 1 of the Convention that the first applicant's detention from 21 November to 13 December 2005 had been unlawful. The relevant parts of Article 5 § 1 read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

71. The Government claimed that the applicants had failed to exhaust domestic remedies. Following the domestic court's finding that the first applicant's detention had been unlawful, he could have filed a civil claim for pecuniary and non-pecuniary damage.

72. The applicants maintained their complaint.

73. The Court notes that the Russian law of tort limits strict liability for unlawful detention to specific procedural forms of deprivation of liberty which include, in particular, deprivation of liberty in criminal proceedings and administrative punishment, but exclude administrative arrest (see paragraphs 39 and 40 above). Since the first applicant was subject to administrative arrest, a mere finding of its unlawfulness would not be sufficient for an award of compensation; he would also have to prove that the State officials were at fault (ibid.). It follows that, in the absence of fault

on the part of the arresting officer, the first applicant's claim for compensation would have no prospect of success (see, *mutatis mutandis*, *Makhmudov v. Russia*, no. 35082/04, § 104, 26 July 2007). The Court concludes that the Government's objection must be rejected.

74. The Court further observes that the second applicant was never detained and she cannot claim to be a victim of her husband's allegedly unlawful detention. Her complaint is therefore incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

75. The first applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

76. The Government conceded that the first applicant's detention from 21 November to 13 December 2005 had been unlawful.

77. The first applicant maintained his claims.

78. The Court notes that the first applicant was detained with a view to his administrative removal from Russia to China. Article 5 § 1 (f) of the Convention is thus applicable in the instant case. This provision does not require that the detention of a person against whom action is being taken with a view to deportation or extradition be reasonably considered necessary, for example to prevent his committing an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 112).

79. The Court reiterates, however, that it falls to it to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1, including whether it complied with "a procedure prescribed by law". A period of detention will in principle be lawful if carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For the assessment of compliance with Article 5 § 1 of the Convention the basic distinction has to be made between ex facie invalid detention orders – for example, given by a court in excess of jurisdiction or where the interested party did not have proper notice of the hearing – and detention orders which are prima facie valid and effective

unless and until they have been overturned by a higher court (see *Khudoyorov*, cited above, §§ 128 and 129, with further references).

80. The first applicant's detention with a view to administrative removal was ordered on 21 November 2005 by the Sovetskaya Gavan Town Court. On 13 December 2005 the Khabarovsk Regional Court quashed the detention order (see paragraphs 21 and 22 above). The Court will consider whether the detention order of 21 November 2005 had constituted a lawful basis for the first applicant's detention until it was quashed on 13 December 2005.

81. It has not been alleged that on 21 November 2005 the Town Court acted in excess of its jurisdiction. Indeed, as a matter of domestic law, it had the authority to order the applicant's detention with a view to administrative removal. The detention order of 21 November 2005 was quashed because the Town Court had not given reasons to justify the necessity of holding the first applicant in custody. The Court considers that that flaw did not amount to a "gross or obvious irregularity" in the exceptional sense indicated by the case-law (compare *Lloyd and Others v. the United Kingdom*, nos. 29798/96 et seq., § 114, 1 March 2005).

82. The Court does not find that the Town Court acted in bad faith or that it neglected to attempt to apply the relevant legislation correctly. The fact that certain flaws in the procedure were found on appeal does not in itself mean that the detention was unlawful (see *Gaidjurgis v. Lithuania* (dec.), no. 49098/99, 16 January 2001; *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, § 47). Therefore, it has not been established that the detention order of 21 November 2005 was ex facie invalid, or that the ensuing detention was unlawful within the meaning of Article 5 § 1.

83. There has thus been no breach of Article 5 § 1 of the Convention in respect of the first applicant's detention from 21 November to 13 December 2005.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

84. The Court has examined the other complaints submitted by the applicants under Articles 3, 6, 12 and 13 of the Convention, Article 1 of Protocol No. 4, and Articles 2, 3, 4 and 5 of Protocol No. 7. However, having regard to all the material in its possession, it finds that those complaints 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 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. 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

86. The applicants claimed 89,175 Russian roubles (RUB) in respect of pecuniary damage. They submitted that on 27 December 2004 the Sovetskaya Gavan Town Court had awarded them that amount, representing the administrative fines paid by the first applicant for his unlawful residence in Russia and the legal fee paid by the applicants in the court proceedings in which they had challenged those fines. That judgment had subsequently been quashed on appeal and the amount had never been paid. The applicants submitted that RUB 89,175 was equivalent to 3,313 euros (EUR) at the moment they lodged their claims. They also claimed EUR 300,000 in respect of non-pecuniary damage.

87. The Government failed to submit their comments within the established time-limit.

88. The Court does not discern a causal link between the violation found and the claim for pecuniary damage.

89. The Court further considers that the applicants must have suffered distress and frustration resulting from the deportation order issued 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 both applicants EUR 6,000 for non-pecuniary damage, plus any tax that may be chargeable on the above amount.

B. Costs and expenses

90. The applicants did not claim any costs and expenses and, accordingly, there is no need to make any award to them under this head.

C. Default interest

91. 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 UNANIMOUSLY

1. *Declares* the complaints concerning the refusal to grant the first applicant a residence permit, the issuance of a deportation order against him and his detention from 21 November to 13 December 2005 admissible and the remainder of the application inadmissible;

2. *Holds* 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 in respect of both applicants;

3. *Holds* that there has been no violation of Article 5 § 1 of the Convention in respect of the first applicant;

4. *Holds*
   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) to the applicants jointly in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 6 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President