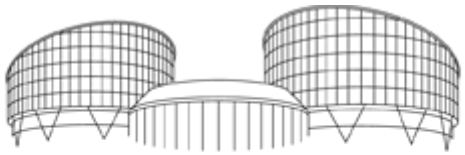

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LJATIFI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 19017/16)

JUDGMENT

STRASBOURG

17 May 2018

FINAL

08/10/2018

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

In the case of Ljatifi v. the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Linos-Alexandre Sicilianos, *President,*
Aleš Pejchal,

Krzysztof Wojtyczek,
Ksenija Turković,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 3 April 2018,

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

PROCEDURE

1. The case originated in an application (no. 19017/16) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Gjilizare Ljatifi ("the applicant"), on 1 April 2016.

2. The applicant was represented by Mr A. Godžo, a lawyer practising in Ohrid. The Macedonian Government ("the Government") were represented by their former Agent, Mr K. Bogdanov, succeeded by the current Agent, Ms D. Djonova.

3. The Serbian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

4. The applicant alleged that she had not been provided with the minimum procedural safeguards in proceedings in which she had been required to leave the respondent State. She also complained that the subsequent judicial review proceedings had not been an effective remedy in that respect.

5. On 25 August 2016 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1991 and lives in Skopje.

A. Background to the case and proceedings for termination of the applicant's asylum

7. In 1999 the applicant (eight years old at the time) and her family (parents and three siblings) fled Kosovo[1] and settled in the respondent State, where she has been living ever since. In 2005 she was granted asylum and a residence permit. She entered into a common-law partnership with a Macedonian national, with whom she has three minor children (the children also have Macedonian nationality). Her residence permit was extended each year until 3 February 2014, when the Ministry of the Interior terminated her asylum, holding that she was "a risk to [national] security." The decision was preceded by an interview at which the applicant, who had been

legally represented, had confirmed her family situation and her intention to marry her partner. That the applicant represented a security risk was not discussed at the interview. The decision further stated:

> "[the applicant] is obliged to leave the respondent State within twenty days of receipt of the final decision."

8. The applicant, through her lawyer, challenged the decision as arbitrary. She argued that there was no evidence that her presence in the respondent State represented a threat to national security. Furthermore, she had not been given an opportunity to challenge any such evidence.

9. On 3 July 2014 the Administrative Court dismissed the applicant's appeal and upheld the decision of the Ministry, noting that the latter had obtained a classified written note (*службена белешка со назнака за доверлив документ*) from the Security and Counter Intelligence Agency ("the Intelligence Agency") indicating that she represented a threat to national security. The court did not provide any further details regarding that document. It ruled accordingly that the impugned proceedings had been lawful.

10. The applicant's representative appealed against that decision before the Higher Administrative Court, reiterating the arguments raised previously. She further alleged that the wording used by the Administrative Court implied that there were some documents on which the impugned decision had been based. However, she had not been given an opportunity to have knowledge of or to comment on that evidence.

11. By a decision of 1 July 2015, served on the applicant on 6 October 2015, the Higher Administrative Court dismissed the applicant's appeal and upheld the Ministry's decision. The relevant part of the decision reads as follows:

> "... [The Ministry] decided on the basis of ... classified information obtained from a relevant body (which) proves indisputably that her presence in (the respondent State) represents a threat to its security.
>
> The Higher Administrative Court has examined the (applicant's) allegations ... that information provided by the relevant body within the Ministry of the Interior was not forwarded to her and her representative, but it considers them irrelevant ..."

B. Other information

12. In the proceedings before the Court, the Government submitted a redacted version of the classified note that the Intelligence Agency had sent on 19 September 2013 to the Ministry of the Interior. The relevant parts of the note read as follows:

> "... following security checks of [the applicant], it has been established that recognition of her asylum status would be a threat to the (national) security of the [respondent State].
>
> It has been established that her (hidden text) ... are perpetrators of tens of crimes (serious thefts, thefts and acts of concealment). The applicant was aware of and supported all crimes committed by her (hidden text) ... She has also been living in a common-law partnership with M.M. in order to obtain the monetary allowance to which she was entitled having been granted asylum.
>
> In such circumstances, we are of the opinion that she should not be granted asylum in [the respondent State]."

13. On 11 November 2015 the Ministry granted a request by the applicant to leave the respondent State in order to obtain, as she had stated, documents from the Serbian authorities for marrying her common-law partner in the respondent State.

She was allowed re-entry to the respondent State in January 2016, which was one month after the expiry of the time-limit for returning to the respondent State. In February 2016 she contacted the Ministry with a view to submitting the relevant documents.

II. RELEVANT DOMESTIC LAW

A. Asylum and Subsidiary Protection Act

14. Section 6(2) of the Act provides that an alien cannot be granted asylum or subsidiary protection if he or she represents a threat to national security.

15. A person under subsidiary protection has the same status as a national of the respondent State as regards social-protection rights (*права од социјална заштита*) (section 60).

B. Aliens Act

16. Section 49(3) of the Aliens Act provides that a temporary residence card can be issued to an alien who is in a close family relationship with a Macedonian national.

III. INTERNATIONAL LAW

Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984

17. The relevant parts of the Explanatory Report read as follows:

> "9. As to its field of application, this article only concerns an alien lawfully resident in the territory of the State in question.
>
> ...
>
> 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 ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7 TO THE CONVENTION

18. The applicant complained under Article 6 of the Convention that there had been no evidence that she represented a threat to national security and that she had not been given an opportunity to have knowledge of and to comment on any such evidence. Furthermore, the authorities had not provided reasons for their decisions. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], no. 37685/10, § 124, 20 March 2018; *Söderman v. Sweden* [GC], no. 5786/08, § 57, ECHR 2013, and *Moretti and Benedetti v. Italy*, no. 16318/07, § 27, 27 April 2010), considers that the applicant's

complaints should be analysed from the standpoint of Article 1 of Protocol No. 7 to the Convention. This Article reads as follows:

> "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. Admissibility

1. Applicability of Article 1 of Protocol No. 7

(a) The parties' submissions

19. The Government disputed the applicability of Article 1 of Protocol No. 7 in the present case, because there had been no order, decision or measure taken with a view to expelling the applicant from the respondent State. The order contained in the Ministry's decision (paragraph 7 above) concerned the time-limit within which the applicant had been requested to leave voluntarily the territory of the respondent State. They urged the Court to take into account the Explanatory Report to Protocol No. 7 to the Convention (paragraph 17 above). According to the Government, "expulsion was an autonomous concept that concerned measures or actions aimed at forcible removal of a person from the territory of one State to the territory of another State." They averred that there was no risk that the applicant would be expelled in the future. In this connection, they stated that there was no example of the forcible removal of a person who had been residing in the respondent State in relation to the Kosovo crisis of 1999.

20. The applicant contested the Government's objection. She stated that the impugned decision of the Ministry had ordered her to leave the respondent State within twenty days of its becoming final. That time-limit had expired a long time ago and its enforcement was not dependent on any subsequent decision. Accordingly, she was under an imminent threat of forcible expulsion at any time.

(b) The Court's assessment

21. The Court notes that the specific guarantees provided for in Article 1 of Protocol No. 7 to the Convention apply to the expulsion of aliens who are lawfully resident on the territory of a State that has ratified this Protocol (see *Lupsa v. Romania*, no. 10337/04, §§ 51 and 52, ECHR 2006-VII). It was not argued that the applicant had not been residing lawfully in the respondent State at the time. The Government's objection under this head concerned the alleged absence of an expulsion order or any other measure taken by the national authorities with a view to expelling the applicant from the respondent State. Accordingly, the Court will confine itself to examining whether the applicant's situation following the impugned decision of the Ministry could be subsumed under the notion of "expulsion" within the meaning of Article 1 of Protocol No. 7 to the Convention.

22. In this connection the Court notes that the Ministry's decision of 3 February 2014 had the effect of terminating the applicant's asylum in the respondent State, which she had enjoyed since 2005 and which was the only ground for her lawful residence. The decision also contained an explicit order compelling the applicant to leave the respondent State within the specified time-limit (see paragraph 7 above). The Court notes that that order was not revoked or otherwise invalidated. Furthermore, there was no decision by any domestic authority by which the implementation of that order was suspended or the applicant granted leave to stay in the respondent State (see, conversely *Saeed v. Denmark* (dec.), no. 53/12, § 7, 24 June 2014). Furthermore, as stated by the applicant and not contested by the Government, the enforcement of that order is not subject to any further formal requirements. Accordingly, the applicant risks expulsion at any time. The fact that the applicant was granted one-off permission to leave and return to the respondent State (see paragraph 13 above), as well as the fact that the order has not been enforced to date, are insufficient for the Court to conclude that the order compelling the applicant to leave the respondent State is no longer in force or that it cannot lead to her expulsion. Both the single permission to leave and the authorities' tolerance of the applicant's continued stay in the respondent State arose from decisions made in the exercise of their discretion and were not based on any statutory grounds. Similar considerations apply to the assertion that no one residing in the respondent State on the same grounds as the applicant had been forcibly removed (see paragraph 19 above).

23. In such circumstances, the Court is satisfied that the Ministry's final decision of 3 February 2014 ordering the applicant to leave the respondent State is to be regarded, for all practical purposes, as a measure of expulsion taken against her, which falls within the ambit of Article 1 of Protocol No. 7 to the Convention (see paragraph 17 above). The Government's objection must therefore be rejected.

2. Non-exhaustion of domestic remedies

(a) The parties' submissions

24. The Government submitted that the applicant had not exhausted all effective remedies. In particular, she had not availed herself of the possibility provided for in section 49 of the Aliens Act (paragraph 16 above) to regularise her stay in the respondent State.

25. The applicant maintained that the legal avenue suggested by the Government could not be regarded as a remedy capable of challenging the expulsion order against her. It was merely a claim for the regularisation of her stay in the respondent State. Given the findings of the domestic authorities that she represented a threat to national security, such a claim lacked any prospects of success.

(b) The Court's assessment

26. The general principles regarding the exhaustion rule under Article 35 § 1 of the Convention are set out in *Vučković and Others v. Serbia* ((preliminary objection) [GC] nos. 17153/11 and 29 others, §§ 70-77, 25 March 2014).

27. In that context, the Court finds it appropriate to reiterate that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. It is not sufficient that the

applicant may have unsuccessfully exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies" (see, *ibid.,* §§ 71-75).

28. Turning to the present case, the Court notes that the Government's non-exhaustion plea rests on the applicant's failure to seek temporary residence in the respondent State under section 49 of the Aliens Act. However, it was not presented with any argument or example of domestic practice that such a request would have led to a review of the procedure followed by the Ministry in making the risk assessment and in issuing the order compelling the applicant to leave the respondent State. Indeed, there is nothing to suggest that a request for temporary residence was capable of remedying directly the applicant's grievances before the Court, namely that she had not been provided with the minimum procedural safeguards to protect her interests in the impugned proceedings. Furthermore, the Court has not been presented with any evidence that a request for temporary residence would be granted to an alien who was deemed to represent a risk to national security, as was the applicant. Assuming that the applicant might have been able to regularise her stay in the respondent State on the basis of such a request, it is to be noted that such a decision would have rested on family grounds that were not connected with her complaints before the Court. For these reasons, the Court rejects the Government's non-exhaustion objection.

29. The Court concludes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other grounds for declaring it inadmissible have been established.

B. Merits

1. The parties' submissions

30. The applicant reiterated her complaints that she had not been provided with the minimum procedural safeguards guaranteed in the Article relied on. The classified note of the Intelligence Agency (see paragraph 12 above) had never been communicated to her. Furthermore, the arguments submitted in support of her appeals before the administrative courts had not been subject to a thorough and rigorous examination. In particular, the courts had failed to provide reasons for their decisions.

31. The Government stated that the impugned decision had been rendered by the competent body and had a statutory basis (paragraph 14 above). The applicant, who had been legally represented, had been interviewed before the adoption of that decision and after it had become final (paragraphs 7 and 13 above). On those occasions, the authorities had suggested that she regularise her stay on family grounds. Furthermore, her case had been subject to judicial review by the courts at two levels. In any event, given the existence of reasons of national security, the impugned decision had been justified under paragraph 2 of Article 1 of Protocol No. 7.

2. The Court's assessment

32. In the event of expulsion, in addition to the protection afforded by Articles 3, 8 and 13 of the Convention, aliens lawfully resident in the territory of a State which has

ratified Protocol No. 7 benefit from the specific guarantees provided in its Article 1 (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 70, 24 April 2008).

33. The Court notes that the first guarantee afforded to persons referred to in that Article is that they "shall not be expelled ... except in pursuance of a decision reached in accordance with law". Since the word "law" refers to domestic law, the reference to it, as in all the provisions of the Convention, concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and also afford a measure of protection against arbitrary interference by the public authorities with the rights secured in the Convention (see, *ibid*., § 39, and *Lupsa*, cited above, § 55).

34. In the instant case, the Court is satisfied that section 6(2) of the Asylum and Subsidiary Protection Act constitutes the legal provision on which the order compelling the applicant to leave the respondent State was based. Accordingly, it concludes that the impugned measure had a basis in domestic law.

35. In so far as the impugned order was based on national security considerations, the Court has held that the requirement of foreseeability does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. 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 or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary (see *C.G. and Others,* cited above, § 40).

36. The Court observes that the Ministry's order requiring the applicant to leave the State simply stated that the measure was being taken because she "[was] a risk to [national] security." Such a general statement, containing no indications of the facts serving as the basis for that assessment, was accepted without any further details in the ensuing judicial review proceedings. Both levels of administrative court only added that the Ministry had reached its decision on the basis of a classified document obtained from the Intelligence Agency.

37. In the proceedings before the Court, the Government produced a redacted version of the classified document which had allegedly served as the grounds on which the impugned assessment had been based. The only fact emerging from that document that was sufficient to consider the applicant as a security risk was her alleged knowledge of and support for other people's involvement in the commission of multiple thefts and acts of concealment (see paragraph 12 above). The document contains no indication capable of establishing the number and identity of those people or the applicant's relationship, if any, with them. It further stated that the applicant had lived in a common-law partnership with a Macedonian national and had been obtaining a monetary allowance on the basis of her asylum.

38. The Court observes that no other factual details were provided in support of the allegations against the applicant. Furthermore, no proceedings were brought

against her for participating in the commission of any offence in the respondent State or any other country.

39. The Court further observes that apart from the general statement mentioned above, the authorities did not provide the applicant with the slightest indication of the grounds on which they had based their assessment. The classified note of the Intelligence Agency submitted in redacted form in the proceedings before the Court, was not available for consultation under any condition in the impugned proceedings before the Ministry. Lacking even an outline of the facts which had served as a basis for that assessment, the applicant was not able to present her case adequately in the ensuing judicial review proceedings.

40. Lastly, there is nothing to suggest that the administrative courts were provided with the classified note of the Intelligence Agency, let alone with any further factual details, for the purpose of verifying that the applicant really did represent a danger for national security. In such circumstances, the Court considers that the courts confined themselves to a purely formal examination of the impugned order. In any event, they did not explain, if only summarily, the importance of preserving the confidentiality of that document or the extent of the review they had carried out (see *Regner v. the Czech Republic* [GC], no. 35289/11, §§ 158-160, ECHR 2017 (extracts)). Accordingly, they failed to subject the executive's assertion that the applicant posed a national security risk to meaningful scrutiny (see *ibid*., §§ 43 and 44; *Lupsa*, cited above, § 41; and *Kaya v. Romania*, no. 33970/05, § 42, 12 October 2006).

41. The Court does not need to examine the Government's argument that the impugned measure was justified under paragraph 2 of Article 1 of Protocol No. 7, because that provision concerns situations in which an alien has been already expelled, which was not the situation in the present case.

42. Against this background, the Court finds that there has been a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No. 7 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

43. The applicant also complained that the administrative courts had not provided for an effective review of her case. She relied on Article 13 of the Convention.

44. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

45. Having regard to the finding of a violation under Article 1 of Protocol No. 7 as a result of the failure of the domestic courts properly to scrutinise whether the impugned order had been issued on genuine national security grounds (see paragraph 42 above), the Court considers that it is not necessary to examine whether there has also been a violation of Article 13 of the Convention in this case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contested this claim as unsubstantiated and excessive. They submitted that the applicant could seek the reopening of the proceedings if the Court found a violation of the Convention.

49. The Court considers that the applicant has sustained non-pecuniary damage on account of the violation found. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards her EUR 2,400 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

50. The applicant also claimed EUR 4,490 for the costs and expenses incurred before the Court. This figure concerned legal fees for the preparation of the application form and the comments in reply to the Government's observations, which were calculated in accordance with the tariff list of the Macedonian Bar. She requested that any award under this head be paid directly to her legal representative.

51. The Government contested this claim as unsubstantiated and excessive. They argued that the applicant had not presented a legal document requiring her to pay the amount claimed. Furthermore, the case had been part of a project implemented by a local non-governmental organisation, which had paid all the related costs. In any event, all of the costs claimed had not been actually and necessarily incurred and the claim was not reasonable as to the quantum.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to the quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress (see *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004, and *Hajnal v. Serbia*, no. 36937/06, § 154, 19 June 2012). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,600 for the proceedings before the Court, plus any tax that may be chargeable to the applicant. This amount is to be paid into the bank account of the applicant's representative.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No. 7 to the Convention;

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

4. *Holds*, unanimously,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and

(ii) EUR 1,600 (one thousand six hundred 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;

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

Done in English, and notified in writing on 17 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel CamposLinos-Alexandre Sicilianos
RegistrarPresident

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Sicilianos;

(b) Partially dissenting opinion of Judge Eicke.

L.A.S.
A.C.

CONCURRING OPINION OF JUDGE SICILIANOS

1. In his partly dissenting opinion, my esteemed and distinguished colleague, Judge Eicke, raises an interesting issue concerning the nature of the violation of Article 1 of Protocol No. 7 to the Convention in the present case. According to the judgment, there has been an *actual* violation of this provision because some of the procedural guarantees contained therein have not been respected. This can be seen from paragraph 2 of the operative part, according to which "... there *has been* a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No. 7 to the Convention" (my emphasis). According to Judge Eicke, this is not an actual but rather a "would-be" violation of Article 1 of Protocol No. 7. He would instead have concluded that there:

"would have been a violation of Article 1 of Protocol No. 7 to the Convention if the applicant had been expelled on the basis of the decision of 3 February 2014' (see *mutatis mutandis* paragraphs 1 and 3 of the operative part of *Paposhvili v. Belgium* [GC], no.41738/10, ECHR 2016-I) or even that there 'would be a violation of Article 1 of Protocol No 7 to the Convention if the applicant were expelled on the basis of the decision of 3 February 2014' (see *mutatis mutandis* paragraph 3 of the operative part of *Sultani v. France*, no. 45223/05, ECHR 2007-IV (extracts)".

2. I respectfully disagree with this approach for the following reasons.

3. Article 1 of Protocol No. 7 does not concern the substantive grounds for expulsion. It is only focused on a series of procedural guarantees. It was meant to constitute *added value to the already existing provisions* in respect of aliens, either in the Convention as interpreted by the then European Commission and the Court, or in other international instruments. This is clearly stated in the Explanatory Report in respect of Protocol No. 7:

"6. In line with the general remark made in the introduction (see above, paragraph 4), it is stressed that an alien lawfully in the territory of a member State of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the European Convention on Human Rights, as interpreted by the European Commission and Court of Human Rights and – in those States which are Parties – by the European Convention on Establishment of 1955 (Article 3), the European Social Charter of 1961 (Article 19, paragraph 8), the Treaty establishing the European Economic Community of 1957 (Article 48), the Geneva Convention relating to the status of refugees of 1951 (Articles 32 and 33) and the United Nations Covenant on Civil and Political Rights of 1966 (Article 13).

7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the European Convention on Human Rights in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. *The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the European Convention on Human Rights*" (Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 117, paragraphs 6-7, my emphasis)."

4. As has been observed by the UN Human Rights Committee in relation to the corresponding provision of the International Covenant on Civil and Political Rights (ICCPR) – Article 13 ICCPR – the purpose of the procedural guarantees contained therein "is clearly to prevent arbitrary expulsion" (CCPR General Comment No. 15/27 (1986): "The Position of Aliens Under the Covenant", paragraph 10). The same idea is applicable*mutatis mutandis* to the guarantees contained in Article 1. In other words, the procedural guarantees of Article 1 have a *preventive* character: to provide for an accessible and foreseeable legal basis for expulsion and allow the alien concerned to submit reasons against his expulsion, to have his case reviewed and to be represented for these purposes before the competent authority. This is the quintessence of the obligations of States Parties to Protocol No. 7 under its Article 1. *What really matters according to this provision is the procedure as such*.

5. In order for the procedural rights recognised in Article 1 of Protocol No. 7 to be really effective, they should in principle be exercised *before* the execution of an expulsion order. To accept the opposite would drastically diminish their effectiveness. This interpretation is consistent with the general preventive character of Article 1 of Protocol No. 7, but also with paragraph 2 of this provision, which introduces an exception to the rule, when the expulsion "is necessary in the interests of public order or is grounded on reasons of national security". Such interpretation clearly flows from the Explanatory Report:

> "15. As a rule, an alien should be entitled to exercise his rights under sub-paragraphs a, b and c of paragraph 1 before he is expelled. However, paragraph 2 permits exceptions to be made by providing for cases where the expulsion before the exercise of these rights is considered necessary in the interest of public order or when reasons of national security are invoked. These exceptions are to be applied taking into account the principle of proportionality as defined in the case-law of the European Court of Human Rights. ..." (Explanatory Report, cited above, para. 15)."

6. It is true that the most common "scenario" in the (relatively few) cases concerning Article 1 of Protocol No. 7, is that an individual introduces an application to the Court after his expulsion (see for instance *Takush v. Greece*, no. 2853/09, 17 January 2012, with further references). In the present case, by contrast, the applicant has not (yet) been expelled. However, the enforcement of the order compelling the applicant to leave the respondent State is not subject to any formal requirements. Accordingly, the applicant risks expulsion at any time (paragraph 22 of the judgment). This is not only pertinent for purposes of the applicability of Article 1. It is also a necessary and sufficient condition for finding a violation of Article 1 of Protocol No. 7, if the guarantees provided therein have not been respected. As stated above, subject to the exceptions provided for in paragraph 2, Article 1 of Protocol No. 7 is *geared to the phase preceding expulsion*. If one accepts the proposition that the object and purpose of this provision is to introduce a series of guarantees of a preventive character, tending to protect the individual from arbitrary expulsion (see above, paragraph 4), then it seems logical to also accept that the issuance of an order to leave the country, adopted without those guarantees having been respected and enforceable at any time, amounts to a violation of Article 1 of Protocol No. 7.

7. There lies the main difference between Article 1 of Protocol No. 7 and Article 3 of the Convention, as interpreted by the Court in an expulsion context (as for instance in *Paposhvili v. Belgium*, cited above, or in *J.K. v. Sweden*, no 59166/12 [GC], 23 August 2016, §§ 77 et seq.). Article 1 of Protocol No. 7 is mainly about *procedure*. Article 3 of the Convention is essentially about *substance*, i.e. the substantive evaluation of the risk that the applicant would face ill-treatment if expelled to another country. Article 1 of Protocol No. 7 mainly concerns the phase *preceding* expulsion. Article 3 of the Convention is geared to the future, i.e. to the risk faced *after an eventual expulsion*. This is precisely the reason why the Court has accepted the principle of examining the risk faced by the applicant, under Article 3 (and also under Article 2 of the Convention), by taking into account elements that are subsequent to the domestic decisions (see for instance *F.G. v. Sweden* [GC], no. 43611/11, 23 March 2016, esp. § 157). In such circumstances it is perfectly understandable and indeed necessary to find only a conditional – a "would-be" – violation. It would be unthinkable to hold that the international responsibility of a State under the Convention is engaged for not having evaluated elements that were not even submitted to the national authorities. More generally, the whole *ratio* of Article 1 of Protocol No. 7 differs from that of other provisions of the Convention applied in an expulsion context and especially Article 3. It is, therefore, not appropriate, in my view, to draw a parallel between those provisions and to necessarily apply the same solutions.

8. For all those reasons, I do believe that the present judgment is correct in finding an actual and not a conditional violation of Article 1 of Protocol No. 7.

PARTIALLY DISSENTING OPINION OF JUDGE EICKE

1. While I agree with the majority both (a) in rejecting the Respondent Government's preliminary objection *ratione materiae*, as well as (b) in their finding that the decision of the Ministry of Interior of 3 February 2014 as well as the decisions of the Administrative Court (3 July 2014) and the Higher Administrative Court (1 July 2015) failed to comply with the requirements of Article 1 § 1 (a) and (b) of Protocol No. 7 to the Convention, I voted against paragraph 2 of the Operative Part of the Judgment in which the Court concluded that "... there has been a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No. 7 to the Convention" (my emphasis).

2. By reason of a number of the factual circumstances particular to this case, my conclusion would rather have been that there "would have been a violation of Article 1 of Protocol No 7 to the Convention if the applicant had been expelled on the basis of the decision of 3 February 2014" (see *mutatis mutandis* paragraphs 1 and 3 of the operative part of *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016-I) or even that there "would be a violation of Article 1 of Protocol No 7 to the Convention if the applicant were expelled on the basis of the decision of 3 February 2014" (see *mutatis mutandis* paragraph 3 of the operative part of *Sultani v. France*, no.45223/05, ECHR 2007-IV (extracts)".

3. Let me briefly explain the reasons for this minor and perhaps rather technical disagreement.

4. Article 1 of Protocol No. 7 to the Convention, in so far as relevant, provides that:

> "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) ....
>
> 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."

5. There being no dispute that the applicant had been "lawfully resident" in the territory of the Respondent State, the Respondent Government based its objection *ratione materiae inter alia* on the fact that the applicant (a) had not, in fact, been "expelled" but was still resident in the Respondent State and (b) had, in fact, been given permission by the Ministry of the Interior to leave the country and, importantly, to re-enter the country (see § 13 of the judgment); in fact, she was permitted to re-enter the country "one month after the expiry of the time-limit for returning" (*ibid.*). There had, so the Government's submission, in fact been no "expulsion decision" in her case but only a decision terminating her right to asylum on grounds of national security and notifying her that she "should voluntarily leave the territory of the Republic of Macedonia" (§ 3 of the Written Observations of the Respondent Government).

6. The Explanatory Report to Protocol No 7 to the Convention makes clear, at § 10, that the concept of "expulsion" in Article 1:

> "... 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."

7. This approach, which is also consistent with the construction of the term "expulsion" in other provisions containing equivalent obligations, among the Member States of the Council of Europe, or between them and other States, under international instruments such as the Geneva Convention relating to the status of refugees of 1951 (Article 32) and the International Covenant on Civil and Political Rights of 1966 (Article 13), has been confirmed by the Court in the few cases in which it has had to consider this issue. As a consequence, in its decision in *Bolat v. Russia*, no. 14139/03, § 79, ECHR 2006-XI (extracts), the Court held that "*the notion of "expulsion" is an autonomous concept which is independent of any definition contained in domestic legislation. 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*". On the facts of that case, however, the issue did not pose any real problems as the Court went on to find that "*[t]here is no doubt that by removing the applicant from his home and placing him on board an aircraft bound for Turkey, the domestic authorities expelled him from Russia*".

8. However, the potential breadth of the autonomous concept of "expulsion" was made clear by the Court's judgment in *Nolan and K. v. Russia*, no. 2512/04, § 112, 12 February 2009, where the decision under consideration was an exclusion decision preventing return to Russia. The Court reiterated its definition in § 79 of *Bolat* and held that:

> "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"."

9. In both these cases, the decision at issue led to the "definitive departure" of the applicant from the respondent state enabling the Court in both cases to find that there "has been a violation of Article 1 of Protocol No. 7".

10. By contrast, in the present case, there has been no "definitive departure" of the applicant from the territory of the Respondent State; quite the contrary, the applicant having left the territory and having remained outside the territory beyond the time-limit of her re-entry, permission was nevertheless (and despite the findings that she posed a threat to national security) granted for her to re-enter the territory of the Respondent State where she remains to this day with her family.

11. It is this factor which led me to conclude that it would be stretching the autonomous meaning of "expulsion" too far if it were also to include situations in which the decision at issue did not lead to, or was not enforced so as to lead to, the departure of the applicant (whether "definitive" or otherwise) from the territory of the respondent state;[2] after all, what Article 1 of Protocol No 7 to the Convention prohibits is the expulsion ("shall not be expelled") and not the decision *per se*. As a consequence, in my view, any violation of Article 1 of Protocol No 7 to the Convention would only occur or would only have occurred as and when the departure of the applicant from the territory of the Former Yugoslav Republic of Macedonia is or had been enforced.

12. This conclusion on the merits, however, takes us back to the preliminary objection *ratione materiae* of the Respondent Government. Why then, it might be said, is this complaint within the material scope of Article 1 of Protocol No 7 to the Convention at all if there is, on the facts before the Court, no actual expulsion?

13. For me the answer lies in the fundamental need for the Convention "*... provisions [to] be interpreted and applied so as to make its safeguards practical and*

effective (...). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"" (*Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161) and in the nature of the decision at issue in the present case.

14. The applicant translates (Applicant's reply to the Government's Written Observations at § 5; a translation the Respondent Government does not dispute) the relevant aspects of the decision of 3 February 2014, in which the Ministry of the Interior terminated her residence on the basis that she was "a risk to [national] security" and ordered her to leave the country, as follows:

> "The above stated [The Applicant] is obligated to vacate the territory of the Republic of Macedonia within 20 days upon receipt of the final Decision."

15. On the evidence available to the Court, it seems to me to be clear, therefore, that the decision was plainly intended to achieve the departure of the applicant from the territory of the respondent state and, as such, fell squarely within material scope of the procedural safeguards provided for by Article 1 § 1 of Protocol No 7 to the Convention. To reject any complaint against such a decision as inadmissible *ratione materiae* on the sole basis that the applicant remains on the territory of the respondent state at the time of making his or her application (and/or makes his or her application before being, in fact, "expelled"), in my view, would render the procedural safeguards provided by Article 1 of Protocol No 7 theoretical and illusory rather than practical and effective.

16. This is further underlined by the fact that Article 1 § 2 of Protocol No 7 to the Convention, unlike e.g. Article 13 ICCPR or Article 32 of the Geneva Convention relating to the status of refugees of 1951, expressly permits expulsion before the rights in Article 1 § 1 thereof have been exercised but only "when such expulsion is necessary in the interests of public order or is grounded on reasons of national security". In the present case, the Respondent Government has not sought to rely on this exception.

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[1]1. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

[2]1. See, in this context, the earlier decision in *Naumov v. Albania* (Dec.), no 10513/03, 4 January 2005, in which the question whether "expulsion" could cover an unexecuted deportation order (arising out of an order depriving the applicant of his nationality) was left open with the Court declaring the complaint under Article 1 of Protocol No 7 to the Convention inadmissible as manifestly ill-founded (rather than *ratione materiae*). The Court noted, however, that "*… the applicant was never in fact expelled from Albania, no steps having been taken to enforce the police orders of 29 September or 5 October 2001. Moreover, the applicant was able to submit reasons against his expulsion and his case reviewed by the national courts, which on 20 March 2003 declared the orders to be null and void following the annulment of the presidential decree revoking the applicant's Albanian citizenship*".