Stowarzyszenie Interwencji Prawnej

HELSINKI FOUNDATION for HUMAN RIGHTS

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Linos-Alexandre Sicilianos

President of the Court

European Court of Human Rights

Council of Europe

67075 Strasbourg-Cedex

France

Application no. 80982/12

Muhammad and Muhammad v. Romania

WRITTEN COMMENTS

BY

HELSINKI FOUNDATION FOR HUMAN RIGHTS AND ASSOCIATION FOR LEGAL INTERVENTION[1]

I. INTRODUCTION

This third party intervention is submitted by the Helsinki Foundation for Human Rights and Association for Legal Intervention, pursuant to the leave granted by the President of the Grand Chamber of the European Court of Human Rights (Court) under Rule 44 § 5 of the Rules of the Court on 29 May 2019.

The case has been communicated to the Government of Romania under Article 1 of Protocol No. 7 by the Court on 10 July 2015. The Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber on 26 February 2019.

[1] The comments were written by Jacek Białas, lawyer of the Helsinski Foundation for Human Rights (HFHR) and Malgorzata Jaźwińska, lawyer of the Association for Legal Intervention (ALI).

II. EXECUTIVE SUMMARY

Present case concern two Pakistani nationals who were declared undesirable in Romania on the grounds of serious indications they were engaged in activities which posed a threat to national security. The applicants complain they were not informed of the exact reasons for their removal from Romania.

The Court asked parties whether the measures taken against the applicants, foreigners lawfully residing in the territory of the respondent State, comply with the procedural requirements of Article 1 of Protocol No. 7 to the Convention. In particular, the Court asked whether these procedural safeguards were satisfied because the judges in this case had access to the classified documents that were not disclosed to the applicants.

- according to the Court's jurisprudence the person concerned (or a lawyer acting on his/her behalf) should have at least limited possibility to know factual grounds of the decision to effectively challenge arguments presented by the authorities; similar position is presented by the Court of Justice of the EU and UN mechanisms,

- only the concerned person has full knowledge about circumstances of his/her case and can provide valuable information to refute the accusation, therefore the national court may not be able to perform thorough review of the circumstances of the case which are not known to it,

- the secrecy surrounding such cases may lead to abuse and to violation of foreigner's rights

- procedural safeguards of the Article 1 Protocol 7 are not satisfied when the judges have access to the classified documents that were not disclosed to the applicants.

III. JURISPRUDENCE OF THE COURT CONCERNING PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS

The Court issued a number of judgments where it referred to standard concerning procedural safeguards relating to expulsion of aliens contained in Article 1 of Protocol No. 7 to the Convention.

In judgment C.G. and Others v. Bulgaria, no. 1365/07, § 72, the Court stated that the first guarantee afforded to the persons referred to in Article 1 of Protocol No. 7 to the Convention is that they shall not be expelled except "in pursuance of a decision reached in accordance with law". In the same judgment, the Court stated that this phrase has a similar meaning throughout the Convention and its Protocols including in the first paragraph of Article 1 of Protocol No. 7.

According to the Court jurisprudence, "even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information." (C.G. and Others v. Bulgaria, § 40; Lupsa v. Romania, no. 10337/04, § 32). In these judgments the Court also stated that "(...) the individual must be able to challenge the executive's assertion that national security is at stake." (C.G. and Others, § 40, 57)

and "before that review body the person concerned must have the benefit of adversarial proceedings in order to present his point of view and refute the arguments of the authorities." (Lupsa v. Romania (§ 38).

Moreover, in its judgments against Bulgaria the Court stated that it "finds it particularly striking that the decision to expel the first applicant made no mention of the factual grounds on which it was made. It simply cited the applicable legal provisions and stated that he 'present[ed] a serious threat to national security'; this conclusion was based on unspecified information contained in a secret internal document. Lacking even outline knowledge of the facts which had served as a basis for this assessment, the first applicant was not able to present his case adequately in the ensuing appeal to the Minister of Internal Affairs and in the judicial review proceedings." (C.G. and Others v. Bulgaria, § 46; Kaushal and Others v. Bulgaria, § 30).

In recent judgement Ljatifi v. The Former Yugoslav Republic of Macedonia, no. 19017/16, the Court reiterated general standard of application of Article 1 of Protocol 7. Moreover, in this judgment the Court found violation of the Article 1 of Protocol 7 where "apart from the general statement, the authorities did not provide the applicant with the slightest indication of the grounds on which they had based their assessment. Lacking even an outline of the facts which had served as a basis for that assessment, the applicant was not able to present her case adequately in the ensuing judicial review proceedings."

In the judgment A v. United Kingdom, no. 3455/05, § 220, the Court considered the British system in which the institution of the so-called special advocate is applied. It stated that "the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate." It must be noted that in this judgment, the Court found a violation of the Convention in a situation where the judicial authority had access to classified documents.

It must be noted that even if the judges enjoy full access to all files of the case, such judicial control still cannot be considered effective. The materials presented to the national court by the authorities may not be reliable or may omit the essential circumstances of the case. They can also contain incorrect information. On the other hand, only the concerned person has full knowledge about the circumstances of his/her case and may correct information provided by the authorities or present them in a different light, which may affect judicial assessment of the case. For example, the concerned person may provide an alibi, indicate that he/she was unaware that some of his/her actions may be associated with activities that pose a threat (e.g. they passed information to their friends or relatives without knowing they belong to terrorist organizations), they may indicate they were forced to cooperate with people who pose a threat, etc. (see A. and Others v. UK, § 220). Therefore, the national court may not be able to perform thorough review of the circumstances of the case which are not known to him.

In the much-discussed judgement Regner v. Czech Republic, no. 35289/11, the Court found no violation of art. 6 § 1 of the Convention when the applicant's security clearance was revoked based on classified documents to which the applicant had no

access. The Court found that since national courts could review the summary of classified materials, the adversarial principle and the principle of equality of arms was not violated. The facts of the present case differ from those in the Regner v. Czech Republic case and, therefore, the ruling of the case should not be followed. Firstly, the case concerns the expulsion of an alien and not the civil case in the meaning of art. 6 §1 of the Convention. The protection offered to aliens, a vulnerable group, should be especially strong as a wrongful expulsion of an alien based on classified materials can lead to irreparable harm and to the violation of article 2, 3 or 8 of the Convention. Secondly, contrary to Regner case, in the statement of facts in the present case there is no indication of initiating the criminal proceedings against the applicants what puts into question the findings of national authorities that they pose a real threat to national security. Finally, the Regner v. Czech Republic judgement was not unanimous. There were four dissenting opinions. Two of the judges found no violation of article 6 §1 of the Convention since they held that the Convention does not apply in the case. For those reasons the ruling of the Regner case should not be followed.

Therefore, we would like to emphasize that - according to the Court's jurisprudence - the person concerned (or a lawyer acting on his/her behalf) should have at least limited possibility to know factual grounds of the decision. Without such possibility the person concerned cannot present his/her point of view and refute the arguments of the authorities – they cannot refer directly to particular reasons of the decision. It should be also noted that mentioned standard is applicable even if the national court has access to classified material. Therefore, procedural safeguards of the Article 1 Protocol 7 are not satisfied when the judges have access to the classified documents that were not disclosed to the applicants.

IV. INTERNATIONAL STANDARDS ON THE RIGHT TO DEFENCE AND ON PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS

1. EU law standard on right of defence and right to be heard

According to the Court jurisprudence, the concept of "law" contained in several Convention provisions also refers to international law which is binding for the respective state. Therefore, EU law is considered as domestic law (Suso Musa v. Malta, 42337/12, § 97).

Article 47 of the Charter of fundamental rights of the European Union (hereinafter: CFREU) provides right to an effective remedy and to a fair trial. Guarantees enshrined in this provision were interpreted in the jurisprudence of the Court of Justice of the European Union (hereinafter: CJEU). In the judgement C-300/11, ZZ v Secretary of State for the Home Department, CJEU stated that:

"54. Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security.

65. In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event,

of the essence of the grounds on which a decision (...) is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard (...)".

This was also reiterated in other CJEU judgments, including: M. v Minister for Justice, Equality and Law Reform, C-277/11 paras. 82-88; Kadi, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P (Grand Chamber), paras 111-129. It must be noted that the CJEU also referred to this standard in case not involving foreigners or migration issues, i.e. C-437/13, Unitrading Ltd v Staatssecretaris van Financiën, paras 19-21. Therefore, this standard has a general character and applies to any case based on EU law, including cases concerning migration and expulsion of aliens.

Therefore, according to the Article 47 of the CFREU and its interpretation by the CJEU jurisprudence, the aliens who are subjected to expulsion should be informed of the essence of the grounds on which decision issued in their case was based, regardless whether the court had access to classified documents or not.

It must be also noted that EU asylum law also provides similar guarantees of the rights of defence. Article 23 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection provides that Member States shall ensure that a lawyer who represents an applicant, enjoys access to the information in the applicant's file. It also provides that Member States may make an exception where disclosure of information or sources would jeopardise national security. However, in such cases, Member States shall establish in national law procedures guaranteeing that the applicant's rights of defence are respected. In particular, they may grant access to such information or sources to a lawyer who has undergone a security check. According to the Article 46 of 2013/32 directive, effective remedy against the negative asylum decision provides for a full and *ex nunc* examination of both facts and points of law, at least in appeals procedures before a court or tribunal of first instance. It means that guarantee of the rights of defence ensured in Article 23 of the 2013/32 directive shall be observed even when the court has access to all the materials of the case, including classified ones.

2. United Nations standard on procedural safeguards relating to expulsion of aliens

International Covenant on Civil and Political Rights in Article 13 provides procedural safeguards relating to expulsion of aliens. It states that an alien may be expelled only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The UN Human Rights Committee addressed the matter of procedural safeguards relating to expulsion of aliens in case Ahani v Canada, communication No. 1051/2002. In this case, an Iranian's national asylum application had been rejected based on classified materials. During proceedings in Canada the applicant was provided by the national court with a summary redacted for security concerns reasonably informing him of the claims made against him. In its communication, the UN HRC stated that in the circumstances of national security involved, the Committee is not persuaded that the process was unfair to the complainant. However, the UN

HRC also stated that in respect of claims concerning a risk of substantial harm in case of expulsion the proceedings were unfair as the complainant had not been provided with the full materials on which the authorities based its decision and an opportunity to comment in writing thereon (paras 10.5 – 10.8).

Similar issue was considered by the UN Committee Against Torture in case Bachan Singh Sogi v. Canada, communication No. 297/2006. In this case, the Canadian authorities used evidence that for security reasons was not divulged to the complainant. The UN CAT stated in its communication that "the complainant did not enjoy the necessary guarantees in the pre-removal procedure. The State party is obliged, in determining whether there is a risk of torture under article 3, to give a fair hearing to persons subject to expulsion orders." (paras 10.4 – 10.5).

Classified evidence is also used in asylum proceedings, especially in cases of exclusion from international protection. The United Nations High Commissioner for Refugees in its comments referred to procedural guarantees in asylum cases which may admittedly does not apply directly to expulsion, however, we would like to draw attention of the Court to them. According to the UNHCR "it offends principles of fairness and natural justice when the exclusion decision is based on evidence that the individual concerned does not have the opportunity to challenge". UNHCR also stated that in cases involving national security there is desire to withhold the nature of certain evidence. However, national security interest may be protected by "introducing procedural safeguards which also respect the asylum-seeker's due process rights". UNHCR pointed out for disclosing the general content of the sensitive material to the individual but reserving the details for his or her legal representative only.[2]

V. POLISH NATIONAL CONTEXT

HFHR and ALI believe that the present case is of utmost importance not only for Romania, but also for other European countries, including Poland. In recent years both organisations were involved in number of cases where aliens lawfully residing in Poland were expelled on the grounds of national security based on classified documents to which they had no access. These decisions were immediately enforceable and expulsion took place before national court considered the appeal. Aliens were deprived of access to classified information on which decision was based also in other types of procedures: revoking international protection, refusing residency in Poland, etc.

In our opinion, the secrecy surrounding these cases may lead to abuse, in particular when the foreigner is expelled immediately after the decision is issued and may not be able to appoint a representative who could represent him or her in further proceedings.

As indicated in the partly dissenting opinion of Judge Serghides in the Regner v. Czech Republic case, "Furthermore, such an approach could lead to giving ample

[2] See: UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating; to the Status of Refugees; Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees; Addressing Security Concerns without Undermining Refugee Protection - UNHCR's perspective.

room to the authorities to restrict human rights or even to encouraging them to abuse human rights, hiding behind the pretext of security and confidentiality." This risk is especially real in cases concerning the expulsion of aliens as, in the Polish context, usually no criminal proceedings are initiated against them and after the expulsion they have limited possibility to challenge the legality of the decision. It gives room for the uncontrolled abuse of power by secret services.

It must be noted that according to the Polish criminal procedure the party has access to classified materials. According to Article 156 § 4 of the Polish Code of Criminal Procedure (consolidated text: Journal of Laws of 2018, item 1987) classified case documents are available to the parties (including defendant and his/her representative). It gives them possibility to present their point of view and to refute prosecutor's arguments within criminal proceedings. This safeguard also prevents the risk of abuse of using the secret materials in the proceedings. On the other hand, such a possibility has not been found to have caused a threat to security by disclosing secret investigative methods to defendant.

In this point it needs to be referred to the example of a case run before the Regional Court in Bialystok (case no. III K 113/16, not published). In this case four Russian nationals of Chechen origin were charged with supporting the so-called Islamic State in Syria (IS). Grounds of the charges brought against them were translated transcripts from their phone conversations ("summaries"). These "summaries" contained alleged statements of the defendants concerning their financial support for the IS. Defenders argued that in the wiretapped conversations there was no word about the IS, and the act of indictment was prepared on the basis of improperly translated transcripts from the phone conversations. It seems that only because they had knowledge about the evidence the charge was based on, they could effectively challenge prosecutor's arguments in this respect.

In the judgment of 7.08.2017 the Regional Court in Bialystok stated that during the proceedings, it turned out that the "summaries" contain errors and words or phrases added by the person who made them which were not used in the telephone conversation. The Regional Court emphasized that the defendants noticed incorrect translation of their phone conversations.

The judgment of the Regional Court in Bialystok was upheld by the Court of Appeals in Bialystok on 26.06.2018 (case no. II AKa 26/18, not published). The Court of Appeals pointed out that "incorrect translation of the basic evidence constituting the basis for charges, i.e. materials from operational control in the form of 'summaries' of telephone conversations of the accused". The Court of Appeals also stated that "while listening to the recorded conversations, the court received explanations from the defendants to the most accurate, most faithful understanding of 'decoding' the actual content of these conversations (...)".

In this case, the access to classified documents guaranteed the defendants genuine opportunity to express their opinion and challenge the authorities' arguments. It led to effective challenging the accusations brought against the defendants. Eventually, three of them were convicted for supporting the so-called The Caucasus Emirate in Chechnya, while the fourth of them was acquitted. [3]

[3] More information about this case: Sąd Okręgowy w Białymstoku, Wyrok w sprawie czterech obywateli narodowości czeczeńskiej oskarżonych w finansowanie terroryzmu, available at:

Moreover, in some instances expulsion of an alien for security reasons can lead to the risk of violating his or her rights in their country of origin. In the Polish context, in 2018 it resulted in the forcible expulsion of Azamat Bayduev who, based of classified documents, was deemed a threat to national security. Mr Bayduev upon his return to Russia was apprehended by the police and placed in detention where he was with high probability, subjected to torture. He had no possibility to challenge the findings that he was a threat to national security as he did not know the reasoning of the decision.[4] The applicant was not presented with the reasons why he was considered a threat to national security although Polish news agencies published information in this regard in mass media after his deportation.[5]

In another similar case, run before the Court under the no. 9323/19, the applicant was considered a threat to national security and was to be expelled. Due to the serious risk of irreparable harm the Court granted interim measure.

These examples show that public authorities can abuse the possibility to classify information thus depriving foreigners the possibility to question their findings. For this reason, guaranteeing a fair expulsion procedure, which gives a genuine opportunity for an alien to defend him or herself against the charges, is essential.

V. SUMMARY

Referring to the above-mentioned jurisprudence of the Court and provisions of international law, in our opinion, in expulsion cases involving national security, procedural guarantees regarding the expulsion of the foreigner should at least include a minimum information on the grounds of the decision to be provided to the applicant. In our opinion procedural safeguards of Article 1 of Protocol 7 to the Convention are not satisfied when the judges have access to the classified documents and they are not disclosed to the applicants.

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http://bialystok.so.gov.pl/aktualnosci/778-komunikat-20170807-1.html ; Polskie Radio Białystok, Białostocki sąd skazał Czeczenów oskarżonych o wspieranie terrorystów, available at: http://www.radio.bialystok.pl/wiadomosci/index/id/146766 ; Radio Poland, Polish court finds three Chechens guilty of supporting terrorism, available at: http://thenews.pl/1/10/Artykul/319853,Polish-court-finds-three-Chechens-guilty-of-supporting-terrorism.

[4] More information about this case: Amnesty International: Russia: Chechen refugee forcibly disappeared after being unlawfully deported from Poland, available at: https://www.amnesty.org/en/latest/news/2018/09/russi-chechen-refugee-forcibly-disappeared-after-being-unlawfully-deported-from-poland/

[5] See: rmf24.pl Żaryn: Polska nie może godzić się na radykalne postawy cudzoziemców https://www.rmf24.pl/fakty/polska/news-zaryn-polska-nie-moze-godzic-sie-na-radykalne-postawy-cudzoz,nId,2639057