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La Corte EDU su espulsione arbitraria per mancanza di adeguate garanzie procedurali (CEDU, sez. IV, sent. 15 novembre 2022, ric. n. 21196/21)

Il caso deciso dalla Corte EDU riguarda l'espulsione dalla Bosnia-Erzegovina di un cittadino montenegrino coniugato con una donna bosniaca. L'ordinanza di espulsione era stata disposta dalle autorità nazionali sulla base di informazioni, provenienti dall'agenzia di intelligence nazionale, stando alle quali il ricorrente rappresentava una minaccia per la sicurezza nazionale. Nel ricorso, invocando l'articolo 8 della Convenzione, quest'ultimo ha lamentato l'arbitrarietà dell'ordinanza adottata, formulata peraltro in termini così vaghi e generici da impedirgli una puntuale contestazione.

Secondo la consolidata giurisprudenza della Corte di Strasburgo, anche laddove è in gioco la sicurezza nazionale, i concetti di legalità e di Stato di diritto in una società democratica richiedono che le misure che incidono sui diritti umani fondamentali siano oggetto di una qualche forma di procedimento in contraddittorio dinanzi a un organo indipendente, competente a riesaminare i motivi della decisione e la fondatezza delle prove. In proposito, la Corte ha osservato che la Corte di Stato bosniaca ha ritenuto la presenza del ricorrente una minaccia per la sicurezza nazionale senza alcuna verifica circa la credibilità e la veridicità delle prove ad essa presentate dall'agenzia di intelligence nazionale. In ragione di ciò, i giudici di Strasburgo hanno ritenuto che l'ordinanza impugnata costituisse un'ingerenza nell'esercizio del diritto del ricorrente al rispetto della sua vita familiare ed ha ritenuto che sebbene al ricorrente siano state concesse alcune garanzie procedurali, tali garanzie non erano state adeguate e sufficienti a soddisfare i requisiti procedurali dell'articolo 8. Di conseguenza, l'interferenza con il suo diritto al rispetto della sua vita familiare non era conforme alla "legge" con conseguente violazione dell'articolo 8 della Convenzione.

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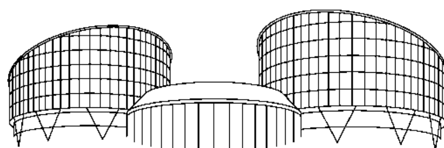

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF XXX v. BOSNIA AND HERZEGOVINA

(Application no. 21196/21)

JUDGMENT

STRASBOURG

15 November 2022

This judgment is final but it may be subject to editorial revision.

In the case of XXX v. Bosnia and Herzegovina,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:
Tim Eicke, President,
Faris Vehabović,
Pere Pastor Vilanova, *judges*,
and Ludmila Milanova, *Acting Deputy Section Registrar*,

Having regard to:

the application (no. 21196/21) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 13 April 2021 by a Montenegrin national, Mr XXX, born in XXX and living in XXX, ("the applicant") who was represented by Mr D. Barbarić, a lawyer practising in Mostar;

the decision to give notice of the complaint concerning the applicant's deportation under Article 8 of the Convention to the Government of Bosnia and Herzegovina ("the Government"), represented by their Acting Agent, Ms J. Cvijetić, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 18 October 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns an allegation of arbitrary deportation to Montenegro.

2. The applicant moved from Montenegro to Bosnia and Herzegovina in late 2013. In 2015 he married a citizen of Bosnia and Herzegovina and had a child with her. In 2019 the relevant authorities issued an order withdrawing his residence permit, ordering his deportation and imposing a three-year ban on his re-entering Bosnia and Herzegovina on the ground that, according to information provided by the national intelligence agency, he posed a threat to national security. The Court of Bosnia and Herzegovina ("the State Court") upheld that order in 2020. On 14 October 2020 the Constitutional Court found no violation of Article 8 of the Convention. In the meantime, on 16 May 2019, the applicant left the country. On 17 May 2022, after the expiry of the three-year ban, he tried to re-enter Bosnia and Herzegovina but was denied entry on the ground that he still posed a threat to national security. He did not appeal against that decision.

THE COURT'S ASSESSMENT

3. The applicant complained, relying on Article 8 of the Convention, that the 2019 order was arbitrary. In particular, he submitted that the order was in vague, general terms which lacked particularity such as to enable him to conduct any meaningful challenge to the allegations against him.

4. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.
5. The parties agree that the impugned order amounted to an interference by a public authority with the exercise of the applicant's right to respect for his family life, as guaranteed by Article 8. Such interference will be in breach of Article 8 unless it is "in accordance with the law", pursues a legitimate aim under paragraph 2 and is "necessary in a democratic society".
6. In a series of Bulgarian cases, the Court has developed the idea of the need for procedural safeguards as an integral feature of the lawfulness of deportation and exclusion decisions under Article 8 of the Convention (see, among other authorities, *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002, and *Amie and Others v. Bulgaria*, no. 58149/08, 12 February 2013). It is clear from this case-law that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require measures affecting fundamental human rights to 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 (see *Amie and Others*, cited above, § 92). In the context of such proceedings, the person concerned 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 the assessment has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary (see *Al-Nashif*, cited above, § 124).
7. The present applicant had the possibility of seeking judicial review of the 2019 order before the State Court (contrast *Al-Nashif*, cited above, § 126). It has not been disputed that the State Court is a fully independent court, that it sees all the evidence upon which the Ministry of Security's order to deport an individual is based and that it forms its own, independent view as to whether the Ministry reached the correct decision (contrast *Liu v. Russia (no. 2)*, no. 29157/09, §§ 88-89 and 91, 26 July 2011). It is thus competent to examine and, if necessary, to reject the Ministry of Security's assertion that the person concerned poses a threat to national security.
8. However, in the proceedings before that court neither the applicant nor his lawyers were able to ascertain even the slightest factual reasons for his deportation. Furthermore, in Bosnia and Herzegovina there are no specialised lawyers who hold the relevant authorisation to access classified documents in the case file which are not accessible to the persons concerned (contrast *I.R. and G.T. v. the United Kingdom* (dec.), nos. 14876/12 and 63339/12, § 63, 28 January 2014, and *Saeed v. Denmark* (dec.), no. 53/12, § 39, 24 June 2014; see also *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, §§ 168-92, 15 October 2020 in which the Court dealt with a similar issue, although under Article 1 of Protocol No. 7 to the Convention). Lastly, the State Court gave a very general response in dismissing the applicant's plea that he had not acted to the detriment of national security. It merely held that it could be seen from the evidence in the file that the applicant's presence posed a threat to national security, without any verification of the credibility and veracity of the evidence submitted to it by the national intelligence agency (see *Amie and Others*, § 98, and *Muhammad and Muhammad*, § 199, both cited above). For those reasons, the Court disagrees

with the Government that the applicant was offered an effective opportunity to submit reasons against his deportation and be protected against any arbitrariness. Indeed, the Court has reiterated on many occasions that all the provisions of the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see, for example, *Muhammad and Muhammad*, cited above, § 122).

9. The Court therefore considers that, although the applicant was afforded certain procedural guarantees against arbitrariness, those guarantees were not adequate and sufficient to satisfy the procedural requirements of Article 8. As a result, the interference with his right to respect for his family life was not in accordance with a "law" satisfying the requirements of the Convention.

10. There has accordingly been a violation of Article 8 of the Convention. That being so, the Court is not required to determine whether the interference with the applicant's family life pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

11. The applicant claimed 35,000 euros (EUR), corresponding to the loss of income he had allegedly sustained on account of his deportation, in respect of pecuniary damage, EUR 20,000 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

12. The Government contested the applicant's claims.

13. The Court observes that the only basis on which just satisfaction can be awarded, in the present case, lies in the fact that the applicant did not enjoy sufficient procedural safeguards in the proceedings leading to his deportation. The Court cannot speculate as to any other outcome of the proceedings. It therefore rejects the claim pertaining to pecuniary damage. At the same time, it awards the applicant EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable. Lastly, the Court notes that the applicant has not submitted any evidence (bills or invoices) about the costs and expenses incurred. Simple reference to the tariff fixed by the local bar associations, for example, is insufficient in this regard. Therefore, his claim in respect of costs and expenses is rejected for lack of substantiation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ludmila Milanova Acting Deputy Registrar
Tim Eicke President