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

FIRST SECTION

CASE OF NOLAN AND K. v. RUSSIA

(Application no. 2512/04)

JUDGMENT

STRASBOURG

12 February 2009

FINAL

06/07/2009

This judgment may be subject to editorial revision.

In the case of Nolan and K. v. Russia**,**

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 22 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 2512/04) 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 two citizens of the United States of America, Mr Patrick Francis Nolan ("the applicant") and K. ("the applicant's son"), on 18 December 2003.

2. The applicant was represented by Mrs G. Krylova and Mr D. Holiner, lawyers practising in Moscow and London respectively. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. By a decision of 30 November 2006 the Court declared the application partly admissible.

4. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. Mr Nolan and K. were born in 1967 and 2001 respectively and live in Tbilisi, Georgia. Mr Nolan is the father and sole custodial parent of K.

6. Since 1988 the applicant has been a member of the Unification Church ("the Church"), a spiritual movement founded by Mr Sun Myung Moon in 1954.

A. Legal status of the Unification Church in Russia

7. On 21 May 1991 the Unification Church was officially registered as a religious association in the Russian Socialist Federative Soviet Republic.

8. On 29 December 2000 the Ministry of Justice of the Russian Federation granted State re-registration to the Unification Church at federal level as a centralised religious organisation. It did so on the basis of an expert opinion from the Expert Council for Conducting State Expert Examinations in Religious Studies, which stated, *inter alia*, the following:

> "In the Russian Federation neither the Unification Church nor its leaders have ever been held criminally liable. No violations of the federal law on freedom of conscience and religious associations on the part of the Unification Church or its various representatives have been established. Thus, (1) the Unification Church is a religious, non-commercial organisation and, accordingly, has the characteristics of a religious association within the meaning of section 6 § 1 of the federal law on freedom of conscience and religious associations; and (2) no indication of unlawful activities has been uncovered in its religious teachings and corresponding practice."

B. The applicant's residence in Russia

9. In 1994 the Church invited the applicant to assist its activities in Russia. The Ministry of Foreign Affairs of the Russian Federation granted the applicant leave to stay in Russia. His leave to stay was subsequently renewed by the Ministry on a yearly basis through invitations issued by the registered religious organisation of the Unification Church in Moscow and an associated social organisation in St Petersburg, the Family Federation for World Peace and Unification (FFWPU).

10. The applicant lived primarily in Rostov-on-Don in southern Russia, where he worked with local branches of the FFWPU and the Youth Federation for World Peace (YFWP). He explains that, while the Unification Church, the FFWPU and the YFWP and other associations operating in Russia maintain legal independence from one another, they cooperate with one another in pursuit of similar goals. According to the applicant, these organisations acknowledge their origin in the Unification Movement founded by Rev. Moon; their different titles and legal forms reflect the specific focus of their activities and the fact that the social organisations are open to members of other faiths.

11. On 21 May 1999 the FFWPU established a local organisation in Rostov. Since the applicant's host organisation in Russia was responsible

for processing his residence registration with the police during the term of his stay, this was subsequently arranged through the Rostov FFWPU.

12. On 10 January 2000 the acting President of the Russian Federation amended, by Decree no. 24, the Concept of National Security of the Russian Federation, adopted in 1997. The relevant paragraph of Chapter IV, "Ensuring the National Security of the Russian Federation", was amended to read:

> "Ensuring the national security of the Russian Federation also includes the protection of its ... spiritual and moral heritage ... the forming of a State policy in the field of spiritual and moral education of the population ... and also includes opposing the negative influence of foreign religious organisations and missionaries ..."

13. On 25 July 2000 the Promyshlenniy District Court of Stavropol, on an application by the acting Stavropol regional prosecutor, decided to dissolve the Stavropol regional branch of the FFWPU and ban its activities "irrespective of State registration" on the ground that it was "engaged in religious activities under the guise of a registered social organisation". On 25 October 2000 the Stavropol Regional Court upheld the judgment of 25 July 2000.

14. On 3 August 2000 the *Rossiyskaya Gazeta* newspaper ran an article on the Unification Church's activities in southern Russia which – according to the applicant – described in general terms the grounds subsequently endorsed by the Federal Security Service in favour of his expulsion. It was entitled "Caramels from Moon will drive to debility" (*«'Гуцулочки' от Муна до маразма доведут»*):

> "*The prosecutor's office of the Stavropol Region has banned the activity of social organisations under the protection of which the Korean Moon ... was buying souls for $500 a piece.*
>
> Once there were two public organisations registered by the Stavropol Department of Justice: the Youth Federation for World Peace (YFWP) and the Family Federation for World Peace and Unification (FFWPU). As it turned out, these so-called public movements preach one of the most dangerous religions of the past century...
>
> Outwardly inoffensive 'pedlars' who sell or give away the 'New Families' newspaper and cheap caramels lure young men and women into Moon's family ... Young missionaries who were freely permitted to lecture to senior students at Stavropol schools introduced themselves as volunteers from the International Education Fund (IEF), [which is] one of Moon's many 'parishes' ...
>
> The self-proclaimed lecturers had no documents authorising them to talk to students. To 'sweeten' the lectures, they distributed caramels. Later, a panel of experts from the Stavropol clinic for borderline states gave a negative appraisal of *Gutsulka* caramels that Moonies distributed to children and adults alike. As it turned out, an outwardly inoffensive caramel destroys the human being's energy-information profile. Simply speaking, such caramels with little-known inclusions – in some of them small holes are visible – facilitate the conversion of neophytes into zombies.

> The contents of Moonies' lectures leave a strong aftertaste of debility. It is sufficient to read the briefing materials [prepared by] the IEF – an outline of the lecture on 'Preparation of a Secure Marriage'. Citation: 'The genitals belong to a spouse and they only serve their purpose in a marital relationship ... Until the marriage you are the guardian of your genitals for your future spouse ...'
>
> After some time ... [a certain young man] was introduced to the head Moonie in the Northern Caucasus, Patrick Nolan. To the newcomers he was presented as an American professor who periodically came to them from Rostov-on-Don ...
>
> In Russia, a mass of associations belong to the Moonie movement – professors, women and even mass-media employees, including cultural foundations and the aforementioned YFWP and FFWPU. All these socialites are preachers of the Unification Church. Meanwhile, as early as three years ago the [upper chamber of the Russian Parliament] declared the Unification Church a totalitarian sect and a destructive cult ...
>
> At long last the prosecutor's office and the Federal Security Service of the Stavropol Region have started working on the Moonies. The regional prosecutor has filed an application ... for dissolution of the YFWP and banning of its activities. The same goes for the FFWPU ...
>
> One question is still open: why does such a tenacious businessman as Rev. Moon spend [resources] on Russians? There are several theories. Not long ago... addresses were confiscated from one Moonie ... Among them – the address of an American, Patrick Nolan, who passes his time in Rostov, and two e-mail addresses of the CIA. Why shouldn't we imagine that Moon's aim ... is to catch our homeland in a spy net consisting of millions of agents – teachers, scholars, engineers, students and servicemen ...?" [italics as in the original]

15. On 26 June 2001 the applicant's leave to stay in Russia was renewed for another year by the Ministry of Foreign Affairs on the basis of an invitation from the FFWPU. As before, the applicant registered his residence with the police upon arrival in Rostov, through the Rostov branch of the FFWPU.

16. On 12 July 2001 the applicant's son, K., was born. On 2 October 2001 the applicant and his wife separated; the applicant's wife returned to the United States and the applicant retained sole custody of the child.

17. On 31 August 2001 the Kirovskiy District Court of Rostov-on-Don, on an application by the Rostov Department of Justice, decided to dissolve the Rostov FFWPU on the ground that it had failed to notify the registration authorities of the continuation of its activities for more than three consecutive years. According to the applicant, by that time the Rostov FFWPU had been incorporated for only two years and three months and had been issued with a new registration certificate by the Rostov Department of Justice just eight months previously, after undergoing re-registration. According to the judgment, the Rostov FFWPU was incorporated on 21 May 1998 or 21 May 1999, both dates being mentioned as the incorporation date. The hearing was held in the absence of both parties and

the FFPWU learned of the decision after it had come into force on 17 September 2001, with no further right of appeal.

18. On 10 October 2001 the Rostov police summoned the applicant and demanded his passport. They added a stamp to the effect that his registration was "terminated", orally notifying him that the Rostov FFWPU had been dissolved by a court order.

19. Thereafter the applicant obtained registration with the police through other FFWPU branches, first in Novorossiysk and then in Krasnodar. His residence registration in Krasnodar was valid for the entire term of his leave to stay under his current visa, that is, until 19 June 2002.

C. The applicant's exclusion from Russia

1. Refusal of re-entry to Russia

20. On 19 May 2002 the applicant travelled to Cyprus. His son stayed in Russia with his nanny.

21. At 11 p.m. on 2 June 2002 the applicant arrived at Sheremetyevo-1 Airport in Moscow on a flight from Cyprus. When he reached the passport control booth, two officers – one male and the other female – examined his passport and visa insert. The male officer left with his documents, while the other told him to wait.

22. At about 0.30 a.m. on 3 June 2002 the applicant was allowed to cross the border to collect his baggage. Border officials conducted an extensive search of his belongings. Then he was directed back through passport control and out through the passenger entry doors from the tarmac to a flight transfer bus, which took him to the airport transit hall.

23. Upon his arrival at the transit hall, officials directed the applicant to wait in a small room adjacent to their office with a desk and a sofa, but no phone, ventilation or windows. Once he entered the room, the officials locked him in from outside. Initially the applicant thought that this would be just for a few minutes, but after half an hour he realised that he was being held in an improvised detention cell. He began knocking on the door, asking to be let out. The female officer responded through the door that he would not be let out until the morning, and told him to lie down and sleep. Ten minutes after that a male officer came with the applicant's visa stapled to a one-page document. He told the applicant that his visa had been cancelled and asked him to sign the document. The applicant did as he was requested, although he could not read the document, which was handwritten in Russian.

24. At 8.30 a.m., after knocking and shouting for twenty minutes, the applicant was allowed to leave under guard and use the toilet.

25. At 10 a.m. a man in civilian clothing came to the room and introduced himself as the official in charge of passport control officers. The

applicant was told that he would not be allowed to cross the Russian border and that border officials were only following orders and were not responsible for the decision. The man said that he did not know the reason for the decision and could not disclose where the order had come from. The man apologised that the applicant had been held overnight in the room, stating that "the night crew is not too bright".

26. The applicant bought a ticket to Tallinn, Estonia. A border guard continued to accompany the applicant until he boarded his flight at 11.30 a.m., returning his passport, but not his visa, only before he entered the aeroplane.

27. On 26 June 2002 the applicant sent letters, through his legal representatives in Russia, by registered mail to:

- the Ministry of Foreign Affairs;
- the Federal Security Service (FSB) and its department in the Krasnodar Region;
- the Federal Border Service, the military prosecutor's office of that service and the Moscow Border Control;
- the Ministry of the Interior and its Krasnodar department of passports and visas; and
- the Ombudsman and Presidential Envoy for the Central Circuit.

28. In these letters the applicant asked why he had been denied entry and detained even though he had committed no violation and why no procedural documents had been compiled or given to him. He also complained that he had been detained for over nine hours, and that as a result of the exclusion his eleven-month-old son had been left behind in Russia without either of his parents. The applicant also requested assistance to be reunited with his son.

2. Attempted return to Russia on a new visa

29. On 4 July 2002 the applicant received a new invitation issued through the Russian Ministry of Foreign Affairs. On 5 July 2002 he applied for a visa to enter Russia at the Russian consulate in Tallinn and on the same day he was issued a multiple-entry visa valid until 3 July 2003.

30. On 7 July 2002, while he was crossing the border from Finland to Russia, Russian border guards at passport control twice stamped the applicant's visa "annulled" and denied him entry into Russia. No explanation was given. The consulate in Tallinn referred him to the Ministry's office in Moscow.

31. On 12 April 2003 the applicant was reunited with his son whom his nanny, a Ukrainian national, had brought to Ukraine.

D. Proceedings concerning the applicant's complaints

32. Many of the applicant's complaints sent on 26 June 2002 did not receive a response. Of those that did, none addressed the substance of his complaints. Responses from the Moscow Border Control of the Federal Border Service of 9 July and 22 August 2002 indicated that he had been denied entry into Russia on the basis of section 27 § 1 of the Entry Procedure Act, in implementation of an order given by another (unnamed) State body. The military prosecutor's office responded that the applicant "had not been placed in administrative detention and therefore no detention record had been drawn up".

33. On 8 August 2002 the applicant, through his legal representative in Moscow, challenged the decision refusing his return to Russia before the Khimki Town Court of the Moscow Region. He filed the challenge on behalf of himself and his son K., listing the Moscow Border Control as defendant.

34. On 29 August 2002, at the directions hearing, the defendants disclosed that they had acted on the orders of the Federal Security Service (FSB). The court joined the FSB as a co-defendant.

35. On 5 September 2002 the defendant requested that jurisdiction be transferred to the Moscow Regional Court because matters involving State secrets could only be examined by regional courts. The court granted their request in an interim decision.

36. On 25 March 2003, after repeated adjournments, the hearing was held *in camera* before the Moscow Regional Court. The applicant and K. were represented by counsel and an officer of the Unification Church in Russia, both of whom were required to give an undertaking not to disclose the contents of the proceedings.

37. The Moscow Regional Court dismissed the complaint. On the issue of whether the applicant had posed a threat to national security, the judgment stated as following:

> "The representative of the first deputy head of the Department for the Protection of the Constitutional Order and the Fight against Terrorism, of the Russian FSB Directorate ... did not accept the appellants' claims, and presented a written defence to the complaint ... In support of his position the representative pointed out that his client had approved the report to deny US citizen Patrick Francis Nolan entry into the Russian Federation, which was prepared by the Stavropol Regional Branch of the Federal Security Service on the basis of materials obtained as a result of operational and search measures. In the opinion of Russian FSB experts participating in the preparation of the report, the [applicant's] activities in our country are of a destructive nature and pose a threat to the security of the Russian Federation. The representative ... emphasised that the threat to State security is created by the activities, not the religious beliefs of [the applicant]."

38. Nowhere else in the nine-page text of the judgment did the Regional Court indicate what "activities" had posed a threat to national security. It

may, however, be inferred from the judgment that the applicant's phone conversations had been intercepted by the FSB pursuant to a certain earlier court order.

39. It also appears that the Regional Court examined an information letter from the Federal Security Service of 29 May 2000, entitled "Information on the activities of representatives of non-traditional religious associations on Russian territory", which stated, in particular, as follows:

> "Representatives of such foreign sectarian communities as the Jehovah's Witnesses, Moon's Unification Church ... under the cover of religion establish extensive governing structures which they use for gathering socio-political, economic, military and other information about ongoing events in Russia, indoctrinate the citizens and incite separatist tendencies ... Missionary organisations purposefully work towards implementing the goals set by certain Western circles with a view to creating the conditions in Russia and perfecting the procedure for practical implementation of the idea of replacing the 'socio-psychological code' of the population, which will automatically lead to the erasing from the people's memory of the over a thousand-year-long history of the Russian State and the questioning of such concepts as national self-identification, patriotism, Motherland and spiritual heritage ..."

40. As to the applicant's overnight detention, the officers of the Moscow Border Control denied in court that the applicant had been "detained" and claimed that he had bought a ticket to Tallinn and merely waited for his flight scheduled for the following day. Although the Regional Court established that the ticket had been in fact bought in the morning of 3 June 2002, it held that this fact was "of no legal significance" and ruled that the applicant had not been deprived of his liberty.

41. The Regional Court also noted that the Russian authorities had not prevented the applicant from reuniting with his son in any country other than Russia. His allegations about interference with his family life were therefore rejected as manifestly ill-founded.

42. The applicant appealed, citing as grounds, *inter alia*, that the Regional Court had failed to examine whether the FSB had any legitimate basis in fact for its "conclusions". He relied on Articles 5, 8, 9 and 14 of the Convention.

43. On 19 June 2003 the Supreme Court of the Russian Federation, sitting *in camera* in a three-judge formation, dismissed the appeal. It held that there had been no violations of the applicant's Convention rights. The judgment was based on the administrative competence of the FSB and the Border Control to take decisions in the field of national security and border control. It did not indicate what activities of the applicant were alleged to pose a threat to national security:

> "The decision on the issue whether or not the activities of a citizen (in respect of whom a conclusion barring entry into Russia has been issued) pose a threat to State security ... comes within the competence of the Russian authorities ... this right of the State is one of the basic elements of its sovereignty. Therefore, the [regional] court's conclusion that the claims of the appellant and his representatives that the Russian FSB acted *ultra vires* are unfounded in the present case." [so in the original]

II. RELEVANT DOMESTIC LAW

A. Provisions relating to the exclusion of aliens from Russian territory

44. 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 given, the foreign national has to leave Russia or will otherwise be deported. The 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").

45. A foreign national will be refused entry into Russia if this is necessary for the purposes of ensuring the defensive capacity or security of the State, or protecting public order or health (section 27 § 1 of the Entry Procedure Act).

46. The Guidelines on checking the documents of persons crossing the border of the Russian Federation, ratified by order no. 0234 of the Federal Border Service of 4 August 2000 ("the Border Crossing Guidelines"), were not published or accessible to the public. The applicant submitted that they contained the following provisions, the authenticity of which was not disputed by the Government:

> "...upon discovery of [persons whose entry into Russia is prohibited], officials of the border control shall notify them of the grounds for refusing them entry across the border, escort them to isolated premises and place them under guard, and take measures towards deportation of such persons from the territory of the Russian Federation."

B. Provisions on State liability for damages

47. The State or regional treasury is liable – irrespective of any fault by State officials – for the damage sustained by an individual on account of, in particular, unlawful criminal prosecution or unlawful application of a preventive measure in the form of placement in custody (Article 1070 § 1 of the Civil Code). 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 of the Civil Code). Non-pecuniary damage must be compensated for irrespective of the tortfeasor's

fault in the event of, in particular, unlawful conviction or prosecution or unlawful application of a preventive measure in the form of placement in custody (Article 1100 § 2).

III. RELEVANT *TRAVAUX PRÉPARATOIRES*

48. The Explanatory Report to Protocol No. 7 (ETS No. 117) defines the scope of application of Article 1 of Protocol No. 7 in the following manner:

> "9. The word 'resident' is intended to exclude from the application of the article any alien who has arrived at a port or other point of entry but has not yet passed through the immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose...
>
> The word lawfully refers to the domestic law of the State concerned. It is therefore for domestic law to determine the conditions which must be fulfilled for a person's presence in the territory to be considered 'lawful'.
>
> ... [A]n alien whose admission and stay were subject to certain conditions, for example a fixed period, and who no longer complies with these conditions cannot be regarded as being still 'lawfully' present."

49. The Report further cites definitions of the notion of "lawful residence" contained in other international instruments:

Article 11 of the European Convention on Social and Medical Assistance (1953)

> "a. Residence by an alien in the territory of any of the Contracting Parties shall be considered lawful within the meaning of this Convention so long as there is in force in his case a permit or such other permission as is required by the laws and regulations of the country concerned to reside therein...
>
> b. Lawful residence shall become unlawful from the date of any deportation order made out against the person concerned, unless a stay of execution is granted."

Section II of the Protocol to the European Convention on Establishment (1955)

> "a. Regulations governing the admission, residence and movement of aliens and also their right to engage in gainful occupations shall be unaffected by this Convention insofar as they are not inconsistent with it;
>
> b. Nationals of a Contracting Party shall be considered as lawfully residing in the territory of another Party if they have conformed to the said regulations."

50. The Report clarifies the notion of "expulsion" as follows:

> "10. The concept of expulsion is used in a generic sense as meaning any measure compelling the departure of an alien from the territory but does not include extradition. Expulsion in this sense is an autonomous concept which is independent of any definition contained in domestic legislation. Nevertheless, for the reasons explained in paragraph 9 above, it does not apply to the *refoulement* of aliens who

have entered the territory unlawfully, unless their position has been subsequently regularised.

11. Paragraph 1 of this article provides first that the person concerned may be expelled only 'in pursuance of a decision reached in accordance with law'. No exceptions may be made to this rule. However, again, 'law' refers to the domestic law of the State concerned. The decision must therefore be taken by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules."

THE LAW

I. THE GOVERNMENT'S COMPLIANCE WITH ARTICLE 38 OF THE CONVENTION

51. The Court observes that on 1 March 2005, when communicating the application to the Government, it asked them to produce a copy of the report by the Federal Security Service dated 18 February 2002, for the purpose of clarifying the factual grounds for the applicant's exclusion from Russia. Mindful of the sensitive nature of the report, it reminded the Government of the possibility of restricting public access to the document in accordance with Rule 33 §§ 1 and 2 of the Rules of Court. The Government refused to produce the report on the ground that Russian law did not lay down a procedure for communicating information classified as a State secret to an international organisation.

52. At the admissibility stage the Court reiterated the request for a copy of the report of 18 February 2002 and also put questions to the parties as regards the Government's compliance with their obligations under Article 38 of the Convention, the relevant part of which reads as follows:

Article 38

"1. If the Court declares the application admissible, it shall

(a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities ..."

53. In their observations on the merits of the case, the Government declined once again to submit the report, stating that it contained operative and investigative information about the "unlawful activity of P.F. Nolan [in] the territory of the Russian Federation". That information was a State secret and could not be made available to the Court. The Government claimed that

their refusal was compatible with the duties of the State and derived from the provisions of Article 10 of the Convention.

54. In his statement to the Court dated 10 November 2005, Mr K., the applicant's representative in the domestic proceedings, stated that he was aware of the contents of the report of 18 February 2002 but, bound by the non-disclosure undertaking, was unable to inform the Court of its contents.

55. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Failure on a Government's part to submit such information which is in their hands, without a satisfactory explanation, may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 3531/94, § 66, ECHR 2000-VI).

56. The Court notes that the Government failed to produce a copy of the document requested by the Court, despite repeated requests to that effect. They did not deny that the report was in their possession. By way of justification for their refusal, they referred to the absence of an established procedure for making available such documents to international organisations. However, the Court reiterates that in ratifying the Convention, the States Parties have agreed, under Article 38 § 1 (a) of the Convention, to furnish all necessary facilities for the effective conduct of the Court's investigation. That obligation implies putting in place any such procedures as would be necessary for unhindered communication and exchange of documents with the Court. In these circumstances, a mere reference to the structural deficiency of the domestic law which renders impossible the communication of sensitive documents to international bodies is an insufficient explanation to justify the withholding of key information requested by the Court. Furthermore, it is noted that the report was examined in the domestic proceedings and the applicant's representative in those proceedings was allowed to take cognisance of its contents but he could not disclose its contents to the Court because of the confidentiality undertaking he had been required to sign. This fact indicates that the nature of the information contained in the report was not such as to exclude any possibility of making it known to anyone outside the secret intelligence services and the highest State officials. Finally, even if there existed legitimate State security concerns preventing the disclosure of the

report, the Government should have been able to address those concerns by editing out the sensitive passages or supplying a summary of the relevant factual grounds, whereas in the present case they have done neither.

57. Having regard to the importance of cooperation by the respondent Government in Convention proceedings and the difficulties associated with the establishment of the facts in cases such as the present one, the Court finds that the Russian Government fell short of their obligations under Article 38 § 1 (a) of the Convention on account of their failure to submit a copy of the requested report.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

58. The applicant complained under Article 9 of the Convention about his exclusion from Russia, which allegedly purported to penalise him for manifesting and spreading his religion. Article 9 reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Submissions by the parties

59. In the applicant's view, the Government accepted in their submissions on the admissibility and merits that the sanction of exclusion from Russia had been imposed on him in connection with his religious activities. Accordingly, that sanction amounted to an interference with his right to freedom of religion. He pointed out that the distinction between "activity" and religious beliefs, drawn by the Russian authorities and the Government in their submissions, was artificial and ineffective since Article 9 of the Convention protected both religious belief (*forum internum*) and its manifestation in practice (*forum externum*). As regards the justification for the interference, the applicant emphasised that the interests of national security relied upon in the domestic proceedings were not included as a legitimate aim in paragraph 2 of Article 9. The Russian Government's official national security policy defining "foreign" religions and missionaries as a threat to national security was incompatible with the Convention. Religious plurality was at the foundation of a democratic society: national security required that governments protect it, not oppose it. Furthermore, the applicant submitted that neither he nor the Unification

Church had ever engaged in any criminal activities, evidence of this being provided by the opinion submitted by the Expert Council to the Ministry of Justice (see paragraph 8 above). The evidence examined in unrelated proceedings before the Promyshlenniy District Court in Stavropol, to which the Government had referred in their pre-admissibility submissions, had not made any reference whatsoever to the applicant. Neither the evidence nor the District Court's judgment had been relied upon by the State authorities in the proceedings concerning the applicant's exclusion, nor had they been attached to the file. The applicant maintained that there was no justification for the interference with his rights under Article 9 of the Convention.

60. The Government submitted that the applicant's expulsion was justified in the light of the European Parliament's Resolution on Cults in Europe of 29 February 1996, in which it had expressed concern over certain cults "engaging in activities of an illicit or criminal nature and in violations of human rights, such as maltreatment, sexual abuse, unlawful detention, slavery, the encouragement of aggressive behaviour or propagation of racist ideologies, tax fraud, illegal transfers of funds, trafficking in arms or drugs, violation of labour laws, the illegal practice of medicine". The Government also referred to the same effect to Recommendation 1178 (1992) of the Parliamentary Assembly of the Council of Europe on sects and new religious movements and the Committee of Ministers' supplementary reply to that Recommendation, adopted on 17 February 1994 (doc. 7030). The Government inferred from those documents that States had the right and obligation to exercise vigilance and caution in such sensitive matters as spreading religious teachings. The applicant's activity as a coordinator of Rev. Moon's groups had been merely a "motive" rather than a "ground" for the Russian authorities "to exercise vigilance and make use of existing legal instruments". The grounds for the applicant's exclusion were the results of the operational and search measures as reflected in the report by the Stavropol Regional Branch of the Federal Security Service, dated 18 February 2002, concerning the banning of the applicant from the Russian Federation. As the Moscow City Court had pointed out in its judgment of 25 March 2003, the applicant's activities in the Russian territory were "of a destructive nature and pose[d] a threat to the security of the Russian Federation". The Government emphasised that the threat resulted from the applicant's activities rather than his religious beliefs.

B. The Court's assessment

1. *Existence of an interference with the applicant's right to freedom of religion*

61. The Court reiterates its consistent approach that freedom of thought, conscience and religion, as enshrined in Article 9, is one of the foundations

of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions. The Court has held on many occasions that the imposition of administrative or criminal sanctions for manifestation of religious belief or exercise of the right to freedom of religion was an interference with the rights guaranteed under Article 9 § 1 of the Convention (see *Serif v. Greece*, no. 38178/97, § 39, ECHR 1999-IX; *Larissis and Others v. Greece*, 24 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I, and *Kokkinakis v. Greece*, 25 May 1993, § 36, Series A no. 260-A).

62. The gist of the applicant's complaint was not that he was not allowed to stay or live in Russia but rather that his religious beliefs and/or activities had prompted the Russian authorities to ban his re-entry. The Court reiterates in this connection that, whereas the right of a foreigner to enter or remain in a country is not as such guaranteed by the Convention, immigration controls have to be exercised consistently with Convention obligations (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, §§ 59-60, Series A no. 94). As regards specifically Article 9, it emphasises that "deportation does not ... as such constitute an interference with the rights guaranteed by Article 9, unless it can be established that the measure was designed to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers" (see *Omkarananda and the Divine Light Zentrum v. Switzerland*, no. 8118/77, Commission decision of 19 March 1981, Decisions and Reports (DR) 25, p. 118). More recently, the Court has examined cases against Bulgaria, in which the State's use of immigration controls as an instrument to put an end to an applicant's religious activities within its jurisdiction was found to have given rise to an admissible complaint of an interference with rights under Article 9 (see *Al-Nashif v. Bulgaria* (dec.), no. 50963/99, 25 January 2001, and *Lotter v. Bulgaria* (dec.), no. 39015/97, 5 November 1997). In a Latvian case the Court held that the refusal to issue an Evangelical pastor with a permanent residence permit "for religious activities", a decision which had been grounded on national-security considerations, amounted to an interference with the applicant's right to freedom of religion (see *Perry v. Latvia*, no. 30273/03, §§ 10 and 53, 8 November 2007). It follows that, in so far as the measure relating to the continuation of the applicant's residence in a given State was imposed in connection with the exercise of the right to

freedom of religion, such measure may disclose an interference with that right.

63. Accordingly, the Court's task in the present case is to establish whether the applicant's exclusion from Russia was connected with his exercise of the right to freedom of religion. The Court observes that the applicant came to Russia in 1994 on an invitation of the Unification Church, a religious association officially registered in Russia. He was granted leave to stay which was subsequently extended on an annual basis through invitation from the Unification Church and an associated non-denominational organisation in St Petersburg. In 1999 he moved to Rostov-on-Don to work for the Rostov branch of the Unification Church. There is no indication in the case-file, and it was not claimed by the Government, that the Unification Church or its branches had engaged in activities other than spreading of their doctrine and guiding their followers in the precepts of Rev. Moon's spiritual movement. The religious nature of their activities finds corroboration, by converse implication, in the judgment of the Promyshlenniy District Court of Stavropol which banned an affiliated social organisation for "engaging in religious activities under the guise of a registered social organisation" (see paragraph 13 above).

64. Furthermore, nothing indicates that the applicant held any employment or position outside the Unification Church and its organisations or that he had exercised any activities other than religious and social work as a missionary of the Unification Church. The Government consistently maintained that the threat to national security had been posed by the applicant's "activities" rather than "religious beliefs". However, at no point in the proceedings before the Court did they indicate the nature or character of any non-religious activities which the applicant allegedly may have undertaken. Whereas they vaguely mentioned certain "findings" of the operational and search measures relating to the applicant's "activities", they forfeited the opportunity to substantiate that claim by failing to submit a copy of the report by the Federal Security Service which was repeatedly requested by the Court.

65. Finally, the Court cannot overlook the applicant's submission that the Concept of National Security of the Russian Federation, as amended in January 2000, declared that the national security of Russia should be ensured in particular through opposing "the negative influence of foreign religious organisations and missionaries". The unqualified description of any activities of foreign religious missionaries as harmful to the national security lends support to his argument that his religious beliefs, combined with his status as a foreign missionary of a foreign religious organisation, may have been at the heart of the Russian authorities' decision to prevent him from returning to Russia.

66. On the strength of the parties' submissions and the information emerging from the case-file, the Court finds that the applicant's activities in

Russia were primarily of a religious nature and amounted therefore to the exercise of his right to freedom of religion. Having regard to the fact that the applicant was not shown to have engaged in any other, non-religious activities and also to the general policy, as set out in the Concept of National Security of the Russian Federation, that foreign missionaries posed a threat to national security, the Court considers it established that the applicant's banning from Russia was designed to repress the exercise of his right to freedom of religion and stifle the spreading of the teaching of the Unification Church. There has therefore been an interference with the applicant's rights guaranteed under Article 9 of the Convention (see *Abdulaziz, Omakaranda*, and *Lotter* cases, all cited above).

67. In order to determine whether that interference entailed a breach of the Convention, the Court must decide whether it satisfied the requirements of Article 9 § 2, that is, whether it was "prescribed by law", pursued a legitimate aim for the purposes of that provision and was "necessary in a democratic society".

2. Justification for the interference

68. The Government claimed, firstly, that the interference was justified because the applicant's activities in Russia had posed a threat to national security. The applicant denied that claim.

69. The Court reiterates that, in assessing evidence in Convention proceedings, it is habitually guided by the principle *affirmanti, non neganti, incumbit probatio* (the burden of proof lies upon him who affirms, not upon him who denies). The proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In certain instances the respondent Government alone have access to information capable of corroborating or refuting specific allegations. The failure on a Government's part to submit such information without a satisfactory explanation may give rise to the drawing of inferences as to the well-foundedness of the applicant's claims (see, among other authorities, *Makhmudov v. Russia*, no. 35082/04, § 68, 26 July 2007; *Fadeyeva v. Russia*, no. 55723/00, § 79, ECHR 2005-IV; and *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 426, 6 April 2004).

70. The justification for the interference offered by the Government in the present case was confined to the assertion that the applicant's activities had posed a threat to national security. Obviously, given the sensitive nature of the information, solely the respondent Government, and not the applicant, had access to material which would be capable of substantiating that claim. However, the Government did not submit any such material or offer an explanation as to why it was not possible to produce evidence supporting their allegation. Moreover, they consistently refused to provide the report of 18 February 2002 which had apparently been at the heart of the Russian

authorities' decision to exclude the applicant from Russia on the grounds of national security, or at least to make a summary of its contents.

71. The Court further observes that no evidence corroborating the necessity to ban the applicant from entering Russia was produced or examined in the domestic proceedings. It 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 *Liu and Liu v. Russia*, no. 42086/05, § 59, 6 December 2007; *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 123-124, 20 June 2002; and *Lupsa v. Romania*, no. 10337/04, §§ 33-34, ECHR 2006-VII).

72. In the instant case, counsel acting for the Federal Security Service in the domestic proceedings referred to the report of 18 February 2002 but did not make specific submissions on the factual circumstances underlying its findings or the nature of allegations of unlawful conduct on the part of the applicant, if such were indeed contained in the report. The Moscow Regional Court at first instance and subsequently the Supreme Court on appeal confined the scope of their inquiry to ascertaining that the report had been issued within the administrative competence of the Federal Security Service, 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. In these circumstances, the Court is unable to discern in the domestic decisions any concrete findings of fact corroborating the Government's argument that the applicant's religious activity posed a threat to national security.

73. Furthermore, in so far as the Government relied on the protection of national security as the main legitimate aim of the impugned measure, the Court reiterates that the exceptions to freedom of religion listed in Article 9 § 2 must be narrowly interpreted, for their enumeration is strictly exhaustive and their definition is necessarily restrictive (see *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, § 132, 14 June 2007). Legitimate aims mentioned in this provision include: the interests of public safety, the protection of public order, health or morals, and the protection of the rights and freedoms of others (see paragraph 58 above). However, unlike the

second paragraphs of Articles 8, 10, and 11, paragraph 2 of Article 9 of the Convention does not allow restrictions on the ground of national security. Far from being an accidental omission, the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as "one of the foundations of a 'democratic society' within the meaning of the Convention" and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs (see, *mutatis mutandis*, *Kokkinakis*, cited above, § 31, and *Ivanova v. Bulgaria*, no. 52435/99, § 79, ECHR 2007-...). It follows that the interests of national security could not serve as a justification for the measures taken by the Russian authorities against the applicant.

74. In so far as the Government also alleged, at the pre-admissibility stage, that the applicant's religious activities had interfered with private, family and other legitimate interests of individuals, the Court notes that the sole piece of evidence they mentioned in this connection was that examined by the Promyshlenniy District Court in the proceedings concerning the dissolution of the Stavropol regional branch of the FFWPU (see paragraph 13 above). The Court observes, however, that the applicant had not been an employee of the Stavropol branch or a party to the dissolution proceedings, that he had not been mentioned by name or otherwise identified in the District Court's judgment, and that no findings of fact had been made in respect of him in those proceedings. Moreover, that judgment by the District Court was not relied upon or even mentioned in the proceedings concerning the applicant's exclusion from Russia. The Government did not explain its relevance or give any other indication as to why they considered that the applicant's religious activities affected the rights and freedoms of others. It follows that this justification for the interference with the applicant's right to freedom of religion has not been made out.

75. Having regard to the above circumstances, the Court finds that the Government did not put forward a plausible legal and factual justification for the applicant's exclusion from Russia on account of his religious activities. There has therefore been a violation of Article 9 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 9

76. The applicant complained that he had suffered discrimination in the enjoyment of his right to freedom of religion on the ground of his position as a foreign missionary, contrary to Article 14 of the Convention read in conjunction with Article 9. Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

77. The applicant submitted that there had been a difference in treatment between "traditional" Russian religions and those that were perceived as having foreign origins, in that only the latter were singled out in Russia's National Security Concept as being a "negative influence" and posing a threat to national security. The extreme measure of excluding him from Russia, where he had engaged in the lawful and peaceful manifestation of his religious beliefs, had served no legitimate purpose and had also been disproportionate to whatever aim had been pursued.

78. The Government argued that there had been no discrimination on the grounds of religion because the Moscow Regional Court had found that the threat to national security had been posed by the applicant's "activities" rather than his "religious beliefs". The prohibition on activities of the Stavropol FFWPU could not be regarded as discrimination against the applicant.

79. Having regard to the finding of a violation which the Court reached under Article 9 of the Convention, it does not consider it necessary to examine the complaint also under Article 14 (see *Perry*, cited above, § 70).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

80. The applicant and the applicant's son complained that their forced separation resulting from the applicant's exclusion from Russia had been in breach of the right to respect for their family life under Article 8 of the Convention which reads:

"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. Submissions by the parties

81. The applicant and his son submitted that the applicant had not been informed in advance of the exclusion order or allowed to travel together with his son. He had lived in Russia for eight years and had not had a settled home elsewhere to which to take his son. As a result of State actions, he had faced the practical difficulty of having to arrange, from abroad, for the paperwork of an infant, including an exit visa, through a third party – a nanny – with no family relationship to him. The consideration of his

complaint had been drawn out over seven and a half months because of repeated adjournments granted by the court to the FSB as a result of the latter's consistent lack of preparation. In their submission, these elements pointed towards an interference with the applicant's and his son's right to respect for their family life, for which the Government offered no reasonable justification.

82. The Government submitted that Russian law treated all aliens on an equal basis, irrespective of whether or not they had a minor child in Russia. There was no evidence that the State authorities had prevented the applicant from being reunited with his son in a different State. Nor had he shown that he had taken any steps to remove his son from Russia. In any event, the Convention does not guarantee the right to establish family life in any specific country (here they referred to the case of *Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003-X). Unlike the first applicant in the *Slivenko* case, who had come to Latvia when she had been only ten months old and had spent her entire life there, the applicant had arrived in Russia as an adult and had lived there for only eight years. His integration into Russian society was open to doubt since he had been unable, by his own admission, to read a document handwritten in Russian. Moreover, owing to their profession, religious missionaries must be prepared to change their place of residence with greater ease. Finally, the Government submitted that, in any event, the interference with the applicant's family life had been in accordance with law, pursued the legitimate aim of the protection of national security and had also been necessary in a democratic society.

B. The Court's assessment

83. As regards the scope of the complaint under Article 8, the Court notes at the outset that the applicant and his son did not claim that respect for their rights under this provision required that they be allowed to establish family life in Russia and nowhere else. Rather, they complained that the exclusion measure had been decided upon against the applicant while he had been still on Russian territory, yet he had been given no advance warning of that decision and no provision had been made to enable him – as the sole parent of K. and his only legal guardian – to make travel arrangements for him. In this connection the Court observes that more than three months separated the issuing of the Federal Security Service's report of 18 February 2002, which apparently served as the basis for the applicant's exclusion, and the enforcement of the exclusion order in early June 2002. During this entire period the Russian authorities were obviously aware that the applicant would not be allowed to return to Russia, but there is no indication that the applicant was in any way apprised of that possibility. After his exclusion from Russia in June 2002, a subsequent attempt to obtain a new visa and return to Russia to be reunited with his son

was also thwarted. This resulted in a situation where the applicant was unable to have physical access to his son, who had remained in Russia in the care of a nanny. The physical separation of the applicant from his son lasted approximately ten months, during which the applicant attempted to challenge the exclusion order and arrange for the necessary documents – such as a Russian exit visa – that would enable his son to leave Russia. The period of separation was the direct consequence of a combination of the Russian authorities' actions (the decision to exclude the applicant from Russia) and omissions (failure to notify the applicant of that decision and to take measures that would enable his son to leave Russia).

84. As regards the characterisation of those actions and omissions of the Russian authorities, the Court reiterates that, although the object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private and family life. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 70, ECHR 2007-...).

85. The Court does not consider it necessary to decide in the instant case whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since it is of the view that the core issue is whether a fair balance was struck between the competing public and private interests involved.

86. As noted above, at the material time the applicant was the only parent and legal guardian of his son. At the time of their separation K. was barely ten months old, an age which is both vulnerable and formative for a child. The applicant's and his son's interests obviously consisted in remaining, to the maximum extent possible, in physical proximity and contact or, failing this, to be reunited as soon as practicable.

87. The Government put forward the interests of national security as the only justification for the course of action they had adopted. The Court has already found above that they failed to produce any material or evidence corroborating their claim that the applicant's presence on Russian soil had indeed posed a threat to national security. It follows that the Government did not offer any justification which could outweigh the legitimate interest of the applicant and his son in staying together.

88. Furthermore, the Court reiterates that the State has a positive obligation to ensure the effective protection of children (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; *Osman v. the United*

Kingdom, 28 October 1998, §§ 115-116, *Reports* 1998-VIII; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). The Russian authorities did not deny that they were aware of the applicant's situation as a single parent. Nor were they oblivious to the fact that his exclusion from Russia would result in his separation from K., who had been born in and had previously never left Russia, a situation which required complex paperwork for his departure. However, despite being aware of these factors, the authorities concealed the existence of the decision from the applicant, thereby depriving him of an opportunity to take measures to prepare for K.'s departure, and also took no measures facilitating K.'s exit from Russia and their reunion in any other country. The manifest absence of an assessment of the impact of their decisions and actions on the welfare of the applicant's son must be seen as falling outside any acceptable margin of appreciation of the State.

89. There has therefore been a violation of Article 8 of the Convention in respect of the applicant and his son.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

90. The applicant complained that he had been detained at Sheremetyevo Airport in Moscow in breach of the guarantees of Article 5 of the Convention, which provides:

> "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.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Submissions by the parties

91. The applicant invited the Court to take account of his concrete situation when examining whether or not he had been deprived of his liberty. He pointed out that he had been locked in a room for nine hours and during that period had only been permitted to go to the toilet once, under guard. At all other times until his departure he had been under the constant escort and supervision of a border guard. He submitted that his detention had failed to meet the standard of "lawfulness" because it had been governed by the unpublished Border Crossing Guidelines, which were not "accessible" regardless of formal compliance with them. Since he had not been detained in connection with any administrative or criminal procedure, he had had no procedural protection allowing him to have the lawfulness of his detention reviewed, as required by paragraph 4 of Article 5. Any *ex post facto* review would not have allowed him to secure an order for his release as required by Article 5 § 4. Lastly, he maintained that, since the courts had held that the border officials' actions had not constituted a breach of Russian law or Article 5, he had no enforceable right to compensation, as required by Article 5 § 5.

92. The Government denied that the applicant had ever been "detained" because he had not been "arrested in procedural terms" and because no formal "detention measures" had been taken. Rather, the applicant had not been permitted to cross the Russian border and had been offered the possibility of staying in the transit hall of the airport, where he could use the bar and telephone. Accordingly, the Government considered that Article 5 of the Convention was not applicable in the present case. In any event, they claimed that the applicant had been able to lodge an application for judicial review of his alleged detention with the Moscow Regional Court, which had satisfied the requirements of Article 5 § 4.

B. The Court's assessment

1. Existence of a deprivation of liberty

93. The parties disagreed on the issue of whether or not the applicant was deprived of his liberty within the meaning of Article 5 of the Convention. The Court reiterates that in proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction

upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Amuur v. France*, 25 June 1996, § 42, *Reports* 1996-III).

94. On the facts, the Court observes that the applicant arrived at the Moscow airport from Cyprus at 11 p.m. on 2 June 2002. After the border control had refused him leave to enter Russian territory, he was escorted to the transit hall. In the transit hall he was locked up overnight in a small room. He was allowed to use the toilet, bar and telephone in the morning on the following day. At about 10 a.m. he bought a ticket to Tallinn and boarded that flight one and a half hours later. He was accompanied by a border guard until such time as he was on board.

95. Even though the applicant had not crossed the Russian border, as the Government pointed out, during his stay in the transit hall he was under the jurisdiction of the Russian Federation. The Government did not claim that the transit zone of Sheremetyevo Airport had the status of extraterritoriality or was otherwise outside the State's control (compare *Shamsa v. Poland*, nos. 45355/99 and 45357/99, § 45, 27 November 2003). The Court finds therefore that the applicant was effectively under Russian authority and responsibility (compare *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV).

96. That the applicant was not subject to any administrative or criminal detention procedure – the fact on which the Government heavily relied – is not relevant for the Court's assessment of whether or not there existed a *de facto* deprivation or restriction of his liberty. With regard to his concrete situation, the Court observes that during the overnight stay at Sheremetyevo Airport he was unable to leave of his own will the room in which he had been placed, because it was locked from the outside. Although he was permitted to use the toilet and bar the following morning, that could only be done under constant supervision by a border control officer. In fact, his departure only became possible on the following day when he bought a ticket to Estonia, by which time his overnight detention had already taken place. The applicant's submission that his liberty was restricted overnight is also corroborated by the requirements of the Border Crossing Guidelines, which mandated the border control to escort persons in the applicant's situation to "isolated premises" and place them "under guard" until such time as they had left Russian territory (see paragraph 46 above). Accordingly, the Court finds that the conditions of the applicant's overnight stay in the transit hall of Sheremetyevo Airport in Moscow were equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty, for which the Russian authorities were responsible.

2. Compliance with Article 5 § 1

97. The applicant was refused leave to enter Russia and his detention at Sheremetyevo Airport was thus covered under Article 5 § 1 (f) of the Convention for the purpose of preventing his effecting an unauthorised

entry into the country. The Court reiterates that it falls to it to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1, with particular reference to the safeguards provided by the national system. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness (see *Amuur*, cited above, § 50).

98. The Court must therefore ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law", requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Nasrulloyev v. Russia*, no. 656/06, § 66, 11 October 2007; *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-X; *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, cited above).

99. As the Government maintained that the applicant had not been "detained" within the meaning of Russian law, they did not refer to any domestic legal provisions which might have governed the deprivation of liberty to which he had been subjected. The applicant indicated that his detention might have been effected in accordance with the Border Crossing Guidelines (see paragraph 46 above), since he fell in the category of persons whose entry into Russia was prohibited. He pointed out, however, that the Border Crossing Guidelines had never been published or accessible to the public. The Government did not dispute that submission. Accordingly, the Court finds that the Border Crossing Guideless did not meet the requirements of accessibility and foreseeability and fell short of the "quality of law" standard required under the Convention. The national system failed to protect the applicant from arbitrary deprivation of liberty, and his detention cannot be considered "prescribed by law" for the purposes of Article 5 § 1 of the Convention.

100. There has therefore been a violation of Article 5 § 1 of the Convention.

3. Compliance with Article 5 § 4

101. The Court notes that the applicant was deprived of his liberty for a short period of time. That period of deprivation of liberty ended with his departure from Russia, that is, before he lodged an application for judicial review of his detention. Since the applicant regained his liberty speedily before any judicial review of his detention had taken place, the Court does not find it necessary to examine the merits of his complaint under Article 5 § 4 (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 45, Series A no. 182).

4. Compliance with Article 5 § 5

102. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4. The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court (see *Govorushko v. Russia*, no. 42940/06, § 57, 25 October 2007; *Fedotov v. Russia*, no. 5140/02, § 83, 25 October 2005; and *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

103. In the present case the Court has found a violation of paragraph 1 of Article 5 in that the applicant's deprivation of liberty was not effected in accordance with a "procedure prescribed by law". It must therefore establish whether or not the applicant had an enforceable right to compensation for the breach of Article 5.

104. The Court observes that, pursuant to the relevant provisions of the Russian Civil Code (see paragraph 47 above), an award in respect of pecuniary and/or non-pecuniary damage may be made against the State only if the detention is found to have been unlawful in the domestic proceedings. In the present case, however, the Moscow City Court and subsequently the Supreme Court did not consider that the applicant had been deprived of his liberty. Thus, the Court finds that the applicant did not have an enforceable right to compensation for the deprivation of liberty which has been found to be in violation of Article 5 § 1 of the Convention.

105. There has therefore been a violation of Article 5 § 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7

106. The applicant claimed that the exclusion order had been issued in breach of the guarantees of Article 1 of Protocol No. 7, which provides:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

A. Submissions by the parties

107. The applicant submitted that he had been lawfully resident in Russia for over seven years and that at the time of his attempted re-entry he had possessed a valid visa. The visa had retained full validity at the material time and no order had been issued to deport him or to shorten its duration. The applicant had therefore been lawfully resident in Russia, even though at the time of the events he had not been physically present on Russian soil. The decision taken against him had been a measure "compelling the departure of an alien from the territory" within the meaning of the Explanatory Report to Protocol No. 7 and therefore fell under the notion of "expulsion". The applicant lastly maintained that he had not been afforded the procedural guarantees required under Article 1 § 1 of Protocol No. 7. In so far as the Government relied upon the national-security exception in paragraph 2 of that provision, the applicant claimed that on the facts, that would amount to a breach of Article 18 of the Convention in conjunction with Article 1 § 2 of Protocol No. 7.

108. The Government claimed, firstly, that the applicant had not been resident in Russia because he had flown in from Cyprus. Secondly, they alleged that his visa had no longer been valid and his residence had therefore been unlawful, referring to the Commission's decision in the *Voulfouvitch and Oulianova v. Sweden* case (no. 19373/92, Commission decision of 13 January 1993). Thirdly, they maintained that the decision on the applicant's exclusion had been taken "in accordance with the law", namely section 27 § 1 of the Entry Procedure Act, and that an alien could be expelled before being able to exercise his procedural rights if this was

necessary "in the interests of public order or is grounded on reasons of national security". The Government did not state the reasons underlying the expulsion decision, referring to "generally accepted international practice". They lastly pointed out that the right to admit aliens to its territory was a universally recognised sovereign right of a State.

B. The Court's assessment

1. Applicability of Article 1 of Protocol No. 7

109. The scope of application of Article 1 of Protocol No. 7 extends to aliens "lawfully resident" in the territory of the State in question. It is therefore necessary to ascertain that the applicant was lawfully resident in Russia at the time of his exclusion from Russian territory.

110. Firstly, as to the Government's argument that the applicant could not be considered "resident" because he had come from Cyprus and was thus outside Russian territory, the Court emphasises that the notion of "residence" in a given State is broader than that of "physical presence" on that State's territory. As paragraph 9 of the Explanatory Report indicates, the word "resident" operates to exclude those aliens who have not been admitted to the territory or have only been admitted for non-residential purposes (see paragraph 48 above). These exceptions are obviously inapplicable to someone who, like the applicant, had continuously resided in the country for many years. It does not appear plausible to the Court that, after having been admitted for residential purposes and having established his or her residence in a given State, an individual would cease to be "resident" each and every time he or she took a trip abroad, no matter how short in duration. The notion of "residence" is akin to the autonomous concept of "home" developed under Article 8 of the Convention, in that both are not limited to physical presence but depend on the existence of sufficient and continuous links with a specific place (see, *mutatis mutandis*, *Prokopovich v. Russia*, no. 58255/00, § 36, ECHR 2004-XI, and *Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109). In the instant case the applicant had been continuously resident in Russia since 1994 and he had not established his residence elsewhere. His absence abroad was of a short duration and, on coming back, he expected to continue his residence in Russia. This is all the more evident in the light of the fact that his very young son K. had remained on Russian soil. The Court accordingly finds that the applicant was "resident" in Russia at the material time.

111. Secondly, as to the Government's second argument about the allegedly unlawful nature of his residence, the Court observes that, by contrast with the applicants in the above-mentioned *Voulfouvitch and Oulianova* case, who had arrived on one-day transit visas without ever

having been resident in Sweden and had no legitimate expectation that they would be permitted to stay once their asylum application had been turned down, the applicant in the present case had been lawfully resident in Russia for over seven years and at the material time possessed a multiple-entry annual visa valid until 19 June 2002. The Government did not explain why they considered that the applicant's visa had been invalid at the time of his attempted return to Russia. The Court, for its part, does not discern any information in the case file to corroborate such an allegation. The visa the applicant possessed entitled him to reside in Russia and his place of residence had been registered on the basis of that visa (see paragraph 19 above). There had been no deportation order against him or any decision on reducing the term of validity of his visa. Finally, in so far as the Government may be understood to be referring to the effect of the border control's cancellation of the applicant's visa in the morning of 3 June 2002 (see paragraph 23 above), the Court considers that this act cannot deprive the applicant of his status as a "lawful resident" in the preceding period. Were it otherwise, a decision to expel would in itself remove the individual from the protection of Article 1 of Protocol No. 7 with the result that its guarantees would have no sphere of application at all. Accordingly, the Court dismisses the Government's claim that the applicant's residence was not lawful.

112. A third element required for Article 1 of Protocol No. 7 to apply is that an alien be "expelled". The notion of "expulsion" is an autonomous concept which is independent of any definition contained in domestic legislation (see *Bolat v. Russia*, no. 14139/03, § 79, ECHR 2006-XI). With the exception of extradition, any measure compelling the alien's departure from the territory where he was lawfully resident constitutes "expulsion" for the purposes of Article 1 of Protocol No. 7 (ibid.; see also paragraph 10 of the Explanatory Report cited in paragraph 50 above). The Court has no doubt that by issuing a decision of such nature as to bar the applicant from returning to Russia following his next trip abroad, the Russian authorities sought to prevent him from re-entering Russian territory and to compel his definitive departure from Russia. The applicant may therefore be considered to have been "expelled".

113. In the light of the above considerations, the Court finds that Article 1 of Protocol No. 7 was applicable in the present case.

2. Compliance with Article 1 of Protocol No. 7

114. The Court reiterates that the High Contracting Parties have a discretionary power to decide whether to expel an alien present in their territory but this power must be exercised in such a way as not to infringe the rights under the Convention of the person concerned (see *Bolat*, cited above, § 81, and *Agee v. the United Kingdom*, no. 7729/76, Commission decision of 17 December 1976, DR 7). Paragraph 1 of this Article provides

that an individual may be expelled only "in pursuance of a decision reached in accordance with law" and subject to the exercise of certain procedural guarantees. Paragraph 2 allows the authorities to carry out an expulsion before the exercise of these guarantees only when such expulsion is necessary in the interests of public order or national security.

115. The Government invoked the exception mentioned in paragraph 2 of Article 1 of Protocol No. 7 to justify the course of action adopted by the Russian authorities against the applicant. However, as the Court has found above, they did not submit any material or evidence capable of corroborating their claim that the interests of national security or public order had been at stake. Accordingly, the exception set out in paragraph 2 cannot be held to apply in the instant case and the normal procedure described in paragraph 1 must have been followed. As regards compliance with that procedure, the Court notes that the Government did not furnish any explanation as to why the decision on the applicant's exclusion had not been communicated to him for more than three months and why he had not been allowed to submit reasons against his expulsion and to have his case reviewed with the participation of his counsel. He was therefore not afforded the procedural guarantees set out in Article 1 of Protocol No. 7.

116. There has therefore been a violation of Article 1 of Protocol No. 7.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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

118. The applicant claimed 20,000 euros (EUR) in respect of the non-pecuniary damage caused by his expulsion and overnight detention at the airport, the discriminatory treatment he had suffered on account of his religious beliefs, his exclusion from his home of eight years and his forced separation from his infant child K.

119. The Government submitted that the claim was excessive and ill-founded. They pointed out that, by virtue of their profession, missionaries often changed their place of residence.

120. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration resulting from the measure compelling his departure from Russia which was not accompanied by any procedural guarantees, his lengthy separation from his son K., and his

overnight detention at the airport without any clear legal basis or any possibility of claiming compensation. In the Court's assessment, the damage the applicant suffered is not sufficiently compensated for by the finding of a violation of the Convention. However, it finds the amount claimed by the applicant excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

121. The applicant claimed EUR 810 in respect of legal fees owed to Mr Holiner for preparation of the reply to the Government's observations. He enclosed a payment receipt drafted under Mr Holiner's letterhead.

122. The Government submitted that this claim should be rejected in full.

123. On the basis of the material produced before it, the Court is satisfied that the legal fee claimed for the preparation of the applicant's observations is reasonable and that the expenses were actually incurred. Accordingly, the Court awards the applicant the entire amount claimed in respect of costs and expenses, plus any tax that may be chargeable to him.

C. Default interest

124. 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. *Holds* by six votes to one that there has been a failure to comply with Article 38 § 1 (a) of the Convention in that the Government have refused to submit the document requested by the Court;

2. *Holds* unanimously that there has been a violation of Article 9 of the Convention;

3. *Holds* unanimously that it is not necessary to examine the complaint under Article 14 of the Convention, taken in conjunction with Article 9;

4. *Holds* unanimously that there has been a violation of Article 8 of the Convention in respect of the applicant and his son;

5. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;

6. *Holds* unanimously that it is not necessary to examine the complaint under Article 5 § 4 of the Convention;

7. *Holds* unanimously that there has been a violation of Article 5 § 5 of the Convention;

8. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 7 to the Convention;

9. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, the following amounts:
(i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 810 (eight hundred and ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(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.

10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

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

C.L.R
S.N.

PARTLY DISSENTING OPINION OF JUDGE KOVLER

I share with some hesitation the conclusions of the Court concerning the alleged violations of Articles 9 and 8 and Article 5 § 1, as well as some of its other conclusions, but I am strongly opposed to the conclusions on the Article 38 and Article 1 of Protocol No. 7 issues.

The conclusion that there was a breach of Article 38 § 1 of the Convention is based on a very broad interpretation of the phrase "... the State concerned shall furnish all necessary facilities" in this Article. I would observe that in the recent Grand Chamber judgment *Stoll v. Switzerland* the Court accepted the idea of "a necessary discretion" for some confidential official documents of the member States (see *Stoll v. Switzerland* [GC], no. 69698/01, § 136, ECHR 2007-) and the need to preserve it. The document requested by the Court in the present case was the report of the Federal Security Service dated 18 February 2002 containing the factual grounds for the applicant's expulsion from Russia (see details in paragraph 51 of the judgment). The Court notes itself that the report was examined in the domestic proceedings and the applicant's representative in those proceedings was allowed to take cognisance of its contents, but he could not disclose its contents to the Court because of the confidentiality undertaking he had been required to sign (see paragraph 36). To my mind, the conclusion of the Court is rather strange: "This fact indicates that the nature of the information contained in the report was not such as to exclude any possibility of making it known to anyone outside the secret intelligence services and the highest State officials" (see paragraph 56). I think that a serious question relating to the interpretation of the Court's case-law on Article 38 and to the concept of the States' margin of appreciation is raised.

As to Article 1 of Protocol No. 7, I see a great difference between the present case and the case of *Bolat* (see *Bolat v. Russia*, no. 14139/03, ECHR 2006-IX), where the applicant was expelled at the time when his complaint about the annulment of his residence permit was being reviewed and the interim measure indicated by the Town Court for the period necessary for the review was effective. In the present case, on the contrary, the applicant was able to challenge the decision refusing his return to Russia at two levels of jurisdiction and the Moscow Regional Court finally dismissed the complaint in a nine-page judgment. In my view, this procedure satisfied the provisions of both paragraphs of Article 1 of Protocol No. 7 of the Convention, but the Court preferred to give a new, rather radical, interpretation (very brief, I must say) of paragraph 2 of this provision (see paragraphs 114-115 of the judgment).

Last but not least, I am not sure that the activities of a missionary are the same as those of a priest and amount only to the exercise of the right to freedom of religion. The notion of "social work" is not clarified in our judgment (see paragraphs 64-65).