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ECtHR - S.E. v. Serbia, application no 61365/16

The case concerns the refusal of Serbia for seven years to grant a travel document to the applicant, a Syrian national who had been granted refugee status in Serbia and whose passport expired. This was due to a failure by the Ministry of the Interior to enact regulations that govern the content and design of travel documents for refugees to implement the Asylum Act, which prevented the applicant from travelling outside Serbia for several years. Finding that this refusal curtailed the applicant's right to leave Serbia freely, to the extent that it impaired the essence of this right and deprived it of its effectiveness, the Court found a violation of Article 2 of Protocol No. 4 ECHR.

Case number: Application no 61365/16
Citation: ECtHR, S.E. v. Serbia, no. 61365/16, 11 July 2023
Date of decision: 11/07/2023
State: Serbia
Court / UN Treaty Body: European Court of Human Rights
Language(s) the decision is available in: English
Applicant's country of residence: Germany
Legal instruments: European Convention on Human Rights (ECHR)
Key aspects: Passport restoration, Residence permit
Relevant Legislative Provisions:

Article 2 of Protocol No. 4 ECHR

Facts

In April 2015, the applicant was granted refugee status in Serbia, based on his political activities in Syria and his fear of persecution or threats to his safety. From then on, he lawfully resided in Serbia and married a Serbian national in June 2018. In May 2015, the applicant requested the Serbian Government a travel document for refugees. His Syrian passport had expired sometime during that year. However, in

June 2015, the Border Police Unit (a department of the Ministry of the Interior) notified the applicant that they could not issue a travel document, due to the absence of regulations that governed the content and design of such a document.

In August 2015, the applicant alerted the Minister of the Interior about the impossibility of obtaining a refugee travel document, and asked him to enact regulations enabling its issuance, but the Minister’s office did not respond. In the meantime, in June 2015, the applicant lodged a constitutional appeal against the Border Police Unit's decision, complaining that the Minister of the Interior had failed to adopt regulations which would allow him to travel outside Serbia, and requested that the Constitutional Court order the Minister to urgently adopt regulations concerning the content and design of travel documents for refugees. In June 2016, the Constitutional Court refused the applicant's appeal, stating that such an appeal could only be lodged against individual actions or decisions, not against inaction or non-adoption of general legal acts.

In May 2022, the applicant obtained a Syrian passport from the Syrian embassy in Belgrade. He then obtained a working visa, for the purpose of moving to Germany to work there. In October 2022, the applicant left Serbia and flew to Germany using his new Syrian passport.

Legal arguments by the applicant

The applicant argued that Article 2 of Protocol No. 4 to the ECHR legally obliged Serbia to ensure that he could leave and return to the country. Serbia's compliance with the negative obligation to respect this right did not nullify the effect of non-compliance with its positive obligation to ensure freedom of movement. Thus, his inability to travel or leave Serbia due to the expiration of his Syrian passport, and inability to acquire a travel document for refugees from the Serbian authorities, demonstrated that Syria had disregarded its obligation to protect him and ensure his freedom of movement.

The applicant acknowledged that he had not been precluded from leaving Serbia by any restrictive measure, and could have obtained a Syrian passport to leave. However, he argued that no one could be expected to lawfully leave a country without a travel document, and a refugee could not be directed to his country of origin to have a passport issued, as he no longer enjoyed its protection. While the applicant eventually obtained a Syrian passport during the proceedings, this was done through putting himself in danger by approaching the authorities of the

country from which he had fled persecution, and risking revocation of his refugee status.

Legal arguments by the opposing party

The Serbian Government first argued that it had not confiscated the applicant's passport, or taken any other measures to restrict his freedom of movement. Additionally, travel documents to 'foreigners' had not been issued for technical reasons – the need to find a comprehensive solution for all travel documents issued by Serbia, which required financial resources.

The Government also argued that the applicant could legally leave using a Syrian passport, as he had not lost or severed his legal link with Syria through obtaining refugee status in Serbia. There was thus the opportunity for him to renew his Syrian passport if he intended to leave the country. In response to the applicant's arguments about the risks of requesting or using a Syrian passport, the Government claimed, without a source, that there were thousands of refugees who had obtained travel documents from their country of nationality in their country of new residence.

Lastly, the fact that the applicant had been able to obtain a Syrian passport and leave for Germany demonstrated that his freedom of movement had not been restricted, and he could freely apply to the Syrian authorities to obtain a travel document without any risk of political persecution, or cessation of refugee status. Also, as a foreign national who has been married to a Serbian national, the applicant could have applied for Serbian nationality, which would have enabled him to apply for a Serbian passport. His inability to leave Serbia thus arose from his own failure.

Decision & Reasoning

Beginning with an interpretation of Article 2 of Protocol No. 4, the Court held that any measure, including a refusal to issue or reissue a travel document, by means of which a national or an alien is denied the use of a document to leave the country, is an interference with the rights guaranteed by the Article. This is the case regardless of whether there were intentional restrictions by the State on the applicant's right to leave, or there was no such intention from the authorities. For a State's interference with a person's right to leave any country to be justified, it must be 'in accordance with law', pursue one of more of the legitimate aims in the provision, and be 'necessary in a democratic society'. (paragraphs 74-76)

Irrespective of the lack of intention by the Serbian authorities to restrict the applicant's right to leave Serbia, the Court found that the applicant's right had been interfered with. The refusal to issue him with a travel document for refugees was an obstacle to his effective enjoyment of his right to leave the country for an extended period of seven years, as his Syrian passport had expired, and he was unable to obtain any other travel document. Regarding the option of obtaining a Syrian passport, the Court held that referring the applicant to his country of nationality would be in defiance of Serbia's international obligations and difficult to reconcile with the rule of law, especially as the country was one that the applicant had fled persecution. The credibility of the applicant's fear of persecution, and his inability and unwillingness to avail himself of Syrian protection, had been recognised by the Serbian authorities, as seen through the granting of refugee status in May 2015. The Serbian authorities had also never claimed that the applicant no longer required protection. In addition, obtaining a Syrian passport would put the applicant at risk of losing his refugee status, as according to the Ministry of the Interior, whether the issuance of travel documents by the Syrian authorities would lead to the cessation of refugee status depended on an assessment of the individual case. For the Court, this was a risk that the Serbian authorities could not expect the applicant to take. Finally, regarding the applicant's failure to obtain Serbian nationality, the Court held that the State could not circumvent its accepted obligations, by imposing an obligation of naturalisation on the applicant in order to leave the country. Therefore, overall, there was an interference with the applicant's right to leave Serbia. (paragraphs 77-81)

Having found an interference with the right, the Court moved to consider justifications for the interference. The requirement that the interference was 'in accordance with law' not only requires that the concerned measure should have some basis in domestic law, but also that it was compatible with the rule of law. Serbia's former 2008 Asylum Act and current 2018 Asylum and Temporary Protection Act recognises the individual right of a refugee to obtain a travel document, and requires the Minister of the Interior to enact subsidiary legislation to ensure their implementation within 60 days. The applicant's entitlement to a refugee travel document thus stems from these two pieces of domestic legislation, and was triggered by Serbia's decision to grant him refugee status, and his acquisition of lawful residence. However, it had been almost five years since the 2018 Act came into force, and no implementing regulations had been adopted. No effective possibility of obtaining a travel document was available to the applicant, nor did the Serbian authorities demonstrate any effort to implement the domestic law and

provide a possibility for the applicant and similar individuals to obtain a refugee travel document. Such a systemic failure rendered the effective right of refugees to leave Serbia illusory. By putting the applicant in a state of uncertainty, and pushing him to take the risk of applying to the Syrian authorities for a passport, this state of affairs was difficult to reconcile with principles arising from the rule of law. Furthermore, considering that both the 2008 Act and 2018 Act set the same time limit for the Minister to implement the primary legislation, it was likely that the legislature did not consider that the time limit was too short or difficult to meet. Thus, the Government could not justify its inaction by relying on the lack of available resources or technical solutions. Competent authorities should have overseen national budget allocations, and ensured timely and adequate technical support in managing the task. The Court also reiterated that ‘economic wellbeing of the country’ and related financial considerations were not legitimate aims that could justify restrictions on the right to leave one’s country. Hence, the interference with the applicant’s right to leave the country was not ‘in accordance with law’, and it was unnecessary for the Court to further determine if the interference pursued a legitimate aim or was necessary in a democratic society. (paragraphs 82-87)

Decision documents

Judgment

Outcome

The refusal by the Serbian authorities to issue the applicant with a refugee travel document for seven years due to the absence of appropriate regulations had curtailed his right to leave Serbia freely, such that it impaired the essence of the right and deprived it of effectiveness. Hence, there was a violation of Article 2 of Protocol No. 4.

Caselaw cited

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Third party interventions

UNHCR submitted a third-party intervention.