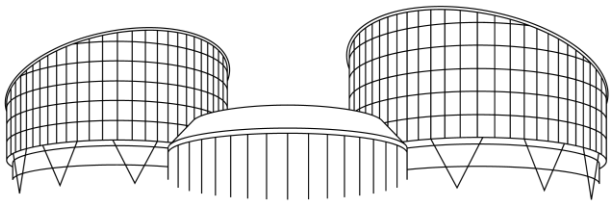

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KOLESNIK v. RUSSIA

(Application no. 26876/08)

JUDGMENT

STRASBOURG

17 June 2010

FINAL

22/11/2010

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

In the case of Kolesnik v. Russia**,**

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 27 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 26876/08) 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 Ms Irina Batdanovna Kolesnik, a national of Turkmenistan, and Mr Viktor Pavlovich Kolesnik, a national of Russia, ("the applicants"), on 9 June 2008.

2. The applicants were represented by Mrs Ryabinina, a lawyer practising in Moscow, and by Mrs Tseytlina, a lawyer practising in St. Petersburg. The Russian Government ("the Government") were represented by Mrs V. Milinchuk, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their new Representative, Mr G. Matyushkin.

3. The applicants alleged that the first applicant's extradition to Turkmenistan would subject her to a risk of ill-treatment and violate their right to respect for their family life, that her detention was not lawful and not subject to judicial review, and that the presumption of innocence had been breached. They referred to Articles 3, 5, 6 and 8 of the Convention.

4. On 27 June 2008 the President of the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to extradite the first applicant to Turkmenistan pending the Court's decision.

5. On 2 March 2009 the President of the First Section decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1961 and 1946 respectively and live in the Tula Region.

A. Background events

7. The applicants are a married couple and have a daughter born in 1992. The first applicant also has a daughter from her previous marriage, born in 1985. Both daughters are Russian nationals.

8. Prior to their arrival in Russia, the applicants and their daughter were living in Turkmenistan. There the second applicant and their daughter acquired Russian citizenship in 2002. On 15 November 2005 criminal proceedings were brought against the first applicant's employer on economic charges. The first applicant was questioned as a witness on several occasions and allegedly threatened by the investigator.

9. On 10 December 2005 the applicants and their daughter moved to Russia. The first applicant's elder daughter was already living in Russia.

10. The applicants purchased a house in the Tula Region. In May 2006 the first applicant obtained a temporary residence permit. In September 2006 the first applicant also applied for Russian citizenship.

11. On 22 February 2007 her application for Russian citizenship was refused on the ground that criminal proceedings were pending against her in the State of her nationality. It does not appear that the first applicant appealed against this decision to a court.

B. Asylum proceedings

12. On 24 July 2007 the first applicant applied to the Federal Migration Service (the FMS) seeking refugee status.

13. On 26 July 2007 the FMS refused to examine the merits of the request, on the ground that the first applicant had a temporary residence permit, was married to a Russian national and was on a wanted list in Turkmenistan.

14. The first applicant complained about the refusal to the Central District Court of Tula. In her complaint she did not raise any arguments concerning her fears that in Turkmenistan she would be subjected to ill-treatment and separated from her family.

15. On 28 January 2008 the Central District Court of Tula upheld the decision of the FMS and dismissed the first applicant's complaint. The first applicant appealed.

16. On 29 May 2008 the Tula Regional Court upheld the first-instance decision.

17. On 2 July 2008 the first applicant applied for temporary asylum in Russia. In her application she stated briefly that she would be subjected to torture and other forms of ill-treatment if expelled to Turkmenistan.

18. On 23 July 2008 the first applicant was interviewed in this connection while in custody.

19. On 25 July 2008 her application was accepted for examination, and on 22 October 2008 the FMS refused the application. The first applicant appealed, referring to a threat of inhuman treatment in Turkmenistan and to family ties in Russia.

20. On 17 February 2009 the Zamoskvoretskiy District Court of Moscow ruled that the FMS decision should be upheld. The first applicant did not appeal against this decision to a higher court.

C. Extradition proceedings

21. On 28 January 2006 the Turkmen authorities, in the context of the criminal proceedings commenced in 2005, charged the first applicant with economic crimes and fraud and placed her on a wanted list.

22. On 6 September 2006 the prosecutor of the Kopetdagsky District of Ashgabat remanded the first applicant in custody.

23. On 10 October 2006 the Turkmen authorities sent the Office of the Prosecutor General of Russia a request to extradite the first applicant.

24. On 15 December 2006 the first applicant learned from the deputy prosecutor of Donskoy town that an "extradition check" was being conducted. Thereafter she contacted various branches of Russian authorities asking for protection from allegedly unlawful persecution by Turkmen authorities.

25. On 28 August 2007 the Moscow Inter-District Transport Prosecutor's Office drafted a report on the results of the "extradition check". The report stated, *inter alia*:

> "As it follows from the documents submitted by [the Turkmen authorities], [the first applicant] is wanted for crimes [punishable under Turkmen law]...
>
> [The first applicant] is not persecuted in Turkmenistan on political, religious, ethnic or racial grounds, she does not possess information which constitutes any State or military secret of the Russian Federation, and she has not applied to the Russian competent authorities for either political asylum or refugee status. She has applied for ... Russian nationality. However, her request has been refused ... on the ground of criminal prosecution by competent authorities of a foreign State.

[The first applicant] is aware of the grounds for ... the criminal prosecution."

26. On 22 February 2008 the General Prosecutor's Office of Turkmenistan sent a letter to the Office of the Prosecutor General of Russia, guaranteeing that if extradited to Turkmenistan the first applicant would not be subjected to persecution on political grounds.

27. On 11 March 2008 the Office of the Prosecutor General of Russia ordered the first applicant's extradition to Turkmenistan on charges under Articles 33 part 5, 218 parts 1, 2, 3 and 229 part 4 (a) of the Criminal Code of Turkmenistan. The document stated that the first applicant had been charged in Turkmenistan with embezzlement and use of forged documents, which entailed serious damage. It compared these acts with the crimes as described in the Russian Criminal Code, found no obstacles to the extradition and granted the request.

28. The first applicant challenged the extradition order before the Moscow City Court. In her complaint she submitted that her extradition to Turkmenistan might entail "catastrophic consequences to the point of physical elimination". There were no other arguments regarding her fears of ill-treatment in Turkmenistan, the grounds for her fears, or arguments concerning her removal from the family.

29. On 5 June 2008 the Moscow City Court rejected the first applicant's complaint as unfounded.

30. The first applicant appealed against the decision on the same date. In her appeal statement she mentioned her fears of ill-treatment in Turkmenistan.

31. On 9 June 2008 the first applicant applied to the Court with a request to apply interim measures under Rule 39 of the Rules of Court and to stay her extradition.

32. On 27 June 2008 the Court granted the request and indicated to the Government of the Russian Federation that the first applicant should not be extradited to Turkmenistan until further notice.

33. On 17 July 2008 the Supreme Court of Russia allowed the first applicant's appeal, set aside the decision of 5 June 2008 and remitted the case for a fresh examination. At the same time the Supreme Court set the time-limit for the first applicant's detention at 8 August 2008.

34. On 1 August 2008 the Moscow City Court again rejected the first applicant's complaint against the extradition order.

35. On 16 October 2008 the Supreme Court of Russia, on an appeal by the first applicant, quashed and remitted the decision of the Moscow City Court. It found that the City Court had failed to examine the first applicant's arguments that she risked ill-treatment and that her family was living in Russia.

36. In November and December 2009 the Moscow City Court requested the Ministry of Foreign Affairs of Turkmenistan to comment on the first applicant's complaints about the threat of ill-treatment and about the

allegations of unfair trial. In reply, on 15 January 2009 the General Prosecutor's Office of Turkmenistan stated that in the event of extradition the first applicant would not be subjected to political persecution, nor to torture or inhuman and degrading treatment and punishment. The letter referred to Turkmenistan's obligations under the International Covenant of Civil and Political Rights and the fact that the death penalty had been abolished in Turkmenistan in 1999. Furthermore, the letter stated that under the legislation of 1999, every year at the time of a Muslim festival there was an amnesty for convicted criminals if they had repented and taken the path to reform. On 9 February 2009, responding to a question from the Moscow City Court, the General Prosecutor's Office of Turkmenistan forwarded to the City Court a letter from the Ministry of the Foreign Affairs of that country, by which their initial request had been forwarded to the Prosecutor's Office.

37. On 13 February 2009 the Moscow City Court again found the decision of the General Prosecutor's Office of 11 March 2008 to be valid. The City Court heard the applicant and her lawyer, as well as Ms Ryabinina, who made a statement as an expert on the situation in Central Asia and in Turkmenistan in particular. The court reviewed the documents submitted by the applicants, including copies of the relevant international reports about the situation in Turkmenistan. The court also examined the decisions by which the applicant's request for temporary asylum had been rejected. The court found that the first applicant's allegations of the danger of ill-treatment in Turkmenistan were based on general information and unsubstantiated. It relied on the assurances provided by the General Prosecutor's Office of Turkmenistan and found that they had been issued by a competent body. It also took into account information about the legal framework of the criminal proceedings and detention in Turkmenistan, which appeared to be consistent with the requirements of fair trial and lawfulness of detention. The court took note of the annual amnesties announced in Turkmenistan for convicted persons. The City Court refused to consider the first applicant's arguments concerning the circumstances of the imputed actions, noting that she had been charged with a criminal offence in Turkmenistan and that the question of her involvement would be decided by the competent court in that country.

38. The first applicant appealed. On 31 March 2009 the Supreme Court confirmed the decision of 13 February 2009.

D. The first applicant's detention

1. The first applicant's first arrest

39. On 14 May 2007 the first applicant was arrested by Russian police.

40. On 16 May 2007 the deputy prosecutor of Donskoy town applied to the Donskoy Town Court seeking authorisation to remand the applicant in custody.

41. On 18 May 2007 the Donskoy Town Court dismissed the deputy prosecutor's request and the first applicant was released in the courtroom. The court found, *inter alia*, that at the time of her departure from Turkmenistan the first applicant had not been suspected of or charged with any criminal offences, no preventive measures had been applied to her and her freedom of movement had not been restricted. It also noted that the first applicant herself had contacted the Tula Regional department of the interior in relation to her placement on the wanted list by Turkmenistan.

42. On 21 May 2007 the Donskoy Town Prosecutor's Office appealed. On 4 July 2007 the Tula Regional Court set aside the decision of the Donskoy Town Court and remitted the case for a fresh examination.

2. The first applicant's second arrest

43. On 19 August 2007, when attempting to leave for Ukraine to visit her relatives, the first applicant was arrested and placed in remand prison IZ-77/6 in Moscow.

44. On 21 August 2007 the Dorogomilovskiy District Court of Moscow examined the documents concerning the first applicant's extradition and granted the prosecutor's request to detain her provisionally until 24 August 2007. The first applicant and her counsel stated that they agreed with the prosecutor's request.

45. On 24 August 2007 the Dorogomilovskiy District Court of Moscow ordered the first applicant's detention pending extradition proceedings. The court set no time-limits for her detention. The first applicant did not appeal against this order.

46. In October 2007 the first applicant complained to the Moscow Lyublinskiy District Court arguing that the administration of remand prison IZ-77/6 had held her in custody unlawfully, since the term of her detention had already expired.

47. On 11 January 2008 the Lyublinskiy District Court granted the complaint. It found that the term of the first applicant's detention had expired on 19 October 2007 and that her detention after that date was unlawful. The first applicant was neither summoned to the hearing nor released. The administration of remand prison IZ-77/6 appealed.

48. On 28 February 2008 the Moscow City Court examined the appeal, set aside the decision of 11 January 2008 and delivered a new decision. The appeal court held that the time-limits provided in Article 109 of the Code of Criminal Procedure did not apply to the first applicant since she had not been charged with an offence within the territory of Russia. At the same time, since the order of the Dorogomilovskiy District Court provided no time-limits for her detention, her complaint should be dismissed.

3. Subsequent decisions concerning the first applicant's detention

49. On 19 February 2008 the Dorogomilovskiy District Court of Moscow again ordered the first applicant's detention pending extradition proceedings, although by that time she had already been detained for several months. The decision did not set time-limits and did not refer to Articles 108 or 109 of the Code of Criminal Procedure. The first applicant appealed against the order.

50. On 19 March 2008 the Moscow City Court dismissed the appeal and upheld the decision of 19 February 2008. No time-limits were fixed for the first applicant's detention.

4. The first applicant's release

51. On 11 August 2008 the Moskovsko-Smolenskiy Office of the Transport Prosecutor ordered the release of the first applicant in accordance with the instructions of the Office of the Prosecutor General, on the basis of the Supreme Court's decision of 17 July 2008 setting the time-limit for her detention at 8 August 2008.

52. On 12 August 2008 the first applicant was released, having spent eleven months and twenty-five days in custody.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Relevant domestic law

53. For a recent summary of the relevant Russian law and practice on issues of extradition of foreign nationals see *Khudyakova v. Russia*, no. 13476/04, §§ 33-48, 8 January 2009.

B. Relevant international materials concerning the human rights situation in Turkmenistan

54. For an overview of relevant international reports about the situation in Turkmenistan prior to the end of 2006, see *Ryabikin v. Russia*, no. 8320/04, §§ 91-98, 19 June 2008. The reports cited in that judgment referred to persecution of ethnic minorities including Russians, violations of the principle of a fair trial, widespread use of torture by the police, intolerable conditions of detention and lack of access to detainees by independent bodies, lawyers and relatives. Various intergovernmental and non-governmental organisations characterised the human rights situation in Turkmenistan as “disastrous”, “abysmal” and “one of the worst totalitarian systems in the world”.

55. The latest developments in Turkmenistan following the coming to power of a new president at the end of 2006 are described as follows. The Freedom House wrote in its report "The Worst of the Worst 2009" - Turkmenistan, 3 June 2009:

> "The judicial system is subservient to the president, who appoints and removes judges without legislative review. The authorities frequently deny rights of due process, including public trials and access to defense attorneys. Prisons suffer from overcrowding and inadequate nutrition and medical care, and international organizations are not permitted to visit."

56. The Amnesty International Report 2009 - Turkmenistan, 28 May 2009 concluded:

> **"There was pervasive impunity for police, security services and other government authorities. ...**
>
> Discrimination against ethnic minorities continued and was manifested clearly through restricted access to work and higher education. The policy of checking people's Turkmen origin up to the third generation continued, and meant that there were no members of ethnic minorities among ministers, directors or deputies of regional or district administrations. The three-generation check also applied to those applying to institutions of higher education. There were a few exceptional cases where members of ethnic minorities or people with a non-Turkmen relative were admitted to university, but this would reportedly only occur if a bribe was paid or the person was well connected."

57. The latest report of the US State Department came out in April 2010 (http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136095.htm). In relation to the situation in 2009 it contains the following relevant information:

> "Although there were modest improvements in some areas, the government continued to commit serious abuses, and its human rights record remained poor. ...
>
> **a. Arbitrary or Unlawful Deprivation of Life**
>
> There were no reports the government or its agents committed arbitrary or unlawful killings.
>
> There were no updates on the 2007 reports of citizens who died under suspicious circumstances during detention, including the cases of an allegedly drunk suspect who died in police custody in Mary Province and a man who died in an Ashgabat detention center while awaiting an appeal decision.
>
> **b. Disappearance**
>
> There were no reports of politically motivated disappearances.
>
> **c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**
>
> The constitution and law prohibit such practices; however, security officials trying to extract confessions from detainees tortured, beat, and used excessive force against criminal suspects, prisoners, and individuals critical of the government.

An October 2008 decision of the European Court of Human Rights (ECHR) stated that "any criminal suspect held in custody ran a serious risk of being subjected to torture or inhuman or degrading treatment." The ECHR also reported that the country lacked an effective system to prevent torture.

In contrast with previous years, there were no reports during the year that authorities detained persons in psychiatric hospitals as punishment. ...

... Prison conditions were poor; prisons were unsanitary, overcrowded, and unsafe. According to a civil society source, a women's prison near Dashoguz built for 800 prisoners held approximately 2,000. Disease, particularly tuberculosis (TB), was rampant.

Arrest Procedures and Treatment While in Detention

... Pre-trial detention legally could last no longer than two months, but in exceptional cases it could be extended to one year if an investigator made such a request to the prosecutor general. For minor crimes a much shorter investigation period applies. In contrast to previous years, authorities rarely exceeded legal limits for pre-trial detention. In the past chronic corruption and cumbersome bureaucratic processes contributed to lengthy trial delays; however, the government's anti-corruption efforts and the establishment of the Academy of State Service to improve state employees' qualifications generally eliminated such delays.

Denial of Fair Public Trial

The law provides for an independent judiciary; in practice the judiciary was subordinate to the president. There was no legislative review of the president's judicial appointments and dismissals, except for the chairman (chief justice) of the Supreme Court, whom parliament nominally reviewed. The president had sole authority to dismiss any judge before the completion of his or her term. The judiciary was widely reputed to be both corrupt and inefficient.

The court system consists of a Supreme Court, six provincial courts (including one for Ashgabat), and 64 district and city courts. Civilian courts, under the authority of the Office of the Prosecutor General, tried members of the armed forces for criminal offenses.

Trial Procedures

The law provides due process for defendants, including a public trial, access to accusatory material, the right to call witnesses to testify on their behalf, a defense attorney or a court-appointed lawyer if the defendant cannot afford one, and the right to represent oneself in court. In practice authorities often denied these rights. Defendants frequently did not enjoy a presumption of innocence. There was no jury system. The government permitted the public to attend most trials but closed some trials, especially those it considered politically sensitive. There were few independent lawyers available to represent defendants. The CPC provides that a defendant be present at his or her trial and consult with his or her attorney in a timely manner. The law sets no restrictions on a defendant's access to an attorney. If a defendant cannot afford to pay for attorney's services, an attorney is provided at public expense. The court at times did not allow a defendant to confront or question a witness against him or her and denied the defendant and his or her attorney access to government

evidence. In some cases courts refused to accept exculpatory evidence provided by defense attorneys, even if that evidence would have changed the outcome of the trial.

Even when the courts observed due process, the authority of the government prosecutor far exceeded that of the defense attorney, making it difficult for the defendant to receive a fair trial. Court transcripts were frequently flawed or incomplete, especially when defendants' testimony had to be translated from Russian to Turkmen. Defendants could appeal a lower court's decision and petition the president for clemency. In most cases courts ignored allegations of torture when defendants raised such allegations in trial. There were credible reports that judges often predetermined the outcome of the trial and sentence.

There were regular reports that police would arrest an individual and request he or she pay a fine for breaking a specific law. When a citizen asked to see the law, police or other government officials refused or stated the laws were secret. ...

... There was no further information on 2007 reports that some prisoners accused of economic crimes, including a number of former senior government ministers, might have been moved from Owadan Depe Prison to Mary Prison. Government officials continued to ignore inquiries from family members and foreign diplomats about many prisoners' locations or condition. Government officials also continued to prevent family members, foreign diplomats, and international observers such as the ICRC from accessing detainees or prisoners associated with the 2002 attack."

58. The FCO - UK Foreign and Commonwealth Office reported in their latest publication on the subject, Human Rights Annual Report 2009 - Countries of Concern: Turkmenistan, March 2010 (available at www.ecoi.net):

"In 2009, there were indications that Turkmenistan was backtracking on previous improvements and commitments to human rights. ...

Prison conditions remain extremely worrying. The Turkmen government has still not granted the International Committee of the Red Cross (ICRC) access to Turkmen prisons."

C. Criminal law of Turkmenistan

59. Section 218 of the Criminal Code of Turkmenistan (adopted in 1997) provides that forging documents, use and sale of forged documents or stamps is punishable by correctional labor terms of up to two years, or by a prison sentence of up to two years. The same actions if committed repeatedly are punished by a prison sentence of up to four years.

60. Section 229 § 4 provides that misappropriation of funds, committed by a group or which has caused significant damage, is punishable by a prison sentence of six to twelve years, with or without confiscation of property.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

61. The first applicant complained that her extradition to Turkmenistan would be in violation of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Compatibility *ratione personae*

62. The Government argued that the first applicant could not claim to be a victim of a violation of the Convention since the decision of the Prosecutor General's Office of 11 March 2008 had remained unenforced and would remain so until the Court had considered the case.

63. The Court notes the exceptional nature of the application of the "victim" notion in Article 3 cases involving extradition, namely, "by reason of foreseeable consequences" (see *Soering v. the United Kingdom*, 7 July 1989, § 90 Series A no. 161). The Court further notes that the decision of the Prosecutor General's Office of 11 March 2008 to extradite the first applicant was upheld on appeal by the Supreme Court and remains in force. The Court accordingly dismisses this objection.

B. Otherwise as to admissibility

64. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. Submissions of the parties

65. The first applicant alleged that the decision to extradite her to Turkmenistan would expose her to torture and inhuman treatment and punishment, contrary to Article 3 of the Convention. Relying on the Court's judgment in the case of *Soldatenko v. Ukraine*, she argued that "the mere fact of being detained as a criminal suspect in [Turkmenistan] provides sufficient grounds for fear that [the applicant] will be at serious risk of being

subjected to treatment contrary to Article 3 of the Convention (see *Soldatenko v. Ukraine*, no. 2440/07, § 72, 23 October 2008). The first applicant argued that as a non-Turkmen she would be particularly vulnerable in the face of violations of human rights. She also argued that the Russian authorities had failed to take into account her arguments of such treatment, since they had relied on the materials that were either incomplete, such as the statements of the Russian Ministry of Foreign Affairs, or biased, such as letters from the General Prosecutor's Office of Turkmenistan. The first applicant finally considered that by sending a letter directly to the Turkmen authorities with a reference to her allegations of ill-treatment and lack of guarantees of a fair trial, the Moscow City Court had put her at an even greater risk of persecution, since she could now be perceived as a dissident and someone who had slandered the image of Turkmenistan abroad.

66. The Government disputed these allegations. They insisted that the first applicant's claims about the risk of persecution and ill-treatment had been duly evaluated in the course of proceedings related to the granting of refugee status and territorial asylum, and dismissed. The first applicant had appealed against these decisions to the courts and lost in adversarial proceedings. Within the proceedings related to the extradition requests courts at two levels had specifically examined the first applicant's argument that she was in danger of ill-treatment and found it to be unsubstantiated. The Government relied on the complete and unambiguous wording of the assurances received from the General Prosecutor's Office of Turkmenistan in relation to the first applicant's case. Furthermore, they cited the legislation of Turkmenistan, which prohibited torture, inhuman or degrading treatment and punishment and declared that no one could be restricted in the exercise of his rights, found guilty or subjected to a punishment otherwise than in strict conformity with the law. They noted that Turkmenistan was a State party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 1999.

2. The Court's assessment

67. In line with the Court's consistent case-law, it is necessary to examine whether the foreseeable consequences of the first applicant's extradition to Turkmenistan are such as to bring Article 3 of the Convention into play. Since she has not yet been extradited, owing to an indication by the Court of an interim measure under Rule 39 of the Rules of Court, the material date for the assessment of that risk is that of the Court's consideration of the case (for an overview of the relevant case-law on this matter see, for example, *Y. v. Russia*, no. 20113/07, §§ 74-82, 4 December 2008, with further references).

68. The Court reiterates that it has held previously that extradition to Turkmenistan on criminal charges may entail a violation of Article 3. The

following relevant factors were taken into account: credible and consistent reports from various reputable sources of widespread torture, beatings and use of force against criminal suspects by the Turkmen law-enforcement authorities; very poor conditions of detention; discrimination against persons of non-Turkmen ethnicity, which made them particularly vulnerable to abuses; the cumulative effect of the poor conditions of detention in view of the potential length of prison sentences; systematic refusal of the Turkmen authorities to allow any monitoring of the places of detention by international or non-government observers (see *Soldatenko*, cited above, § 71; *Ryabikin*, cited above, §§ 116, 119; and *Garabayev v. Russia*, no. 38411/02, § 78, ECHR 2007-VII (extracts)).

69. The Court notes that this assessment was done in 2007 and 2008. The latest reports by the government and non-government observers cited above (see paragraphs 62-63 above) do not demonstrate any improvement as to the situation in Turkmenistan on the most important points summarised in the previous paragraph. In particular, international observers, including the ICRC, have continued to be denied access to the places of detention.

70. The Court also finds that it cannot be ruled out that the request for information sent by the Moscow City Court to the authorities in Turkmenistan, which contained references to the first applicant's case and the nature of her claims about the situation in that country, could endanger her situation even further. It should be noted that the first applicant herself did not take any steps to make her claims about ill-treatment known to the authorities of Turkmenistan and thus create an "unwanted" publicity around her case (see *N. v. Finland*, no. 38885/02, § 165, 26 July 2005).

71. The Court does not lose sight of the Government's argument that the first applicant's complaints about the threat of ill-treatment have been examined in the domestic proceedings and dismissed. However, it reiterates that in cases concerning aliens facing expulsion or extradition it is entitled to compare material made available by the Government with material from other reliable and objective sources (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I (extracts), and *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 131, ECHR 2008-...).

72. The Court finds that the dismissal by the courts of the first applicant's complaints was based on the assumption that she had relied on general information which was not matched by her personal circumstances (see paragraph 37 above). However, having regard to the information about the situation in Turkmenistan and the fact that the first applicant is charged with crimes potentially entailing a lengthy prison sentence there (see paragraphs 59-60 above), the Court finds that she has sufficient grounds to fear that she would be at serious risk of being subjected to treatment contrary to Article 3 of the Convention.

73. In its previous judgments, the Court was also unwilling to accept the diplomatic assurances furnished by the Turkmen Government, given that there appeared no objective means to check whether they had been fulfilled (see *Ryabikin*, cited above, § 120, and *Soldatenko*, cited above, § 73). The Court also would state that it has already found that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention (see *Saadi*, cited above, §§ 147-148). Likewise, in the present case the Court cannot agree with the Government that the assurances given by the Turkmen authorities would suffice to guarantee protection for the first applicant against the serious risk of ill-treatment in the event of extradition.

74. In view of the above, the Court finds that the first applicant's extradition to Turkmenistan would be in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

75. The first applicant complained that her detention pending extradition has not been lawful. She also argued that she had no means to obtain a review of the lawfulness of her detention. The relevant sections of Article 5 read:

> "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. ...
>
> 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. ..."

76. The Government contested this claim. They argued that the provisions of the Russian law governing the detention of persons pending extradition were clear enough and foreseeable. In accordance with the decision of the Constitutional Court of 4 April 2006 No. 101-O, the provisions of Article 466 and Chapter 13 of the Code of Criminal Procedure were applicable to such detention. The Government noted that the first applicant had been brought before a judge within forty-eight hours of her arrest. Under Article 109 of the Criminal Procedural Code, her detention could not exceed twelve months, while she had spent eleven months and twenty-five days in detention. In so far as the first applicant complained about the absence of review of her detention, the Government noted that she

had made use of the relevant provisions of the Russian criminal procedural legislation and appealed to higher courts against the decisions by which her detention had been ordered. She could also make use of Article 125 of the Code of Criminal Procedure which allowed the parties to the proceedings to seek judicial review of decisions of the investigation.

77. The applicants reiterated their complaints.

A. Admissibility

78. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

79. It is common ground between the parties that the first applicant was detained between 19 August 2007 and 12 August 2008 with a view to extradition to Turkmenistan. Therefore, the provisions of Article 5 § 1 (f) apply. The parties dispute whether the detention was lawful.

80. The Court observes that the provision in question does not require that the detention of a person against whom action is being taken with a view to extradition be reasonably considered necessary, for example to prevent that person's committing an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I, and *Chahal v. the United Kingdom*, 15 November 1996, § 112, *Reports of Judgments and Decisions* 1996-V).

81. However, it falls to the Court to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1 (f), 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*

v. France, 25 June 1996, § 50, *Reports* 1996-III). Since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Benham v. the United Kingdom*, 10 June 1996, §§ 40 and 41, *Reports* 1996-III).

82. Turning to the circumstances of the present case, the Court notes that the Government, relying on the interpretation of the Constitutional Court, argued that the first applicant's detention pending extradition was governed by the provisions of the Code of Criminal Procedure. Indeed, the first applicant was brought before a judge within forty-eight hours of her arrest. On 24 August 2007 the Dorogomilovskiy District Court of Moscow authorised her detention pending extradition procedure. However, the Court notes, first, that no time-limit was fixed by that decision and, second, that upon the expiry of the maximum initial detention period of two months, no extension was granted by the court. According to the provisions governing the general terms of detention (Article 108 of the Code of Criminal Procedure), the time-limit for detention pending investigation is fixed at two months. A judge may extend that period up to six months. Further extensions may only be granted by a judge if the person is charged with serious or particularly serious criminal offences. Thus, assuming that the decision of the Dorogomilovskiy District Court had served as a lawful basis for the first applicant's initial detention, it ceased to be lawful after the lapse of the two-month period, that is on 19 October 2007.

83. Moreover, the Court notes that the first applicant appealed against her continued detention, and on 11 January 2008 the Lyublinskiy District Court of Moscow found in her favour, having concluded that her detention beyond 19 October 2007 was unlawful. However, this decision did not lead to the first applicant's release. Instead, it was quashed on appeal by the Moscow City Court on 28 February 2008, which stated that the time-limits provided in the Code of Criminal Procedure did not apply to the first applicant. The City Court held that since the initial decision of the Dorogomilovskiy District Court provided no time-limits for detention, her complaint was to be dismissed (see paragraphs 47-48 above).

84. Next, on 19 February 2008 the Dorogomilovskiy District Court again ordered the first applicant's detention, without reference to the six months she had already spent in custody by that date. This decision, reviewed on appeal by the Moscow City Court on 19 March 2008, again contained no time-limits for the detention (see paragraphs 49-50 above).

85. Only on 17 July 2007, within the context of review of the decision to extradite the first applicant, the Supreme Court established a time-limit for the first applicant's detention of 8 August 2008 (see paragraph 33 above). The first applicant was released on 12 August 2008.

86. Thus, the Court finds that assuming that the first applicant's detention between 19 August and 19 October 2007 could be considered

lawful under the provisions of the domestic law, it ceased to be so after the latter date. The subsequent decisions of the courts of 19 and 28 February and 17 July 2008 failed to refer to the relevant national legislation governing the detention, to indicate time-limits and to give sufficient reasons for the continued detention, all in breach of the provisions of Article 109 § 2 of the Code of Criminal Proceedings.

87. In such circumstances, the Court finds that the first applicant's detention pending extradition was not "lawful" for the purposes of Article 5 § 1 of the Convention. Accordingly, there has been a violation of this provision. The Court does not need to consider separately the applicant's additional arguments concerning the quality of the domestic law.

2. Alleged violation of Article 5 § 4 of the Convention

88. The Court has previously found that the provisions of the Russian Code of Criminal Procedure did not confer on persons awaiting extradition the right to a procedure to have the lawfulness of their detention examined by a court. Thus, the Court found that the provisions of Articles 108 and 109 of the Code, which cover the initial placement in custody and set specific time-limits, link the judicial review to the prosecutor's regular application for the extension of such detention. The Court has already found above that the first applicant's detention was not authorised in accordance with the relevant national law, and therefore she was unable to benefit from the provisions governing judicial review of the extensions (see *Nasrulloyev v. Russia*, no. 656/06, § 88, 11 October 2007; *Ismoilov and Others v. Russia*, no. 2947/06, § 153, 24 April 2008; and *Ryabikin*, cited above, § 139). As to the Government's reference to Article 125 of the Code of Criminal Procedure, the Court notes that the first applicant's complaint that her detention was unlawful was initially granted by the Lyublinskiy District Court. However, this decision did not lead to the first applicant's release and was quashed by the Moscow City Court, which decided that the first applicant had no standing under the Code of Criminal Procedure since no criminal charge has been pending against her in Russia (for similar conclusions, see *Nasrulloyev*, cited above, § 89, and *Ryabikin*, cited above, § 140).

89. It follows that the first applicant did not have at her disposal any procedure by which the lawfulness of her detention could have been examined by a court. Therefore, there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

90. The first applicant complained that the decisions of the Russian prosecutors and courts had violated the presumption of innocence in so far

as they referred to her having committed crimes in Turkmenistan. They relied on Article 6 § 2 of the Convention.

91. The Government contested that argument.

92. The Court notes that the decisions of the Moscow Inter-District Transport Prosecutor of 28 August 2007 and of the General Prosecutor's Office of 22 February 2008 to extradite the first applicant clearly referred to the documents submitted by the authorities of Turkmenistan by which the first applicant had been charged with the imputed offences (see paragraphs 25 and 27 above). Similarly, the decisions of the courts on the lawfulness of the extradition order were construed so as to describe the charges pending against the first applicant in Turkmenistan (see paragraph 37 above). In such circumstances the Court does not consider that the statements by the Russian officials amounted to a declaration of the first applicant's guilt, but rather described the "state of suspicion" which had served as the basis for the extradition request and the subsequent decision to extradite her (in contrast to *Ismoilov*, cited above, § 171).

93. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

94. The applicants complained that the first applicant's extradition to Turkmenistan would result in a violation of their family life. They relied on Article 8 of the Convention.

95. The Government contested that argument.

96. Assuming that this complaint is to be declared admissible, having regard to the above finding relating to Article 3, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 8 (see, among other authorities, *Hilal v. the United Kingdom*, no. 45276/99, § 71, ECHR 2001-II).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicants submitted that as a result of the violations endured they had suffered non-pecuniary damage. They left the amount of the compensation to be determined by the Court.

99. The Government disputed that any damage has been caused to the applicants; or, alternatively, that the finding of a violation had constituted sufficient compensation.

100. The Court has found that the first applicant's extradition to Turkmenistan would be in violation of Article 3. It also found a violation of two provisions of Article 5 in respect of the first applicant. The Court accepts that the first applicant has suffered non-pecuniary damage which cannot be compensated solely by the findings of violations and finds it appropriate to award her 24,000 euros (EUR) in this respect.

B. Costs and expenses

101. The applicants claimed a total of 78,250 Russian roubles (RUB) (EUR 1,739) for the costs and expenses incurred before the domestic courts and EUR 4,930 for those incurred before the Court. In support of their claims, the applicants submitted agreements with two lawyers: Mrs Tseytlina and Mr Gaytayev, as well as details of the work carried out by Mrs Ryabinina. The hourly rate for the lawyers' work related to the representation before the Court was set at EUR 100, while their services in the domestic proceedings were determined in advance by set amounts. In addition to these sums, the applicants claimed postal and administrative costs in the amount of 7% of the legal costs.

102. The Government questioned the necessity and reasonableness of the expenses.

103. 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 quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award to the applicants the amount of EUR 6,679, as claimed.

C. Default interest

104. 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 UNANIMOUSLY

1. *Declares* the complaints under Articles 3, 5 and 8 admissible and the remainder of the application inadmissible;

2. *Holds* that the first applicant's extradition to Turkmenistan would be in violation of Article 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 §§ 1 and 4 of the Convention;

4. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, which are to be converted into Russian roubles at the rate applicable on the date of settlement:
      (i) EUR 24,000 (twenty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the first applicant;
      (ii) EUR 6,679 (six thousand six hundred and seventy-nine euros), plus any tax that may be chargeable to the applicants, 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 17 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President