



Deficiencies in Russian domestic remedies in the context of a case concerning risks to a foreigner's life and limb in the event of his removal to Syria

The Chamber judgment¹ in the case of [S.K. v. Russia](#) (application no. 52722/15) involved a decision by the Russian authorities to detain a Syrian national, S.K., and remove him to his home country. In October and November 2015 S.K. obtained an interim measure from the European Court of Human Rights, indicating that he should not be removed from Russia whilst the Court examined his case. Today the Court held, unanimously, that:

there would be a violation of Article 2 (right to life) and Article 3 (prohibition of ill-treatment) of the European Convention on Human Rights if S.K. were to be removed to Syria, because the security and humanitarian situation, as well as the type and extent of hostilities and violence in the country, would expose him to a risk of death or serious harm to his physical integrity; and

there had been a violation of Article 13 (right to an effective remedy) in conjunction with Articles 2 and 3 in respect of the risks to a foreigner's life and limb arising from enforcement of a penalty of administrative removal. It has not been convincingly shown that the available domestic remedies fully satisfied the requirements of "effectiveness" for this type of case, namely the independent and rigorous scrutiny of the risks, a possibility to prevent removal if such risks were shown to be justified and an "automatic suspensive effect" produced *vis-à-vis* the impugned penalty during the use of the said domestic remedies.

The Court also held, unanimously, that there had been **violations of Article 5 § 1 (right to liberty) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)** on account of the applicant's detention with a view to enforcing the penalty of administrative removal.

Under **Article 46 (binding force and implementation of judgments)**, the Court indicated with reference to its findings under Article 5 of the Convention that it would be appropriate to release S.K. without delay, and no later than on the day following notification that the present judgment has become final.

Principal facts

The applicant, S.K., is a Syrian national who was born in 1986. Since February 2015 he has been kept in a detention centre for foreign nationals in the town of Makhachkala, Dagestan Republic (Russia).

S.K. arrived in Russia in October 2011 on a temporary business visa. He stayed beyond the expiry of the visa and started a relationship with a Russian national. The couple had a child in 2013, and married in 2014. In February 2015 he was found guilty of an administrative offence: remaining in Russia beyond the expiry of his visa. The court ordered that he pay a fine and be subjected to the penalty of administrative removal. S.K. was placed in a detention facility for foreigners in the town of Makhachkala, awaiting his administrative removal. One week later, the judgment was upheld on appeal by the Supreme Court of the Dagestan Republic.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Thereafter, he applied for temporary asylum in Russia. He referred to ongoing intensive military actions in Syria. In June 2015 the local migration authority dismissed S.K.'s application for temporary asylum. S.K. sought a review before the Federal Migration Service. However, the body upheld the refusal, noting that S.K. had been convicted of administrative offences. S.K. then applied for judicial review of the decisions. Basmanny District Court of Moscow upheld the refusal to grant temporary asylum in December 2015. In the course of its reasoning, the court held that S.K. was at a risk of violence which was no more intensive than that faced by other people living in Syria. S.K. appealed the judgment to the Moscow City Court, claiming that the District Court had not paid proper attention to the risk to his life and physical integrity. The court dismissed the appeal on 8 June 2016.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life) and Article 3 (prohibition of inhuman or degrading treatment), S.K. complained that the situation in Syria (both at the present time and in 2015) means that he would face serious risk of injury or death if he were to be expelled there. Relying on Article 13 (right to an effective remedy) in conjunction with Articles 2 and 3, S.K. argued that he had had no effective remedy for this complaint. Relying on Article 5 (right to liberty), he complained that his continuing detention is arbitrary, given that he cannot be removed to Syria – and that there had been no domestic procedure which he could have used to have had his detention reviewed. Finally, S.K. relied on Article 8 (right to respect for family life) and Article 13, to complain that his removal from Russia would cause a disproportionate interference with his family life.

The application was lodged with the Court on 26 October 2015. On that day, and on 12 November 2015, the Court indicated an interim measure under Rule 39, that S.K. should not be removed from Russia for the duration of the proceedings before the Court.

Judgment was given by a Chamber of seven judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
Helena **Jäderblom** (Sweden),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Branko **Lubarda** (Serbia),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

[Article 2 \(right to life\) and Article 3 \(prohibition on inhuman and degrading treatment\)](#)

The Court addressed the issue of the risks to one's life and limb in relation to returns to Syria in late 2015 (*L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, 15 October 2015). In the present case the applicant's complaint before the Court has been made in the context of the continuing hostilities in Syria.

Having examined some relevant recent reports, the Court observed, in particular, that the security and humanitarian situation and the type and extent of hostilities in Syria had deteriorated dramatically between S.K.'s arrival in Russia in October 2011 and the removal order issued in February 2015; but also subsequently, in particular between that time and the refusal of his temporary asylum application. The available information indicated that, despite the agreement on the cessation of hostilities signed in February 2016, various parties to the hostilities have been employing methods and tactics of warfare which have increased the risk of civilian casualties. This

included reports of the indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians.

The Government have not substantiated their argument that S.K.'s safety could be assured, because his removal would have been to Damascus; and his safety would have continued in transit and upon arrival in his hometown, or another part of Syria. The Government provided no evidence that the situation in Damascus is sufficiently safe for S.K. (who alleged that he would have been drafted into active military service); or that he could have travelled from Damascus to a safe area in Syria.

The Court concluded that S.K.'s removal from Russia to Syria, on the basis of the judgment of 26 February 2015 as upheld on appeal, would be in breach of Articles 2 and 3 of the Convention.

Article 13 (right to an effective remedy) in conjunction with Articles 2 and 3

The Court considered two sets of remedies in relation to the penalty of administrative removal: the review of the impugned judgment within the administrative-offence proceedings, and the temporary asylum procedure. It held that, on the basis of the material before the Court, neither had provided S.K. with an "effective remedy" in relation to a risk to the applicant's life and physical integrity arising from enforcement of the penalty of removal imposed under the Code of Administrative Offences (CAO).

In regard to the administrative-offence proceedings, the Court noted that a pending appeal against the judgment imposing the penalty of removal did automatically suspend its enforcement. However, the respondent Government had not convincingly demonstrated, with reference to specific provisions of domestic law and/or the established judicial practice, that the domestic courts in this type of proceedings could provide the requisite scrutiny of the risks to life or limb arising from an eventual imposition and enforcement of the penalty of removal. While the Court did not exclude that theoretically there might be room in certain administrative-offence cases for the examination of such risks, it was not convinced that the domestic courts had been able to dispense with the penalty of removal, where it was a mandatory sentence to be imposed once a foreigner is found guilty of the relevant offence.

In regard to the temporary asylum procedure, the Court did not rule out that this form of temporary protection could provide an effective solution in the type of situation faced by S.K. (risks to life and limb arising from serious ongoing hostilities in the individual's home country). While noting that under Russian law the grant of temporary asylum prevented removal for a period of time, the Court was not satisfied on the basis of the available material that during the use of the temporary asylum procedure (both at its administrative stage and in an ensuing judicial review) there was an "automatic suspensive effect" *vis-à-vis* a final removal order imposed under the CAO. In this connection the Court reiterated that for a domestic remedy to be effective in terms of Article 13 of the Convention in this type of case, national law should clearly provide that this remedy has such effect *vis-a-vis* the impugned measure or decision. Furthermore, the domestic migration authorities and courts did not conduct a rigorous scrutiny of S.K.'s case. They found that the situation in Syria did not justify temporary asylum and dismissed the application of S.K., *inter alia*, by referring to factors which were unrelated to the issue of whether he would face a risk to life and limb.

Therefore, given certain deficiencies in domestic law and practice, as well as in the reasoning of the domestic authorities in relation to the facts of the case, S.K. had not had an "effective remedy". There had therefore been a violation of Article 13 of the Convention in conjunction with Articles 2 and 3.

Article 5 (right to liberty)

Under Article 5 § 4, when an individual has been detained he/she has the right to apply to a court, in order for it to speedily decide, *inter alia*, whether new factors have emerged which make the continuing detention unlawful or arbitrary. However, neither the Code of Administrative Offences

nor any other applicable legislation provided for a procedure which would have allowed S.K. to obtain a review of his detention and obtain release. There was also no provision requiring his detention to be automatically reviewed on a regular basis. The Court therefore found a violation of Article 5 § 4.

Detention with a view to expulsion will only be compatible with Article 5 § 1 of the Convention if the proceedings relating to expulsion are in process and pursued with due diligence, and if the detention is lawful and is not arbitrary. In this case, it should have been sufficiently evident to the Russian authorities in February and March 2015 that the removal of S.K. to Syria was not practicable, and would remain unlikely in view of the worsening conflict in Syria. It was incumbent on the authorities to consider alternative arrangements for S.K.. However, once the order was made for him to be detained in a special detention facility for foreigners, his detention was not reassessed (indeed, as noted above, there was no procedure to allow this). The Court therefore found a violation of Article 5 § 1.

Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy)

In light of its conclusions in relation to Articles 2 and 3, the Court held that it was not necessary to examine S.K.'s complaints under Article 8, or his connected complaint under Article 13.

Rule 39 (interim measures)

The Court held that the indication made to the Government under Rule 39 - that S.K. should not be removed from Russia – must continue in force until the Court's judgment becomes final, or until the Court takes a further decision in this connection.

Article 46 (binding force and execution of judgments)

Referring to the Court's findings under Article 46 in *Kim v. Russia* (no. 44260/13, §§71 and 72, 17 July 2014), the Court reiterated that general measures are expected from Russia in relation to detention of foreigners with a view to enforcing penalties of administrative removal. It also found that individual measures were necessary in the case of S.K., indicating that the appropriate way to deal with the matter relating to Article 5 of the Convention would be to release S.K. without delay, and no later than on the day following notification that the present judgment has become final.

Just satisfaction (Article 41)

The Court held that Russia was to pay the applicant 7,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,500 in respect of costs and expenses.

The judgment is available only in English.

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Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

George Stafford (tel: + 33 3 90 21 41 71)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Inci Ertekin (tel: + 33 3 90 21 55 30)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.