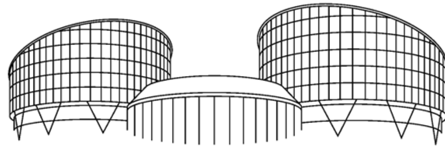

FIFTH SECTION

CASE OF M.S. v. SLOVAKIA AND UKRAINE

(Application no. 17189/11)

JUDGMENT

Art 3 • Expulsion (Ukraine) • Ukrainian authorities' failure to examine the applicant's fear of persecution in Afghanistan before his expulsion • Focus on formal grounds for rejecting the asylum request • Contradictory conclusions concerning his identity document and the identification of his country of origin • Notification to the applicant of the decision only after his transportation to the airport three days before his expulsion • Domestic court's irrational conclusion as to the expulsion order based on examination of outdated information concerning potential risk in Afghanistan
Art 5 §§ 2 and 4 (Ukraine) • Applicant not informed, in a language he understood, of the legal reasons for his detention and of the proceedings concerning his detention • Absence of an interpreter or lawyer in the proceedings
Art 34 (Ukraine) • Authorities complied with the obligation not to hinder exercise of the right of application

STRASBOURG

11 June 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.S. v. Slovakia and Ukraine,

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

Síofra O'Leary, *President,*
Ganna Yudkivska,
Yonko Grozev,
Alena Poláčková,
Lətif Hüseynov,
Lado Chanturia,
Anja Seibert-Fohr, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to:

the application against Slovakia and Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.S. ("the applicant"), on 16 March 2011;

the decision to give notice of the complaints set out in paragraph 1 below to the Governments of the Slovak Republic and Ukraine and to strike out of the list and declare inadmissible the remainder of the application;

the decision of the Section President to grant leave to intervene in written procedure (Article 36 § 2 of the Convention and Rule 44 § 2) to the Office of the United Nations High Commissioner for Refugees and the Human Rights League, a Slovakian NGO;

the decision not to have the applicant's name disclosed;

Having deliberated in private on 17 March 2020,

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

INTRODUCTION

1. The applicant complained that the Slovakian authorities, having arrested him after he had crossed from Ukraine, had failed to inform him of the reasons for his arrest, in violation of Article 5 § 2 of the Convention. They had then returned him to Ukraine, where he had been detained in inadequate conditions in disregard of his alleged status as a minor, in breach of Article 3. He had been unable to participate effectively in the proceedings concerning his detention, and had eventually been returned to Afghanistan in the absence of an adequate assessment of the risks he had faced there, in breach of Article 3, Article 5 §§ 1, 2 and 4, and Article 13 of the Convention. Lastly, he alleged, under Article 34, that an NGO representative had been denied access to him in Ukraine, preventing him from lodging an application for an interim measure with the Court.

THE FACTS

2. The applicant lives in Afghanistan. He was represented by Mr A. Maksymov, a lawyer practising in Kyiv who, at the time the application was lodged, was employed by the Hebrew Immigrant Aid Society ("the HIAS") Representative Office in Ukraine.

3. The Government of the Slovak Republic were represented by their Agent, Ms M. Pirošíková. The Government of Ukraine were represented by their Agent, most recently Mr I. Lishchyna.

4. The applicant alleged that he had been born in 1993 or 1994, whereas the authorities in Slovakia and Ukraine had recorded his date of birth as 14 January 1992 (see paragraphs 9, 18 and 26 below). In support of his claim the applicant submitted to the Court, together with his application form, a photocopy of his Afghan identity document, in the original language, measuring 6 by 7 cm, and its "unofficial translation" into English by a lawyer from the HIAS Representative Office in Ukraine. According to the translation, the field of the document marked "Date of birth and age" stated "age 8 years in year 2002". The applicant also submitted to the Court a photograph which he considered showed that he looked like a teenager.

I. THE EVENTS IN AFGHANISTAN AND THE APPLICANT'S JOURNEY TO SLOVAKIA

5. Prior to leaving Afghanistan the applicant lived in the Kunduz province, in the north of the country.

6. According to the applicant, his father used to work with the National Security Department of Afghanistan. Having arrested some drug smugglers, he was killed in about 2005 by unknown people, possibly associated with the Taliban. In 2010 the applicant's maternal uncle received a threatening letter. The applicant was unaware of its precise contents, but his uncle deduced that the applicant "also faced a risk related to the killing of his father" and arranged for him to leave the country.

7. Still according to the applicant, in May 2010 smugglers took the applicant to Tajikistan, where he crossed the border using his passport. His passport was subsequently taken away by the smugglers. He then travelled onward to Kyrgyzstan, Kazakhstan and Russia. He stayed in Moscow for one month and then entered Ukraine in early July 2010. He stayed in Kyiv for three months. During his journey to Ukraine the applicant was accompanied by his brother-in-law (his sister's husband). In Ukraine the applicant and his brother-in-law separated. The brother-in-law managed to cross into Slovakia three days after the applicant, travelled to Spain and applied for asylum there.

8. At 4.10 p.m. on 23 September 2010 the applicant was arrested by the Slovakian border police while crossing into Slovakia illegally with three other Afghan nationals. He had no identity papers.

9. According to records provided by the Government of Slovakia, at 7.25 p.m. on the same day the applicant was interviewed by border police officers to establish his identity and clarify the circumstances under which he had committed the offence of illegal entry to and residence in Slovakia. Interpretation from Slovak into English was provided. A certain Mr Zazai, apparently a member of the applicant's group of Afghans, translated from English into Pashto. The applicant's date of birth was noted as 14 January 1992. The applicant told the police that he wished to go to western Europe and live and work there, and that he was not requesting asylum in Slovakia.

10. The record of the interview was signed by a police officer and the interpreter from Slovak into English, but not by the applicant or Mr Zazai. The Government of Slovakia submitted that the applicant had been asked to sign the record but had refused without providing a reason. By contrast, two other members of his group did sign similar records.

11. On 24 September 2010 a decision to expel the applicant was issued. He was also banned from entering Slovakia for five years. He was given a Pashto translation of the guidelines on expulsion, summarising the relevant Slovakian legislation and procedures concerning expulsion of foreigners. According to the Government of Slovakia, the expulsion decision had been translated into Pashto. The document submitted by the Government is mainly in Pashto script. The parts containing general rules and quotes from legislation appear to be in that language, while certain case-specific details, such as the date and the country of destination, Ukraine, are written in Slovak.

12. At 2 p.m. on 24 September 2010 the applicant was handed over to the Ukrainian authorities.

13. The applicant alleged that, throughout his time in Slovakia, he had not received any interpretation services or information about the asylum procedure in Slovakia and had had no access to a lawyer. As he spoke no European language, he had tried to ask for asylum with the help of a fellow Afghan who spoke some French. However, the Slovakian officials had not reacted. Despite his efforts to talk to them and to tell them that he was a minor, they had recorded his date of birth as 14 January 1992. They had not provided him with any written decision concerning his return to Ukraine or explained to him any possible avenues of appeal.

II. RETURN TO UKRAINE AND DETENTION THERE

14. Following his expulsion to Ukraine on 24 September 2010, the applicant was placed in the Border Guard's temporary holding facility in Chop. He alleged that through other Afghan detainees who spoke Russian,

he had informed a guard, whom he had taken to be the supervisor, that he was fourteen years old. He also alleged that he had told a representative of Caritas, an NGO, that he was a minor and wished to apply for asylum, and that the Caritas representative had relayed that information to the border guards but that no action had been taken.

15. According to the applicant, his conditions of detention in the Chop facility were unsatisfactory. The cells were overcrowded. Sometimes the detainees were not guaranteed daily exercise, and "had to make noise in order to be allowed their one-hour walk".

16. On an unspecified date the Chop unit of the State Border Control Service of Ukraine ("the SBCS") issued an order directing the applicant to leave Ukraine voluntarily.

17. On an unspecified date the SBCS applied to the Zakarpattya Circuit Administrative Court, seeking the applicant's forcible expulsion from Ukraine and his placement in detention pending expulsion. According to the court decision (see paragraph 18 below), the applicant agreed with the SBCS's application. Also according to the court decision, on 1 October 2010 the SBCS and the applicant had asked the court to examine the case in their absence by way of a written procedure.

18. On 13 October 2010 the court allowed the application and ordered the applicant's expulsion from Ukraine and his detention pending expulsion. The court stated that the applicant had been born on 14 January 1992. It held that he had entered the territory of Ukraine illegally, had no means to return voluntarily and no relatives in Ukraine, and had crossed the border (with Slovakia) illegally. For the court, this showed that he was unlikely to comply with the order to leave the territory voluntarily.

19. The court also referred to a United Nations High Commissioner for Refugees ("UNHCR") publication entitled Collection of Country of Origin Information and Legal Materials to be used in Refugee Status Determination (*Збірник інформації по країнах походження і юридичних матеріалів для використання в процедурі визначення статусу біженця УВКБ ООН*) published in February 2008, apparently in a Ukrainian translation. That publication has not been made available to the Court. According to the circuit court, the publication indicated that "Afghanistan was not a country where crimes against the person occurred" (*Афганістан не є країною де вчиняються злочини проти осіб*). It therefore concluded that in the event of return to Afghanistan, the applicant's life would not be at risk. The court observed that the applicant had not lodged an application for asylum and did not wish to apply for asylum in Ukraine.

20. According to the applicant, he was not aware of the proceedings, he did not have legal representation and did not understand his rights in the proceedings before the court. He had signed a document waiving his right to appear in court without understanding its contents. The court's decision was not served on him and no information was provided to him on how to

appeal. He therefore missed the ten-day time-limit for appeal (see the relevant provision of the domestic law in paragraph 37 below).

21. On 14 October 2010 the applicant was transferred from the Border Guard temporary holding facility to temporary accommodation for foreign nationals and stateless persons in the Volyn Region, under the authority of the Ministry of the Interior at the time. He alleged that on arrival there, he had told the duty officer that he was fourteen years old. The officer allegedly informed the management of the facility but no action was taken.

22. On 20 February 2011 the Embassy of Afghanistan in Kyiv conducted a telephone interview with the applicant and on 22 February 2011 issued a travel document for him, indicating his date of birth as 14 January 1992.

III. ASYLUM APPLICATION IN UKRAINE

23. On 19 October 2010 the applicant, along with three other Afghans, attended a counselling session with a lawyer from an NGO, a local partner of the International Organization for Migration. One of the Afghans provided interpretation. Information on how to apply for refugee status was provided. The applicant did not contest that the session had been held, but stated that he had no recollection of it.

24. On 23 February 2011 the applicant lodged an application for asylum in Ukraine. By way of reasoning he stated that he would be "immediately killed" if he were returned to Afghanistan.

25. On 2 March 2011 an officer from the Volyn Regional Department of the Migration Service ("the Regional Migration Service") interviewed the applicant concerning his asylum application. The applicant stated that in Afghanistan he used to live in Kunduz, had been studying and had been supported by his maternal uncle. When asked what had led him to leave Afghanistan, he stated that his father had been killed by the Taliban four years earlier and the Taliban had then started threatening him. His uncle had received a piece of paper, the contents of which were unknown to the applicant, and had said that the applicant had to leave the country. Afterwards, his uncle had obtained travel documents for him with which he had had no trouble leaving Afghanistan. The applicant was then asked what was his country of destination and responded that he wished to get to London where his sister lived. He explained that he had travelled from Afghanistan to Tajikistan with his passport and an entry visa, but that the smugglers had then taken them away. He also stated that he had arrived in Ukraine from Russia and had travelled to the border with Slovakia through Kyiv. He had not sought help in Ukraine because the smugglers had promised to get him to London where his sister was living.

26. A questionnaire based on the same interview recorded the applicant's answers to a number of standardised questions concerning his

identity, history and background. It stated, in particular, that the applicant had been born on 14 January 1992, that his mother tongue was Dari and that he also spoke Pashto.

27. On 9 March 2011 the Regional Migration Service rejected the applicant's asylum application as inadmissible (see paragraphs 34 and 35 below for the description of the two stages of the asylum procedure in Ukraine). The Regional Migration Service found that

(i) the facts on which his application was based were manifestly unfounded, as he could not be defined as a "refugee" under section 1 of the Refugees Act (see paragraph 33 below);

(ii) since the applicant was not a member of any political, social or military organisation and had not been connected with any violent incidents associated with race, ethnicity, religion or political views, he did not qualify as a refugee under the Refugee Convention;

(iii) the fact that the country of origin had issued the applicant with a travel document demonstrated that he had benefited from protection in his country of origin, which, pursuant to Article 1.E of the Refugee Convention, meant that the Refugee Convention did not apply to him;

(iv) the applicant had not applied for asylum while travelling through Tajikistan, Russia or Ukraine but had done so only after being returned from Slovakia to Ukraine. This showed that he had not intended to seek asylum in Ukraine but had meant to reach the United Kingdom, where his sister resided;

(v) since the applicant had no identity documents, it was not possible to identify him or his country of origin.

IV. EXPULSION TO AFGHANISTAN

28. According to the applicant, on 11 March 2011 in preparation for his expulsion to Afghanistan, he was transferred to Mukacheve, Ukraine, where the Migration Service's decision of 9 March 2011 was notified to him.

29. According to the applicant, on 12 March 2011, a Saturday, an NGO partner of the UNHCR attempted to contact him and other Afghan nationals facing expulsion to provide them with legal advice. However, it was denied access to them, preventing the applicant from applying for an interim measure with the Court under Rule 39 of the Rules of Court.

30. On the same day the applicant was put on a train to Kyiv.

31. On 14 March 2011 the applicant was expelled to Kabul.

32. The applicant alleged that approximately three weeks after his expulsion to Afghanistan, some unknown people had looked for him at his home and left a threatening letter for him. His mother had arranged for him to leave Kunduz for Mazar-e Sharif and Kabul. Since that time, he had been forced to change his place of residence frequently for fear of the people who

had killed his father, and had been travelling frequently between Mazar-e Sharif and Kabul.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW IN UKRAINE

A. Refugees Act of 21 June 2001 (in force at the material time)

33. Under section 1 a refugee was defined as follows:

> "... a person who is not a citizen of Ukraine and who, due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to avail himself of the protection of that country or, due to such fear, is unwilling to avail himself of such protection, or who, not having a nationality and being outside the country of his former permanent residence, is unable or unwilling to return to it because of the said fear ..."

34. Sections 12 to 14 and 16 of the Act provided for a two-stage asylum procedure: admissibility and merits stages. The regional migration services were responsible for examining the initial applications for asylum and decided on the admissibility. If a regional migration service found an application admissible, it instituted proceedings on the merits and made a recommendation to the State Committee for Nationalities and Religions on the merits of the application. The Committee then took a final decision to grant or refuse asylum. Asylum-seekers could appeal against a negative decision taken by the regional migration service either to the Committee or to the courts. The lodging of an appeal constituted grounds for registration of the appellant's temporary residence in Ukraine.

35. Section 12 provided that examination of an asylum application was to begin with an interview conducted in a language the asylum-seeker understood, if necessary with the assistance of an interpreter. An inadmissibility decision was to be taken if the applicant did not meet the definition of a refugee provided for in section 1 of the Act (see paragraph 33 above) or if an application was abusive: based on a false identity or lodged by an individual whose previous application had been rejected, unless circumstances had changed.

B. Legal Status of Foreign Nationals and Stateless Persons Act of 4 February 1994 (in force at the relevant time)

36. Section 32 of the Act laid down the procedure for expulsion of foreign nationals and stateless persons from Ukraine. It listed the grounds for compulsory expulsion, which included a serious breach of the legislation concerning foreign nationals and stateless persons, and provided that foreign nationals and stateless persons could be detained at temporary

accommodation facilities for the period needed to organise their removal, which was not to exceed six months.

C. Code of Administrative Justice of 6 July 2005 (as worded at the relevant time)

37. Under Article 186 of the Code an appeal had to be lodged within ten days of the pronouncement of a judgment. If the judgment was delivered in writing, an appeal had to be lodged within ten days of receipt by the applicant of a copy of the judgment.

II. INTERNATIONAL LAW

Agreement between the European Community and Ukraine on the Readmission of Persons

38. The Agreement, which entered into force on 1 January 2010, reads in the relevant parts as follows:

Article 3
Readmission of third-country nationals and stateless persons

"1. The requested State, upon application by the requesting State and without further formalities other than those provided for by this Agreement, shall readmit to its territory third-country nationals or stateless persons which do not, or no longer, fulfill the conditions in force for entry to or stay on the territory of the requesting State provided that ... such persons:

...

(a) illegally entered the territory of the Member States coming directly from the territory of Ukraine or illegally entered the territory of Ukraine coming directly from the territory of the Member States;"

III. RELEVANT INTERNATIONAL MATERIAL CONCERNING THE SITUATION IN SLOVAKIA AND UKRAINE

A. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT")

39. The report on the 2007 CPT visit to Ukraine (CPT/Inf (2009) 15), published on 19 May 2009, reads in the relevant parts as follows:

"**A. Establishments under the authority of the State Border Service**

...

39. Turning to access to a lawyer, it was limited to visits by pro-bono lawyers from NGOs, who helped foreign nationals file asylum applications and provided them with information on the relevant legal procedures. However, the delegation was concerned to learn that at Chop, the NGO lawyers had limited access to detained persons (i.e. they could only meet persons whose names they already knew). It should also be

noted that the provision of legal consultations was hampered by the lack of proper interpretation at the Border Guard detention facilities (see also paragraph 41).

...

40. The delegation noted that many foreign nationals lacked information on their legal status, the procedure applicable to them and their rights (including the right to lodge complaints). The internal regulations which were posted in the detention areas were, as a rule, available only in Ukrainian. Some other information materials (e.g. the Law on refugees) were also available, but only in French or Russian; Border Guard staff indicated that they had run out of materials in other languages. A positive aspect was the involvement of NGOs in the provision of assistance and information to foreign nationals, on the basis of agreements with the State Border Service. However, the fact that outside bodies were helping foreign detainees does not discharge the State from its responsibility to provide information and assistance to such detainees.

The major complaint of foreign nationals detained was the lack of knowledge of what was happening in their case and how long they would spend in custody. This uncertainty greatly exacerbated the experience of confinement and led to tensions. The observations made during the visit suggest that Border Guard staff need to be more attentive to these problems.

41. As regards the provision of interpretation, a number of detained foreign nationals complained that, following their apprehension, they had been asked to sign documents in Ukrainian without understanding their content. Even when interpretation had been available, the information provided was allegedly not always comprehensible. The delegation learned that there was a shortage of local interpreters speaking the less common languages; to overcome the problem, plans were being made to set up facilities for distance interpretation at the main border units."

B. Office of the United Nations High Commissioner for Refugees ("UNHCR")

40. The UNHCR Position on the Situation of Asylum in Ukraine in the Context of Return of Asylum-Seekers, dated October 2007, reads, in so far as relevant:

"13. Under the *Refugee Law,* the Regional Migration Services are responsible for considering the initial applications for asylum and can decide on the admissibility. If the Regional Migration Service decides to admit a case into the procedure, it will then consider the substance and make a recommendation to the [State Committee for Nationalities and Religions]. The SCNR then takes a decision on the case. The SCNR may approve the RMS recommendation or may take a different approach. Asylum-seekers can appeal a negative decision from the Regional Migration Service either to the SCNR or to the courts.

...

31. Regarding the **quality of the asylum procedure**, one of the main problems in Ukraine's asylum management (as stated in paragraph 13 above) has been the constant reform of the asylum institutions which have been remodelled by successive governments, and in particular of the central executive body. In March 2007, by decree of the Cabinet of Ministers (No. 201), the State Committee for Nationalities and Religions (previously the State Committee for Nationalities and Migration) became the authorized central body of executive power to deal with asylum issues. Its

activities are directed and coordinated by the Cabinet of Ministers through the Vice Prime Minister of Ukraine.

...

42. With regard to reception standards, neither asylum-seekers nor refugees have adequate access to State-sponsored accommodation, material assistance or employment. According to Article 20 of the Refugee Law, only recognized refugees are eligible for financial aid and accommodation. In Ukraine, there is only one temporary accommodation centre for asylum-seekers and refugees currently in operation. It has a capacity of up to 250 places. According to Article 7 of the Refugee Law, the Regional Migration Services should determine places for temporary accommodation and generally facilitate the provision of housing to refugees and asylum-seekers. In practice, however, the Regional Migration Services are unable to provide such services. Instead, refugees and asylum-seekers have to rent accommodation from private owners. As “foreigners”, the rents requested from them are much higher than those charged to nationals. Rents for private accommodation, especially in the cities, are high and continue to increase. As a result, many refugees are obliged to spend almost their complete income on accommodation. Many remain homeless or live in sub-standard conditions, risking their physical and psychological health.

...

46. The overall situation motivates some asylum-seekers to try to leave in search of better protection elsewhere. They are often apprehended for attempting to cross illegally the Western border of Ukraine. Detention has therefore been on the increase. Although detention conditions have improved in recent years, they are still poor due to the ever-growing number of irregular migrants and difficulties of the State to cope with the increased numbers. Asylum-seekers are detained jointly with other foreigners and remain in detention for protracted periods. This type of administrative detention may amount to a denial to the right to seek asylum.

...

52. ... UNHCR advises States, to refrain from returning third country asylum-seekers to Ukraine as at present no assurances can be given that the persons in question: a) would be readmitted, b) would have access to a fair and efficient refugee status determination procedure, c) would be treated in accordance with international refugee standards or d) that there would be effective protection against refoulement.”

C. Human Rights Watch

41. In a 124-page report published in December 2010 and entitled “Buffeted in the Borderland: The Treatment of Migrants and Asylum Seekers in Ukraine”, Human Rights Watch (“HRW”) described the results of their research on the experience of migrants and asylum-seekers returned to Ukraine from Hungary and Slovakia.

42. According to the report, most of the fifty people who were interviewed and who had been returned to Ukraine from Slovakia or Hungary said they had asked for asylum upon arrival in Slovakia or Hungary, but that their requests had been ignored and they had been swiftly expelled back to Ukraine.

43. The report deplores the fact that in December 2009 the Slovakian Ministry of the Interior abrogated an agreement with UNHCR and the Human Rights League which since 2007 had permitted NGO lawyers to monitor return procedures at the border.

44. Concerning the detention of asylum-seekers in Ukraine, the report notes that many of the concerns previously noted by HRW have been addressed. In particular, the material conditions at the centres have improved, all of the facilities visited by the HRW in 2010 looked clean and well-ordered and none were overcrowded. Most of the detainees interviewed in most locations had no complaints regarding lack of hygiene or overcrowding. However, former detainees of the temporary detention facility at Chop indicated that the institution was sometimes overcrowded. The most frequent complaints were about the food, both quality and quantity, and lack of access to lawyers, telephones, the Internet and television. HRW also observed that certain other problems persisted: particularly, access to the asylum procedure; detention of children; mixing of children with adults; corruption; and the disproportionate use of migrant detention in general.

45. According to the report, migration detainees in Ukraine had no consistent, predictable access to a judge or other authority. Nor did they have access to legal representation to enable them to challenge their detention. Furthermore, there was generally no individualised assessment of the necessity of detaining migrants or asylum-seekers.

IV. RELEVANT INTERNATIONAL MATERIALS CONCERNING THE SITUATION IN AFGHANISTAN

46. The UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published on 17 December 2010, read, insofar as relevant:

"**I. Introduction**

...

UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include (i) individuals associated with, or perceived as supportive of, the Afghan Government...

In light of the worsening security environment in certain parts of the country and the increasing number of civilian casualties UNHCR considers that the situation can be characterized as one of generalized violence in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces. Therefore, Afghan asylum-seekers formerly residing in these areas may be in need of international protection under broader international protection criteria, including complementary forms of protection. In addition, given the fluid and volatile nature of the conflict, asylum applications by Afghans claiming to flee generalized violence in other parts of Afghanistan should each be assessed carefully, in light of the evidence presented by the applicant and other current and

reliable information on the place of former residence. This latter determination will obviously need to include assessing whether a situation of generalized violence exists in the place of former residence at the time of adjudication.

UNHCR generally considers internal flight as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of prospective relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. Given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas, a case-by-case analysis will, nevertheless, be necessary.

...

III. Eligibility for International Protection

...

A. Potential Risk Profiles

1. Individuals Associated with, or Perceived as Supportive of, the Government and the International Community, Including the International Security Assistance Force (ISAF)

There is a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active.

...

The majority of targeted attacks on civilians by armed anti-Government groups have occurred in those groups' strongholds. However the number of targeted assassinations and executions of civilians has also increased in other parts of the country previously considered more secure. In the south-eastern and central regions, the number of assassinations and executions allegedly committed by armed anti-Government groups in 2010 has increased in comparison to 2009. Such targeted attacks rose dramatically in parts of the southern region, particularly in Kandahar, where the Taliban have been conducting a systematic and targeted assassination campaign since the beginning of 2010. An average of 21 assassinations per week (compared to seven per week during the same period in 2009) was recorded from June to mid-September 2010, mostly in the southern and south-eastern regions.

UNHCR considers that persons associated with, or perceived as supportive of, the Government and the international community and forces, including Government officials, Government-aligned tribal and religious leaders, judges, teachers and workers on reconstruction/development projects, may, depending on the individual circumstances of the case, be at risk on account of their (imputed) political opinion, particularly in areas where armed anti-Government groups are operating or have control.

...

B. Eligibility Under Broader International Protection Criteria, Including Complementary Forms of Protection

...

1. Civilian casualties

...

In the first half of 2010, suicide attacks caused 183 civilian deaths, more than half of which occurred in the southern region; this represents a 20 percent increase compared to the same period in 2009.

Although during the first half of 2010 armed anti-Government groups predominantly targeted military objectives, IEDs and suicide attacks tactics were also used in civilian areas, including along roads used by civilians, around government buildings, outside hotels, in busy markets and in commercial areas.

Notwithstanding sustained efforts to clear mines and UXOs in the last decade and a steady decrease in the number of Afghan victims, mines and explosive remnants cause, on average, 42 casualties per month, a large majority of who are children. In addition to causing loss of life and serious injury, mine contamination has prevented livelihood activities, including by blocking access to agricultural land, water, health and education.256

A further analysis by UNHCR of reported incidents of civilian casualties during the period from 1 July 2010 to 8 October 2010 reveals that the provinces most affected by indiscriminate conflict- related violence are Helmand and Kandahar in the southern region and Kunduz in the north-eastern region.

...

3. Conflict-Induced Displacements and Voluntary Returns

Increasing insecurity and violence in certain parts of Afghanistan, resulting from the fighting between anti-Government groups and pro-Government forces, continue to cause significant population displacements. The number of conflict-induced IDPs continues to rise and displacement is largely taking place in the southern and western regions of Afghanistan...

...

While there has been an increase in conflict-induced displacement in Afghanistan, it should be noted that voluntary returns, particularly from Pakistan and Iran, are also increasing. Between March and October 2010, over 100,000 Afghans returned, double the number from the same period in 2009. The reasons for return are several, and include: (i) the perception that the security situation in some provinces has improved; (ii) economic factors and (iii) the increased insecurity and natural disasters in the former settlement areas in Pakistan. While thousands of Afghans returned to their home areas, nearly one third currently reside in informal IDP settlements or urban areas in Afghanistan. Some of these settlements are located in the provinces of Nagarhar, Laghman and Kunar, which are experiencing fluctuating but still significant levels of civilian casualties and security incidents. It should be noted that many returns are occurring in the context of deteriorating conditions for Afghans outside the country rather than significant improvements in the security and human rights conditions in Afghanistan.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION BY SLOVAKIA

47. The applicant complained that by failing to provide him with adequate interpretation and legal assistance, the Slovakian authorities had denied him an opportunity to ask for asylum and had returned him to Ukraine where he had faced the risk of *refoulement* to Afghanistan and had indeed been returned there. He invoked Articles 3 and 13 of the Convention, which read as follows:

Article 3

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. Government of Slovakia

48. The Government submitted that although the Afghan identification document (*tazkira*) provided by the applicant indicated "age 8 years in year 2002", they had doubts as to the authenticity of the document and its translation into English prepared by the organisation where the applicant's lawyer worked. They pointed out that the size of the document provided by the applicant did not correspond to the size of original Afghan documents of that type. Moreover, the content of the original document was illegible, so that it had been impossible to verify whether it was genuine and truly belonged to the applicant.

49. In the Government's view, the applicant was required to support his allegations with regard to his age with convincing evidence, which he had failed to do. His date of birth was unclear from his submissions.

50. The applicant had declared to the border police in Slovakia that he had been born on 14 January 1992. Therefore, there had been no indication that he was an unaccompanied minor and no need for further verification. Had he declared himself to be a minor, he would have been dealt with in accordance with the established procedure for such minors.

51. Under the established procedure, unaccompanied migrant children were to be immediately transferred by the police to the care of child-protection services. At the relevant time, declarations of their age as

minors had been taken on faith, since there had been no system in place for medical age verification. The latter had been put in place only later, to prevent abuse of the system by human smugglers.

52. On the question of domestic remedies, the Government submitted that the applicant could have appealed, within fifteen days, against the expulsion decision to a superior authority but that, under the law in force at the relevant time, that appeal had no suspensive effect. Any decision in those proceedings would then have been amenable to a judicial review. Although an application for a judicial review had no automatic suspensive effect, it would have been possible to apply to the court to have enforcement suspended. Another possibility had been to lodge a constitutional complaint with the Constitutional Court and to request the court to suspend enforcement. The applicant, however, had failed to use any of those remedies.

53. In any event, an effective remedy was required only in the event that the applicant had an arguable claim of a violation of his Convention rights, which he did not have as his complaint under Article 3 was manifestly ill-founded.

54. The applicant’s allegations as to the lack of interpretation were untrue as in fact interpretation from Slovak to English and from English into Pashto had been provided.

55. The applicant had failed to present to the Slovakian authorities any allegations of risk of ill-treatment in Afghanistan. In support of his allegations before the Court, he had only referred to publications on the general situation in Afghanistan and the situation concerning children, whereas he had never alleged before the Slovakian authorities that he had been a minor at the time.

56. The reports cited by the applicant either pre-dated his return by three years or post-dated it (see paragraphs 40 and 41 above). Therefore, the Slovakian authorities could not be considered to have been on notice of any deficiencies. Moreover, even if there were certain deficiencies in Ukraine, they were not comparable to the situation in Greece and Hungary previously criticised by the UNHCR and the Court.

57. The facility in Chop had been regularly visited by bodies such as the International Organization for Migration, the UNHCR.

58. Contrary to cases examined previously by the Court, the applicant had not been expelled within the Dublin system. Nor had he manifested any intention to seek asylum in Slovakia, and the authorities could not have predicted that he would apply for asylum in Ukraine. Indeed, after having been transferred there he had waited five months before doing so.

59. Had the applicant actually applied for asylum in Slovakia as he alleged, his application would have been recorded. The Government cited statistics in that respect: in 2010, 495 people had crossed the border

illegally, of whom 100 were Afghan citizens. Sixty-seven people had requested asylum, ten of whom were Afghan citizens.

60. In addition, Ukraine was a member State of the Council of Europe and the Court and the Court's case-law recognised the presumption that member States would respect their international obligations.

61. Referring to the submissions of the Human Rights League (see paragraphs 66 to 69 below), the Government pointed out that they had not conducted monitoring of the border during the relevant period and their submissions were based only on unverified statements made by foreign nationals. Their submissions as to the deficiencies in the organisation of interpretation had not been verified either. Moreover, the HRL's own 2010 report acknowledged that the State had made progress in this area and faced objective difficulties as a result of the lack of interpreters into certain languages in Slovakia. In any event, the applicant had in fact been provided with interpretation into Pashto. Although the HRL had reported foreigners' statements to the effect that the Slovakian border police had not facilitated their access to asylum proceedings despite their requests, there was not a single documented instance of such a situation.

2. The applicant

62. In responding to the Slovakian Government's reservations concerning the Afghan document attesting to his age, the applicant stated that he had not been obliged to support his allegations about his age with convincing evidence. He could have informed the Slovakian authorities about his age orally if he had been given access to an interpreter.

63. Despite the fact that he had looked like a teenager, he had not been provided with an interpreter by the Slovakian border police. He repeated his allegations as summarised in paragraph 13 above. He considered that the Government had been required to conduct an age assessment with the participation of a lawyer and an interpreter.

64. The Slovakian authorities' actions had thus made possible the applicant's *refoulement* to Afghanistan.

B. Third-party interveners

1. UNHCR

65. The UNHCR described the risks faced from Taliban elements by those who supported the Afghan government, in particular in the south and south-east of the country (see paragraph 46 above). They referred to the regulations governing the treatment of asylum-seekers and unaccompanied minors in Slovakia and to the Human Rights Watch report alleging lack of access to information on asylum procedures and lack of interpretation into a language understood by the asylum-seeker (see paragraphs 41 to 45 above).

2. Human Rights League

66. The third-party intervener explained that since 2007 it had conducted monitoring on the Slovakia-Ukraine border under a memorandum of understanding with Slovakia's Bureau of Alien and Border Police. As that cooperation had been limited between 2009 and 2012, the intervener had not received information on the apprehension of third-country nationals and had been unable to inspect individual case files, unless it had been provided with powers of attorney signed by the individuals concerned. That had been the case only for some third-country nationals returned to Ukraine. In 2010 fifty-five monitoring visits had been carried out to all relevant units of the border control on the Slovakia-Ukraine border, and 240 individual cases had been monitored. However, due to limited access and cooperation, not all cases of apprehension of foreign nationals in 2010 had been monitored.

67. The intervener reported a case which it had monitored in the course of 2010, of an Afghan who had been returned to Ukraine. According to the case file, interpretation had been provided from Slovak into English and then by a member of the group of Afghans into Persian, but the signatures of the Slovak-to-English and English-to-Persian interpreters had been missing, raising a doubt as to whether the proper procedure had been observed. In all thirty-three cases monitored in 2010 where foreigners had been returned to Ukraine, the foreigners had stated that they had orally expressed their intention to seek asylum in Slovakia to the Slovakian authorities. That was not corroborated by examination of the Slovakian files and in some cases the files contained explicit statements from the foreigners to the effect that they did not wish to seek asylum. However, in several cases checked, there had been procedural errors which may have led to individuals being interviewed without proper interpretation. In such cases, the reliability of records was evidently open to doubt. A number of foreigners returned to Ukraine had reported a lack of information about asylum procedures in Slovakia and deficiencies in interpretation. Such complaints had been made in particular by nationals of Afghanistan and Somalia.

68. The monitoring had revealed a number of cases where a member of the group of intercepted foreign nationals translated for members of the group in their language, after the police had translated from Slovak into English or Russian. The intervener expressed reservations about the independence and competence of such interpreters and the adequacy of the procedure used to appoint them.

69. The intervener made essentially the same submissions as the Government in respect of the procedure established at the time for the treatment of unaccompanied migrant children (see paragraph 51 above).

C. The Court's assessment

1. Establishment of facts concerning the applicant's age

70. The parties disagreed on the applicant's age. The applicant alleged that he had been born in 1993 or 1994 and so had been, at most, seventeen years of age in September 2010 when he had been detained in Slovakia and returned to Ukraine (see paragraph 4 above). The Government, by contrast, insisted on the correctness of their records, based according to them on the applicant's own statement to the effect that he had been born on 14 January 1992 and had, therefore, been eighteen at the relevant time.

71. The Court notes that the domestic authorities in both Slovakia and Ukraine, and well as the Embassy of Afghanistan in Kyiv, consistently recorded the applicant's date of birth as 14 January 1992 (see paragraphs 9, 22 and 26 above).

72. The only elements in the file which, according to the applicant, contradict those records are the applicant's photograph allegedly showing that he looked like a teenager in 2011, and his Afghan identity document.

73. However, there is no indication as to when and where the photograph was taken.

74. As to the Afghan identity document, the Slovakian Government raised doubts as to its veracity and that of the translation provided by the applicant (see paragraph 48 above). As the Government correctly pointed out, the copy of the identity document provided by the applicant was small and the original text appears unreadable. Moreover, this was not the format of original documents of that type, which indicates that the applicant, for some reason, provided a considerably compressed copy of the document, rendering the text illegible.

75. The applicant did not explain this or attempt to dispel the Government's doubts. Nor did he allege that any specific circumstances prevented him from providing a more legible copy of that or another document attesting to his age. This is particularly striking given the fact that, by the time he responded to the Slovakian Government's observations (4 July 2017), he had been back in Afghanistan for more than six years, by which time he had definitely reached the age of majority.

76. Given that the copy of what the applicant claimed was his identity document was the only official record allegedly confirming the applicant's age as a minor at the time, and that it contradicted all other documents in the file, issued by three different States, including his State of origin, a response from the applicant to the Slovakian Government's concerns was required.

77. Even if the Court were to accept the applicant's allegation that he had not informed the Slovakian authorities of his age due to interpretation difficulties, he did not allege that there were any such difficulties during his interview with the Embassy of Afghanistan or his asylum interview in

Ukraine, both of which resulted in his birth date being recorded as 14 January 1992 (see paragraphs 22 and 26 above).

78. Finally, there is a contradiction in the applicant's own submissions: according to his own account, he told the Ukrainian authorities that he was fourteen, but before this Court he alleged that he had been sixteen or seventeen at the time (contrast paragraphs 4, 14 and 21 above). He has not explained that contradiction.

79. In such circumstances, the Court concludes that the applicant has not provided the Court with cogent elements which would lead it to depart from the findings of fact reached by the domestic authorities in respect of his age (see, for the relevant principles, *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 154, 22 October 2018).

1. Admissibility

80. The Court notes at the outset that the Government could be seen as attempting to argue that the applicant had failed to exhaust certain domestic remedies available to him (see paragraph 52 above). The Court, however, does not consider it necessary to address those arguments, since the applicant's complaints are in any case inadmissible for the following reasons.

81. The Slovakian Government provided the Court with a transcript of the interview which the border police had conducted with the applicant (see paragraph 9 above). According to the transcript, interpretation was provided from Slovak into English; and interpretation was then provided from English into Pashto, apparently by another Afghan migrant arrested with the applicant. While the applicant criticised the adequacy of interpretation arrangements, there is no indication that, in the circumstances, they were so inadequate as to deny the applicant access to the asylum procedure had he wished to access it.

82. According to the records, the applicant provided information to the Slovakian authorities about his journey from Afghanistan to Slovakia, and his intention to travel to western Europe. He stated that he had not intended to ask for asylum in Slovakia. In that respect, the Slovakian authorities' records are consistent with the applicant's subsequent statements to the Ukrainian authorities and in the application form lodged with this Court, to the effect that he and his brother-in-law had intended to travel to western Europe, which the brother-in-law in fact did just days after the applicant had reached Slovakia (see paragraphs 7 and 25 above). The Slovakian authorities' records are also consistent with the applicant's conduct at the border: it is uncontested that he had attempted to pass through Slovakia in a clandestine manner, rather than present himself openly at the border post to ask for asylum (contrast *M.A. and Others v. Lithuania*, no. 59793/17, § 107, 11 December 2018).

83. What is more, the Slovakian authorities' records, rather than the applicant's submissions before this Court, are also consistent with his subsequent conduct in Ukraine: even if the Court were to accept the applicant's allegations that his initial attempt to ask for asylum had been dismissed by Ukrainian officials (see paragraph 14 above), the applicant did not contest that he had attended an information session on the asylum procedure in Ukraine on 19 October 2010. Nevertheless, he did not apply for asylum until 23 February 2011, the day after the Embassy of Afghanistan had issued a travel document for him (see paragraphs 22 to 24 above).

84. By contrast with the Slovakian authorities' records, which are precise and are corroborated by other aspects of the case, the applicant's account of his interactions with the Slovakian authorities is quite vague. He merely stated that he had attempted to ask for asylum through a fellow Afghan who spoke some French (see paragraph 13 above). He failed to specify, however, the substance of his request and to whom exactly it had been addressed, precisely when and in what context. He did not identify the fellow Afghan who had supposedly attempted to translate for him, or provide a statement from that interpreter. Nor did he contest that, as the Slovakian authorities' records indicated, there had been an English speaker in his group of migrants. He did not explain why he had not attempted to ask for asylum through him, given that the Slovakian authorities had provided Slovak-to-English but apparently not Slovak-to-French interpretation.

85. It has not been alleged that there was at the relevant time such a situation of generalised violence in Afghanistan, particularly in its Kunduz province (see paragraph 46 above and *Husseini v. Sweden*, no. 10611/09, §§ 95-99, 13 October 2011), that in itself could have raised concerns as to the applicant's safe return in case of his indirect refoulement to Afghanistan after his return to Ukraine. The applicant's claim that his life would be at risk in Afghanistan was based on his personal circumstances. It was, therefore, up to him to provide that information to the authorities (see *J.K. and Others v. Sweden* [GC], no. 59166/12, § 96, 23 August 2016). There is nothing to indicate that, had he done so, his application would not have been accepted and examined, for example because the Slovakian authorities applied in an overly rigid manner a presumption that Ukraine was a safe third country (contrast *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 163, 21 November 2019).

86. Moreover, there was no reason for the Slovakian authorities to be on alert concerning any situation of systematic violation of migrants' rights to which the applicant could fall victim in Ukraine (contrast *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 131-33, ECHR 2012, and *M.A. and Others v. Lithuania*, cited above, § 113).

87. The UNCHR did not submit that its 2007 report expressing reservations about returns to Ukraine remained valid in 2010 (see paragraphs 40 and 65 above). Moreover, that report concerned asylum-seekers. For the reasons stated above, the Slovakian authorities did not consider that the applicant fell into that category. Since he had not applied for asylum, the authorities were under no obligation to verify whether he would have effective access to the Ukrainian asylum system (contrast *Ilias and Ahmed*, cited above, §§ 134-37, setting out the nature of that obligation as far as it concerns asylum-seekers).

88. Finally, the Slovakian authorities did not expose the applicant to any heightened risk by inducing him to return to Ukraine illegally (compare and contrast *Ilias and Ahmed*, cited above, §§ 161 and 163), but rather handed him over to the Ukrainian authorities within the framework of an orderly readmission process.

89. In summary, the Court is unable to establish to the required standard of proof that the applicant brought any of his personal concerns as to the risk of return to Ukraine or Afghanistan to the attention of the Slovakian authorities, even though he had an opportunity to do so (contrast, for example, *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 242, 21 October 2014). In view also of its conclusion above concerning the applicant's age, the Court is not convinced that the applicant, whose credibility was also an issue, has laid a basis for an arguable claim that there has been a breach of Article 3 by Slovakia.

90. The Court is mindful of the concern expressed by the third-party interveners about the organisation of access to asylum on the Slovakia-Ukraine border at the time (see paragraphs 42, 43, and 65 to 69 above). It stresses, however, the well-established principle of its case-law according to which the Court's task is not to review the relevant law and practice in *abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, *mutatis mutandis*, *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 107, 31 January 2019, and compare *N.D. and N.T. v. Spain* (dec.), nos. 8675/15 and 8697/15, § 15, 7 July 2015).

91. Therefore, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

92. In the absence of an arguable complaint under Article 3, the applicant's complaint under Article 13 must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 (a) and 4.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION BY SLOVAKIA

93. The applicant complained that he had not been informed of the reasons for his arrest in Slovakia. He relied on Article 5 § 2 of the Convention, which reads:

> “2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

A. The parties’ submissions

94. The applicant submitted that the Slovakian authorities had ignored the fact that he had been a minor and had failed to provide him with access to an interpreter and a lawyer.

95. The Government referred to the sequence of events set out in paragraphs 8 to 12 above. They stressed that “no coercive means had been used against the applicant”. In particular, at 7.25 p.m. on 23 September 2010 the applicant had been interviewed by the border police to establish his identity and the circumstances under which he had committed the offence of illegal entry into Slovakia, an offence he had demonstrably committed. He had stated that he had been aiming to go to western Europe and had not wished to request asylum in Slovakia. He had also refused to sign the record of the interview without providing a reason. They submitted that “no other [instance of] deprivation of personal liberty of the applicant on the territory of the Slovak Republic, for example arrest, [had] occurred”. The following day, 24 September 2010, a decision on administrative expulsion had been issued, by which the applicant had also been banned from re-entering Slovakia for five years. The decision had been translated into Pashto. The applicant had been given a Pashto translation of the guidelines on expulsion, summarising the relevant Slovakian legislation and procedures concerning expulsion of foreigners. It also included an explanation as to the available remedy against expulsion.

96. The applicant had been with the Slovakian authorities from 7.25 p.m. on 23 September 2010 to 2 p.m. the following day. During that period he had been interviewed and the reasons for his retention had been explained. He had been heard and it had been decided to expel him. He had been informed of the reasons and the available remedies had been explained to him.

B. The Court’s assessment

97. The principles of the Court’s case-law concerning the applicability of Article 5 to the retention of foreign nationals in border zones are set out in *Ilias and Ahmed* (cited above, §§ 211-17).

98. Paragraph 2 of Article 5 lays down an elementary safeguard: any person who has been arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 115, 15 December 2016). The constraints of time imposed by the notion of promptness will be satisfied where the reasons for the arrest are provided within a few hours of arrest (see *M.A. v. Cyprus*, no. 41872/10, § 228, ECHR 2013 (extracts)).

99. In view of its conclusion below concerning the applicant's complaint under Article 5 § 2, the Court will proceed on the presumption that the applicant was deprived of his liberty in Slovakia and that, therefore, Article 5 of the Convention was applicable.

100. The Court sees no reason to doubt that the applicant was aware that he had entered Slovakia unlawfully and, therefore, that he was also aware of the factual grounds for his detention in Slovakia.

101. As to the legal grounds, the applicant remained with the Slovakian authorities' for about twenty-two hours (see paragraphs 8 and 12 above). Given the relatively brief time-frame and the evident nature of the expulsion context, the Court considers that the information transmitted to the applicant on 23 September 2010 in the course of the interview (with Slovak-to-English and English-to-Pashto interpretation), which occurred within four hours of his arrest, in combination with written information served on him the following day, 24 September 2010 (see paragraphs 8 to 11 above), was sufficient under the circumstances (see, for example, *M.A. v. Cyprus*, cited above, §§ 233-35).

102. The Court reiterates that Article 5 § 2 does not require that reasons be given to a detained person in writing or some other particular form. The reasons may be provided or become apparent in the course of post-arrest interviews or questioning (ibid., § 229). When a person is arrested with a view to extradition or deportation, the information given may be even less complete (ibid., § 230). In particular, Article 5 § 2 does not require that a reference be made to such elaborate details as specific legal provisions authorising detention (see *Suso Musa v. Malta*, no. 42337/12, § 116, 23 July 2013).

103. Therefore, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF CONDITIONS OF DETENTION IN UKRAINE

104. In his application form the applicant complained that the conditions of his detention in Ukraine had been inadequate, in breach of Article 3 of the Convention. He described the conditions of his detention in the terms set out in paragraph 15 above.

105. The Government of Ukraine failed to submit any observations concerning this complaint.

106. The Court reiterates that information regarding the physical conditions of detention falls within the knowledge of the domestic authorities. Accordingly, applicants might experience certain difficulties in procuring evidence to substantiate a complaint in that connection. Nevertheless, in such cases applicants may well be expected to submit at least a detailed account of the facts complained of and to provide – to the greatest possible extent – some evidence in support of their complaints (see, for example, *Visloguzov v. Ukraine*, no. 32362/02, § 45, 20 May 2010).

107. The applicant failed to provide a detailed account of the conditions of his detention at the Chop facility (compare, for example, *Ildani v. Georgia*, no. 65391/09, § 27, 23 April 2013, *Ustyugov v. Ukraine* (dec.), no. 251/04, 1 September 2015, and *Story and Others v. Malta*, nos. 56854/13 and 2 others, § 110, 29 October 2015). Although he mentioned overcrowding, he failed to provide such details as the approximate size of the room in which he had been held or the number of people held there with him (see paragraphs 15 above). The gaps in the applicant's account cannot be supplemented by relevant international reports, which do not contain any conclusive information on this point (see paragraph 44 above).

108. Therefore, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLES 3 AND 13 OF THE CONVENTION BY UKRAINE IN RESPECT OF THE ASSESSMENT OF THE RISK OF THE APPLICANT'S RETURN TO AFGHANISTAN

109. The applicant complained that, by failing adequately to assess the risk that he might be exposed to ill-treatment in Afghanistan and by expelling him there, Ukraine had breached Articles 3 and 13 of the Convention. The latter provision reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

110. The applicant submitted that the Ukrainian authorities had failed properly to consider the risk of his return to Afghanistan, including in the context of his asylum application, and had done everything in their power to remove him to Afghanistan as soon as possible. They had ignored his claim that he would be in danger in Afghanistan.

111. The Government of Ukraine did not submit any observations.

B. The Court's assessment

1. Admissibility

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

2. Merits

(a) Relevant general principles

113. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see *F.G. v. Sweden* [GC], no. 43611/11, § 111, 23 March 2016).

114. In cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention. The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State was adequate and sufficiently supported by domestic

materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or third States, agencies of the United Nations and reputable non-governmental organisations (ibid., § 117).

115. Regarding the burden of proof, it is in principle for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3, and that where such evidence was adduced, it was for the Government to dispel any doubts raised by it. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there and his personal circumstances. Where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the above-mentioned sources, that there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned (ibid., § 120).

116. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (ibid., § 115).

117. When an applicant has already been expelled, the Court considers whether, at the time of removal from the respondent State, a real risk existed that the applicant would be subjected to treatment proscribed by Article 3 in the State to which he or she was expelled. The Court is not precluded, however, from having regard to information which comes to light subsequent to that date. This may be of value in confirming or refuting the assessment that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see, for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I, and *X v. Switzerland*, no. 16744/14, § 62, 26 January 2017).

118. Owing to the absolute character of the right guaranteed, Article 3 of the Convention applies not only to the danger emanating from State authorities but also where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the

risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *J.K. and Others v. Sweden*, cited above, § 80).

119. The possibility for the applicant to obtain protection or to relocate in the State of origin is also of relevance. Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an "internal flight alternative" in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision (ibid., § 81).

120. However, reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that, as a result of its decision to expel, the applicant is not exposed to treatment contrary to Article 3 of the Convention. Therefore, as a precondition to relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise (ibid., § 82).

(b) Application of the above principles to the present case

121. The Court notes at the outset that in the circumstances of the present case, the central question to be answered is not whether the applicant faced a real risk of ill-treatment in Afghanistan, but whether before returning him there, the Ukrainian authorities carried out an adequate assessment of his claim that he would be at such a risk (see, for example, *Batyrkhairov v. Turkey*, no. 69929/12, § 46, 5 June 2018). Therefore, the Court's examination will be limited to ascertaining whether the State authorities fulfilled their procedural obligations under Article 3 of the Convention (see *F.G. and Others v. Sweden*, cited above, § 117).

122. The applicant claimed that he belonged to a group, namely family members of government officials who, according to the relevant country information (see paragraph 46 above), could be at risk in Afghanistan. Accordingly, the Ukrainian authorities were under an obligation to examine his allegations and ascertain whether his expulsion to Afghanistan would expose him to a serious risk.

123. However, instead of making a substantive analysis of the applicant's alleged fear of persecution, the Regional Migration Service focused on formal grounds for rejecting his asylum request. It concluded that he did not meet the definition of a refugee under domestic law and the Refugee Convention. But given the UNHCR's assessment according to which certain persons and their families, perceived as associated with Afghan Government could, depending on the individual circumstances of their case, be at risk on account of that perceived association (see paragraph 46 above), it was incumbent on the competent authority to carry

out a substantive assessment given the material available of whether the applicant belonged to such a group and ran such a risk.

124. In any event, the Regional Migration Service did not explicitly discuss the question whether the applicant would face a risk of treatment contrary to Articles 2 and 3 if returned to Afghanistan, which is the only pertinent question the authorities were expected to ask under the Convention (see *A.D. and Others v. Turkey*, no. 22681/09, § 99, 22 July 2014).

125. What is more, the Regional Migration Service came to the contradictory conclusion that the applicant could count on the protection of the authorities of his country, Afghanistan, and at the same time that his country of origin could not be identified (see paragraph 27 (iii) and (v) above). Another contradiction was that the Migration Service concluded, on 9 March 2011, that the applicant had no identity document even though the Embassy of Afghanistan had issued a travel document for him on 20 February 2011 (see paragraphs 22 and 27 (v) above). What is even more perplexing, the Migration Service mentioned the latter fact in the same decision of 9 March 2011 in which it then went on to conclude that the applicant had no identity document (compare paragraph 27 (iii) and (v)).

126. Moreover, it has not been contested that the Migration Service notified the applicant of its decision only after the applicant's transportation to the airport with a view to expulsion started, three days before he was actually expelled to Afghanistan, all three of those days spent in transit (see paragraphs 28 and 31 above). Since he was not represented, this meant that he had no practical opportunity to challenge that decision before domestic courts.

127. To the extent that the issue of potential risk in the country of origin was examined by the domestic court that ordered the applicant's expulsion, it referred to what appears to be an outdated source of country-of-origin information and came to the irrational conclusion that no crimes against the person were being committed in Afghanistan (see paragraph 19 above). While this assessment predated examination of the applicant's asylum application, it appears to have been the only attempted analysis in substance of the risk he alleged.

128. These shortcomings were of a procedural nature. Had an appropriate examination of the applicant's asylum claim been conducted by the Ukrainian authorities, they may well have concluded that his account of risk of ill-treatment in Afghanistan was not convincing, for example because he had not argued that internal relocation, to which he has successfully had recourse (see paragraph 32 above), was not available to him or because his account was deemed to lack credibility. Such a conclusion could then have been borne out by the fact that the applicant has not actually suffered any ill-treatment in Afghanistan up until now (see *Cruz Varas and Others v. Sweden*, 20 March 1991, §§ 76 and 79, Series A

no. 201; *Al-Moayad v. Germany* (dec.), no. 35865/03, § 67, 20 February 2007; and *A.S. v. France*, no. 46240/15, §§ 62-64, 19 April 2018).

129. However, it was in the first place for the domestic authorities to examine the arguability of the applicant's claim (see *Jabari v. Turkey*, no. 40035/98, § 40, ECHR 2000-VIII).

130. There has, therefore, been a procedural violation of Article 3 of the Convention by Ukraine on account of the Ukrainian authorities' failure to examine, in a manner compatible with the requirements of the Court's case-law, the applicant's claim of fear of persecution in Afghanistan before returning him there.

131. Having regard to the reasoning which has led it to conclude that Article 3 of the Convention was breached in the present case, the Court finds nothing that would justify a separate examination of the same facts from the standpoint of Article 13 of the Convention (see, for example, *M.D. and M.A. v. Belgium*, no. 58689/12, § 70, 19 January 2016, and *Amerkhanov v. Russia*, no. 16026/12, § 59, 5 June 2018).

V. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION BY UKRAINE

132. The applicant complained that his detention in Ukraine had been in breach of Article 5 § 1 of the Convention, which reads, insofar as relevant:

> "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."

133. The applicant submitted that the authorities had failed to consider alternatives to detention and had not pursued the proceedings for his deportation with requisite diligence: his identification by the Embassy of Afghanistan had not been carried out until 20 February 2011, months after his placement in detention (see paragraphs 12 to 22 above).

134. The Government of Ukraine did not submit any observations.

135. The Court is not convinced by the applicant's arguments. Before ordering the applicant's detention, the domestic court did consider factors specific to his case and concluded that his detention was necessary (see paragraph 18 above). Likewise, there is no indication that there were such delays in the proceedings as to show that the authorities did not pursue the applicant's expulsion with requisite diligence.

136. Therefore, this part of the application is manifestly ill-founded and should be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VI. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 2 AND 4 OF THE CONVENTION BY UKRAINE

137. The applicant further complained that he had not been informed of the reasons for his detention in Ukraine, in breach of Article 5 § 2 of the Convention, and that the proceedings for his detention had been in breach of Article 5 § 4 of the Convention. The latter provision reads:

> "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."

A. The parties' submissions

138. The applicant repeated the account of events set out in paragraph 20 above. He submitted that he had not been informed of the grounds for his detention in Ukraine in a language he understood. Because no interpreter or lawyer had been involved in the proceedings before the Zakarpattya Circuit Administrative Court which had ordered his detention on 13 October 2010 (see paragraph 18 above), and he had not been informed of the court's decision in a language he understood, he had been in no position to appeal against it.

139. The Government of Ukraine did not submit any observations.

B. The Court's assessment

1. Admissibility

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

2. Merits

141. The Government of Ukraine have not submitted to the Court any domestic records disproving the applicant's account of the events (see paragraph 20 above) and showing that he had actually been informed, in a language he understood, of the legal reasons for his detention in Ukraine, and of the proceedings concerning his detention. Nor have they submitted any records showing that he had been informed of his associated rights and had effectively waived them. Consequently, the Court has no basis on which to reject the applicant's allegations.

142. Moreover, the only domestic document made available to the Court – the court decision of 13 October 2010 ordering the applicant's expulsion and detention (see paragraphs 18 above) – tends to corroborate those allegations. The court noted that the applicant had waived his right to appear

and ordered his expulsion and detention, but its decision contains no reference to the participation of an interpreter or a lawyer in the proceedings. Nor does it contain any indication that the applicant's rights had been explained to him in a language he understood.

143. It is also relevant that the applicant's allegations are corroborated by the CPT report concerning limited access to legal advice and interpretation at the Border Guard detention facilities where the applicant was held at the time (see paragraph 39 above).

144. There has, accordingly, been a violation of Article 5 §§ 2 and 4 of the Convention by Ukraine.

VII. ALLEGED INTERFERENCE BY UKRAINE WITH THE APPLICANT'S RIGHT OF INDIVIDUAL APPLICATION

145. The applicant complained that the Ukrainian authorities had denied an NGO representative access to the applicant, thus preventing him from lodging a request for an interim measure with the Court (see paragraph 29 above). He relied on Article 34 of the Convention, which provides as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

146. The Court notes that the applicant's allegations in this respect are not supported by any evidence and are couched in rather vague terms.

147. Accordingly, the Court finds that Ukraine has not failed to comply with its obligations under Article 34 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. 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

149. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

150. The Government of Slovakia pointed out that the applicant had not specified against which State his claims were directed. In any event, they considered the claim to be unfounded and manifestly overstated. The Government of Ukraine did not submit any comments.

151. In view of the fact that the violation of Article 3 of the Convention found in the present case is of a procedural nature, the Court awards him EUR 2,300 in respect of non-pecuniary damage, to be paid by Ukraine.

B. Default interest

152. 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, UNANIMOUSLY,

1. *Declares* the complaints against Slovakia inadmissible;

2. *Declares* the complaints against Ukraine under Article 3 and 13 of the Convention in respect of the applicant's return to Afghanistan and under Article 5 §§ 2 and 4 admissible and the remainder of the complaints against Ukraine inadmissible;

3. *Holds* that there has been a procedural violation of Article 3 of the Convention by Ukraine on account of the Ukrainian authorities' failure to examine in an appropriate fashion the applicant's claims of fear of persecution in Afghanistan before returning him there;

4. *Holds* that there is no need to examine separately the applicant's complaint under Article 13 of the Convention taken in conjunction with Article 3 against Ukraine;

5. *Holds* that there has been a violation of Article 5 §§ 2 and 4 of the Convention by Ukraine;

6. *Holds* that Ukraine has not failed to comply with its obligations under Article 34 of the Convention;

7. *Holds*
   (a) that Ukraine 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, EUR 2,300 (two thousand three hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Síofra O'Leary
Registrar	President