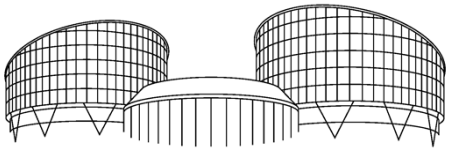

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF O.M. AND D.S. v. UKRAINE

(Application no. 18603/12)

JUDGMENT

Art 3 (procedural) • Expulsion • Removal of mother and her minor son to a third country without examination by Ukrainian border control authorities at international airport transit zone of risk of ill-treatment and/or refoulement of first applicant

Art 34 • Hinder the exercise of the right of application • State failure to comply with interim measure indicated by the Court under Rule 39 not to remove applicants from Ukraine Art 5 § 1 • Ratione materiae • Control and surveillance measures by border guards at airport for about eleven hours not amounting to a deprivation of liberty

STRASBOURG

15 September 2022

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 O.M. and D.S. v. Ukraine,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Yonko Grozev,
Ganna Yudkivska,
Carlo Ranzoni,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 18603/12) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Kyrgyz nationals, Ms O.M. ("the first applicant") and Mr D.S. ("the second applicant"), on 29 March 2012;

the decision to give notice to the Ukrainian Government ("the Government") of the application;

the decision to grant the applicants anonymity under Rule 47 § 4 of the Rules of Court;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the Office of the United Nations High Commissioner for Refugees ("the UNHCR"), who were granted leave to intervene by the President of the Section;

Having deliberated in private on 26 April 2022,

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

INTRODUCTION

1. The application concerns alleged violations of Articles 3, 5 and 13 of the Convention on account of the applicants' treatment by the Ukrainian authorities while in the transit zone of an international airport and their eventual removal from Ukraine without any examination of their allegations of a risk of ill-treatment and/or refoulement depending on the State to which they would be sent. The applicants also complained under Article 34 of the Convention that Ukraine had failed to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court in the present case.

THE FACTS

2. The applicants were born in 1968 and 2007 respectively. According to the most recent information from the applicants, since November 2012 they

have been living in the Netherlands. The applicants were represented, most recently, by Mr D. Dvornyk, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, most recently Mr I. Lishchyna of the Ministry of Justice.

4. The relevant facts are described mainly in chronological order. The description is based on the parties' written pleadings and the information contained in various documents copies of which they submitted to the Court. Where there is no discernible disagreement between the parties as to the relevant facts, no reference to the source of the information is made. Where there is actually or potentially such a disagreement, this has been indicated in the text to the extent possible.

I. EVENTS IN KYRGYZSTAN

5. The first applicant describes herself as an ethnic Ukrainian. She was born in Frunze (currently Bishkek), the capital of the then Kirghiz Soviet Socialist Republic (currently the Kyrgyz Republic). She was married to S. with whom she had a daughter and a son, the second applicant. In March 2009 S. died in circumstances allegedly linked to his political activities.

6. The first applicant was a journalist and a prominent political figure in Kyrgyzstan. Between 1992 and 2000 she held management posts at several television companies and was a member of parliament between 2000 and 2009. In 2009 she was appointed to the post of Head of the Kyrgyz Presidential Administration. She was mainly responsible for the President's public relations and communication with the media.

7. On 6 April 2010 civil unrest broke out in Talas and rapidly spread to other cities of Kyrgyzstan. A number of people were injured and died as a result of clashes with the police and security forces. In particular, on 7 April 2010 more than seventy people were killed and more than 300 injured in Bishkek when government forces opened fire at protesters. On 15 April 2010 the then President Bakiyev fled to neighbouring Kazakhstan fearing reprisals. He later withdrew from the post of President.

8. An interim government was set up under the leadership of the former Foreign Minister, Roza Otunbayeva. The interim government launched criminal investigations into the events of 7 April 2010. The first applicant was questioned about those events. On 3 May 2010 she was arrested on suspicion of abuse of power, in particular for failing to prevent the use of force against the protesters in Bishkek on 7 April 2010. She was detained in a solitary confinement cell at the investigative detention centre in Bishkek pursuant to a decision of a local court. On 17 May 2010 she was placed under house arrest.

9. In October 2010 the first applicant along with more than twenty other former public officials were charged with several counts of aggravated

murder and abuse of power in relation to the events of 7 April 2010 in Bishkek.

10. The trial hearings were held in a hall at the Palace of Sport in Bishkek. They were attended by a large number of people who threatened the first applicant, her co-defendants and their lawyers and called for their execution. During one of the hearings in November 2010 some of the first applicant's co-defendants were injured by the crowd who managed to penetrate onto the stage where the trial was being held (see paragraph 61 below). As a result, the defence lawyers refused to continue to take part in the proceedings.

II. THE APPLICANTS' DEPARTURE FOR KAZAKHSTAN

11. In November 2010 the first applicant, fearing that she would be detained again and subjected to ill-treatment, covertly left Kyrgyzstan for Kazakhstan. She took the second applicant and her father, M., whom she described as an ethnic Ukrainian, with her. The first applicant's daughter stayed in Kyrgyzstan.

12. Until March 2012 the applicants and M. lived in a rented apartment in Almaty. In order not to disclose their presence the first applicant did not leave the apartment except for visits to the office of the UNHCR in that city. During those visits the UNHCR staff advised her to apply for asylum in Kazakhstan. However, she was subsequently told to delay her asylum application because the UNHCR could not obtain guarantees of *non-refoulement* from the Kazakh authorities. The first applicant also learned that the Kyrgyz authorities knew about her presence in Kazakhstan and had requested her extradition. Fearing possible removal to Kyrgyzstan, the first applicant decided to try to seek asylum in another country.

13. With the assistance of a friend in Ukraine, between September and December 2011 the first applicant submitted letters to the Ukrainian authorities, including the President of Ukraine, the Ukrainian Parliament Commissioner for Human Rights and the UNHCR office in Kyiv, asking for protection because her life and liberty were in danger in Kyrgyzstan. The first applicant also transmitted, through a friend, an asylum application to the Ukrainian State Migration Service ("the UMS").

14. In the meantime, the first applicant tried to arrange her travel to Kyiv, for which she unofficially contacted a Kazakh security agent.

15. The first applicant stated that in December 2011 she had been "informally informed by a Ukrainian governmental official" that the Kazakh authorities had agreed that she and her family could leave Kazakhstan andthat "the Ukrainian intelligence service would grant them leave to enter Ukraine". She was also advised to have in her possession documents entitling her to cross State borders when entering Ukraine.

16. As the applicants did not have their Kyrgyz passports with them, the first applicant decided to obtain false identity documents. Thus, in

March 2012 the first applicant obtained a false Kyrgyz passport with her photograph in the name of Darya Podolskaya and the second applicant received a false birth certificate with his photograph in the name of Danat Podolskiy.

17. Subsequently, the first applicant informed the UMS that she and the second applicant were prepared to travel to Ukraine and that they would use false identity documents. She received an email from a migration official confirming that representatives of the UMS and the UNHCR office in Kyiv would meet her immediately upon arrival at Boryspil Airport in Ukraine. The first applicant submitted copies of her email exchange with the representatives of the UMS and the UNHCR.

18. On 28 March 2012 the first applicant bought tickets for an Almaty-Kyiv flight on 29 March 2012 for herself and the second applicant using false identity information (see above), and for her father using his original passport. She informed her contact at the UMS about her flight by email and by mobile phone text message ("sms").

19. On 29 March 2012 the applicants and M. boarded the flight in Almaty and at about 10.15 a.m. (here and below Kyiv time is indicated, unless specified otherwise) on the same day the aircraft landed at Boryspil Airport. The applicants had had an asylum-application and accompanying documents prepared in advance. During the flight the first applicant sent an sms informing her contact at the UMS of her arrival.

III. EVENTS IN UKRAINE

A. The applicants' account of the events

20. The applicants submitted the following account of the events while they had been in Ukraine.

21. When the applicants and M. left the aircraft they were met by Ukrainian border guards, who transmitted the personal details in the first applicant's false passport, in particular the name and date of birth, via a portable radio. The applicants and M. were taken to the transit zone of Boryspil Airport, where the first applicant informed the border guards that she was using false identity documents for herself and the second applicant, and that M. was in fact her father. She stated that her true name was O.M., that she and her family wished to apply for asylum in Ukraine, and that the UMS was aware of her arrival and of her need for protection.

22. The border guards seized the applicants' documents, refused to deal with their asylum requests and took them to one of their offices at the airport.

23. The border guards allegedly attempted to seize the first applicant's mobile phone, but she kept it and managed to make a call to inform her contact at the UMS that she had been detained at the Boryspil Airport transit zone and that she wished to apply for asylum in Ukraine. After that call she

could not make any more calls from her phone, as she had used up the pre-charged credit on the subscriber identity module ("SIM card") which had been issued by a Kazakh mobile phone company. She was not allowed to use the border guards' phones to make calls to the UNHCR or the UMS.

24. Sometime later the border guards' shift supervisor entered the office and stated that the second applicant did not have appropriate documents to cross the Ukrainian border; he invited the first applicant to sign a form enabling her to travel back to Kazakhstan. The first applicant told the officer that she was O.M. and that she had come to Ukraine to seek asylum. She tried to give him her asylum application together with the accompanying documents. The officer refused to take the application or documents, stating that the first applicant was not allowed to make such an application as she had not crossed the Ukrainian border, and that the application should have been submitted to the UMS.

25. Although the applicants were moved several times to different offices, mainly within the airport transit zone, they remained under the permanent surveillance of border guards and were not allowed to leave the offices. Drinking water and sandwiches were provided to them.

26. At about 4 p.m. the first applicant was informed that a meeting was taking place on the airport premises, at which representatives of the State Security Service, the State Border Control Service and the Ministry of the Interior of Ukraine were discussing the applicants' situation.

27. A senior border guard and a security officer who came to meet the applicants later during the day tried to make the first applicant agree to leave Ukraine for another country of her choice. According to the first applicant, they threatened to send her back to Kyrgyzstan or to transfer her under the control of the Kyrgyz Consul who, according to them, had also come to the airport. They noted that the first applicant was wanted by the Kyrgyz authorities for serious crimes. The first applicant refused, insisting that she would like to receive asylum in Ukraine.

28. At about 7 p.m. the senior border guard and the security officer told the first applicant that she and the second applicant would be removed to Tbilisi. The first applicant was given an official decision refusing the second applicant leave to enter, on the ground that he did not have a passport, which was required by the relevant intergovernmental treaty between Ukraine and Kyrgyzstan. They referred to him as Mr Danat Podolskiy. The decision stipulated that it was to be enforced immediately. Although it could be appealed against to the chief of the border guards' unit at Boryspil Airport, the appeal procedure did not have suspensive effect. A copy of that decision was provided to the Court.

29. At about 8.30 p.m. the applicants were taken to an aircraft. Accompanied by two persons in plain clothes whom the first applicant believed to be Ukrainian security officers or border guards, the applicants boarded the aircraft. M. was also taken on board the same aircraft. He brought

a SIM card issued by a Ukrainian mobile operator, which the first applicant inserted in her phone.

30. While on board, the first applicant received a phone call from a representative of the UNHCR office in Kyiv who told her to leave the aircraft because the Court had decided to apply Rule 39 of the Rules of Court in her case (see paragraphs 43 and 44 below). However, the applicants could not leave the aircraft as one of the accompanying persons was standing next to their seats, while a border guard was standing at the exit. Sometime later the first applicant received a mobile phone call from someone from the Ministry of Justice of Ukraine who asked her to pass the phone to the captain of the aircraft. A flight attendant took the applicant's phone to the cockpit. As the flight attendant was coming back with the phone, the first applicant saw a border guard leaving the cockpit.

31. At 9.17 p.m. (8.17 p.m. Strasbourg time) the aircraft took off. It landed in Tbilisi Airport, where the applicants were met by the Georgian migration authorities and were allowed to lodge asylum applications.

B. Information provided by the Government

32. The Government's submissions in respect of the applicant's account of the facts may be summarised as follows.

33. The first applicant did not inform the Ukrainian border guards that she had used false identity documents for herself and the second applicant; nor did she inform them about their true identity. The first applicant did not request asylum; nor did she inform the border guards of any risk of ill-treatment in Kyrgyzstan. The second applicant was refused leave to enter Ukraine as he had no document entitling him to cross the Ukrainian border, and did not have his birth certificate with him. That was why the first applicant decided to leave Ukraine, together with the second applicant, and go to Georgia on the same day, and purchased plane tickets with the help of the border guards.

34. The Government submitted a copy of a letter from the head of the Ukrainian Border Control Service dated 30 March 2012, which was addressed to the then Government Agent. The relevant extracts of the letter read as follows:

> "... [A] Kyrgyz national, Mr Danat Podolskiy ... who arrived at Boryspil Airport on 29 March 2012 and who was accompanied by his mother, Ms Darya Podolska ... was not allowed to enter the territory of Ukraine as he did not have documents entitling him to cross the Ukrainian border ...
>
> Ms Darya Podolska, a Kyrgyz national, was informed that she could either enter the territory of Ukraine alone or return together with her son to the aircraft [on which they had travelled to Ukraine]. Having received explanations [from the border guards], after some period of time Ms Darya Podolska voluntarily expressed the wish to fly to Tbilisi.
>
> Ms Darya Podolska, a Kyrgyz national, did not address the border guards with any claims of political persecution in Kyrgyzstan or with applications for refugee status in

> Ukraine. [W]hen asked about her possible relation to [O.M.], a Kyrgyz national, [Ms Darya Podolska] denied any such relation on several occasions.
>
> Before their departure Ms Darya Podolska and her son remained in the Boryspil Airport transit zone and were provided with all the necessary facilities, including hot food. They were also provided with assistance to obtain airline tickets.
>
> Therefore, the right of Ms Darya Podolska, a Kyrgyz national, to freedom of movement was not restricted by the Ukrainian border guards.
>
> As regards information concerning [O.M.], the State Border Control Service of Ukraine is complying with the instructions of the State Security Service of Ukraine, according to which entry to Ukraine is prohibited to [O.M.], a Kyrgyz national who was born on 16 May 1968. There have been no registered instances where that person was not allowed to cross the Ukrainian border.
>
> The State Border Control Service of Ukraine did not receive any requests from the State Migration Service to meet with any of the passengers on the [Almaty-Kyiv] flight.
>
> None of the passengers on that flight was expelled (returned) to Kazakhstan or Kyrgyzstan."

35. The Government also submitted a copy of a letter from the head of the Ukrainian Border Control Service dated 4 March 2013, in which it was reiterated that at no time had Ms Darya Podolska told the Ukrainian border guards that she or her son had different names. It was also stated that the Border Control Service had been informed of the Court's decision under Rule 39 of the Rules of Court regarding the applicants (see paragraph 43 below) by facsimile from the then Government Agent at 8.40 p.m. (apparently, Kyiv time) on 29 March 2012.

IV. EVENTS AFTER THE APPLICANTS LEFT UKRAINE

36. While the applicants were in Georgia, the Kyrgyz authorities requested that the Georgian authorities extradite the first applicant to Kyrgyzstan. The date of the request is not specified. No decision has been taken on the request. The first applicant stated that it was only due to the assistance of the UNHCR that she had not been extradited to Kyrgyzstan. In this regard, she referred to an interview with a member of the Kyrgyz Parliament, published in a Kyrgyz newspaper on 17 May 2012, in which he had stated that the Georgian highest public officials had promised to facilitate the first applicant's extradition to Kyrgyzstan.

37. On 23 May 2012 the Georgian migration authorities rejected the applicants' asylum applications, having questioned the first applicant and addressed her principal arguments regarding the alleged risk of ill-treatment in Kyrgyzstan. The Georgian migration authorities considered that it was unreasonable to grant the applicants refugee status or humanitarian protection. The decision was amenable to appeal before the courts. The applicants claimed that they had lodged such an appeal with the Georgian

courts, but did not inform the Court of its outcome or any developments in that regard.

38. On 19 November 2012 the applicants left Georgia for the Netherlands, where they were granted asylum allegedly on account of their fears of ill-treatment, arbitrary detention and unfair trial in Kyrgyzstan. In the document issued by the Deputy Minister of Security and Justice of the Netherlands dated 19 November 2012, a copy of which the first applicant provided, it is stated that she had been admitted to the Netherlands as an invited refugee within the framework of the UNHCR resettlement policy.

V. REQUESTS AIMED AT PREVENTING THE APPLICANTS' REMOVAL FROM UKRAINE

39. By letters dated 29 March 2012, copies of which were submitted to the Court by the applicants, representatives of the UNHCR office in Kyiv informed the Ukrainian Border Control Service, the UMS and the Ukrainian Parliament Commissioner for Human Rights that the first applicant had arrived in the Boryspil Airport, that she had been denied entry to Ukraine, that she was in the airport's transit zone and that she wished to apply for asylum. Relying on the Country Agreement between the UNHCR and the Government of Ukraine of 23 September 1996, the UNHCR representatives asked the State Border Control Service to allow them to meet with the first applicant as soon as practicable. The first applicant's real identity was referred to in the communications with the authorities.

40. According to the applicants, on the same day the Ukrainian Parliament Commissioner for Human Rights also contacted the State Border Control Service requesting access to the first applicant. There is no information as to whether a reply was given to that request.

41. According to the information provided by Mr A. Koval, a lawyer who at the material time worked for the Kyiv Legal Protection Service Program implemented by the Hebrew Immigrant Aid Society ("the HIAS") under a contract with the UNHCR, he and representatives from the UNHCR office in Kyiv went to Boryspil Airport on two occasions on 29 March 2012 – at noon and at about 6 p.m. – in order to meet with the first applicant. On the latter occasion they were joined by representatives from the office of the Ukrainian Parliament Commissioner for Human Rights. While at the airport, they met with border guards and asked them to grant them access to the transit zone in order that they could meet with the first applicant on the same day. The border guards confirmed that the first applicant had been in the transit zone, but refused to allow the representatives to meet with her without the permission of the border guards' superior. Eventually, no such permission was given. The representatives sought the assistance of the General Prosecutor and the State Security Service as regards their request, but to no avail.

42. In the meantime, at around 3 p.m. on 29 March 2012, acting on the applicants' behalf, Mr A. Koval lodged with the Court a request under Rule 39 of the Rules of Court seeking to prevent their expulsion from Ukraine. In those submissions to the Court, the lawyer referred to first applicant's real identity and also to the fact that she had used a false passport with her photograph in the name of Darya Podolskaya to travel to Ukraine. The lawyer also stated that the applicants sought asylum in Ukraine in connection with the first applicant's fears of ill-treatment in Kyrgyzstan and submitted copies of the letters which the first applicant had sent to the Ukrainian authorities between September and December 2011 (see paragraph 13 above).

43. The acting President of the Court's Fifth Section granted the request on the same day, indicating to the Government of Ukraine, in particular, that they should not expel the applicants until further notice. The Government were also invited to submit information on the assessment made of the potential risk to which the first applicant could be exposed in Kyrgyzstan if expelled. Copies of the lawyers' submissions and accompanying documents, referred to in paragraph 42 above, were sent to the Government.

44. At about 7.05 (6.05 p.m. Strasbourg time) on 29 March 2012 the Government Agent before the Court was informed by phone of the decision under Rule 39. At about 7.45 p.m. (6.45 p.m. Strasbourg time) a letter informing the Government of that decision was sent by fax.

VI. THE FIRST APPLICANT'S COMPLAINTS TO THE UKRAINIAN AUTHORITIES

45. In May 2012 the first applicant submitted complaints to the General Prosecutor Office and to the State Security Service of Ukraine, alleging that there had been an abuse of office on the part of the Ukrainian border guards in her case. She received no reply to her complaints.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of Ukraine and the relevant legislative acts summarised in the Court's other judgment

46. The relevant provisions of the Constitution of Ukraine, the Code of Administrative Justice of 2005, the State Border Control Act of 2009, the Legal Status of Foreigners and Stateless Persons Act of 2011, and the Refugees and Persons in Need of Complementary or Temporary Protection Act of 2011, as worded at the material time, were summarised in *Kebe and Others v. Ukraine* (no. 12552/12, §§ 33-48, 12 January 2017).

B. The Code of Administrative Offences of 1984, as worded at the material time

47. Under Article 263 of the Code, anyone who violated border control regulations could be detained for up to three hours with a view to drawing up an official report on the violation. If it was necessary to establish the offender's identity and to verify the circumstances of the offence, he or she could be detained for up to three days. Written notice had to be given to the prosecutors within twenty-four hours of the arrest.

C. The 2001 regulations on compliance of the State Border Control Service with the instructions issued by the law-enforcement and intelligence authorities concerning people crossing the border of Ukraine (repealed on 25 April 2013)

48. The regulations, which were adopted by the Cabinet of Ministers on 22 January 2001, provided, *inter alia,* that the State Security Service could instruct the State Border Control Service not to allow a foreigner or stateless person to enter Ukraine. The State Border Control Service could refuse to give effect to the instructions if their enforcement might lead to a violation of the relevant legislation and human rights.

49. When applying restrictions on entry to Ukraine, officials of the State Border Control Service had to provide the people concerned with reasons for their application and explain the appeal procedure. If requested, such information had to be provided in writing.

D. The 2004 regulations on administrative detention of persons arrested by the State Border Control Service (repealed on 30 March 2015)

50. The regulations, which were adopted by the State Border Control Service on 30 June 2004, provided, *inter alia,* that persons arrested pursuant to Article 263 of the Code of Administrative Offences were to be detained in temporary holding facilities (*пункти тимчасового тримання затриманих*) or on specially designed premises (*спеціально обладнані приміщення*) for a period of up to three days or, with the consent of a prosecutor, for up to ten days.

51. Detainees' close relatives had to be immediately informed of their arrest and place of detention. Border guards also had to inform the relevant diplomatic missions of foreigners' detention, unless the foreigners requested, orally or in writing, asylum in Ukraine.

52. Detainees had to be provided with information, in a language they understood, concerning their rights, including the right to seek asylum. They also had to be provided with the necessary facilities if they wished to submit

a complaint or an application to a national or international authority. Detainees' meetings with a lawyer and representatives of the UMS or of the UNHCR could also be authorised.

53. On completion of the term of detention, detainees had to be released. They could also be released if the UMS took a decision accepting their asylum application for consideration on the merits.

E. The Resolution of the Plenary Higher Administrative Court of 2009 on the consideration of disputes concerning refugee status, removal of a foreigner or a stateless person from Ukraine, and disputes connected with a foreigner's or stateless person's stay in Ukraine, as worded at the material time

54. The Resolution, which had been adopted by the Plenary Higher Administrative Court on 25 June 2009 and amended on 20 June 2011 and 16 March 2012, provided that any decision, action or inactivity of the authorities relating to foreigners' and stateless persons' entry or stay, including detention, in Ukraine could be challenged before the administrative courts. Cases concerning foreigners' or stateless persons' liability for administrative offences were excluded from the administrative courts' jurisdiction.

55. Foreigners and stateless persons without a command of the language used in court and without sufficient means to pay for the assistance of an interpreter, had to be provided with such assistance free of charge.

56. The Plenary Court noted that the burden of proof in administrative cases rested with the authorities, which were required to provide the courts with all the documents and material which could be used as evidence in the proceedings. The administrative courts could also use information published on the official Internet sites of the national authorities and of international organisations, including the UNHCR, and that obtained from domestic or international non-governmental organisations and from the mass media.

57. The Plenary Court underlined that the administrative courts had to take into account the provisions of the relevant international treaties, including the European Convention on Human Rights of 1950 and the United Nations Convention Relating to the Status of Refugees of 1951. It noted that Article 3 of the European Convention on Human Rights of 1950 took precedence over the provisions of Article 33 of the United Nations Convention Relating to the Status of Refugees of 1951, which provided for the possibility of expulsion or return of refugees on grounds of danger to national security.

58. When dealing with cases concerning forcible removal and detention of foreigners or stateless persons who stated that they feared persecution in the country of origin, the administrative courts had to check whether those persons had been provided with information, in a language they understood,

concerning the right to request refugee status or the status of a person in need of complementary protection in Ukraine. If necessary, the courts had to ensure that they had access to the relevant procedure before the UMS. The courts also had to check whether the persons concerned had been provided free of charge with legal assistance pursuant to sections 7, 8, 9 and 11 of the Legal Aid Act of 2011. A decision refusing to grant refugee status or complementary protection could not serve as grounds for forcible expulsion of a foreigner or stateless person. The administrative courts had to check whether there were lawful grounds for such expulsion.

59. The Plenary Court explained that there were two preconditions for a decision on forcible removal under section 32 of the Legal Status of Foreigners and Stateless Persons Act of 1994: (i) the existence of a decision ordering the person's removal; and (ii) the person's failure to comply with that decision or the existence of reasonable grounds suggesting that the person would fail to leave Ukraine. It was also stated that a request for a foreigner's or a stateless person's detention could not be examined before a decision on that person's deportation had been taken.

II. UNHCR OBSERVATIONS ON THE SITUATION OF ASYLUM-SEEKERS AND REFUGEES IN UKRAINE

60. In July 2013 the UNHCR published its Observations on the Situation of Asylum-seekers and Refugees in Ukraine. The relevant parts of the observations read as follows:

> "...
>
> 3. UNHCR concludes that, despite significant progress in recent years, Ukraine's asylum system still requires fundamental improvements: it does not offer sufficient protection against *refoulement*, and does not provide asylum-seekers the opportunity to have their asylum claims considered in an efficient and fair procedure. Therefore, Ukraine should not be considered as a safe third country and UNHCR further urges States not to return asylum-seekers to Ukraine on this basis.
>
> ...
>
> 25. Persons seeking international protection in Ukraine may express their wish to seek asylum upon first contact with the authorities, namely to officials of the State Border Guard Service of Ukraine ('SBGS') ...
>
> 26. Ukrainian law obliges the SBGS to transfer asylum-seekers to the State Migration Service and to respect human rights in all dealings with persons at the border. In 2012, the SBGS reports receiving just five asylum applications at border entry points to Ukraine. During the same period, the SBGS denied 16,272 persons access to the territory, and while most were undoubtedly refused entry for valid reasons, this number includes some individuals from refugee-producing countries such as Syria who require enhanced attention to meet their protection needs. So far, despite some progress noted, the SBGS still needs to adopt procedures on protection-sensitive screening of persons entering the country; thus, the SBGS has limited capacity to identify persons with international protection needs, as well as other vulnerable persons, such as victims of trafficking, among the flow of migrants and to prevent their *refoulement*. Given the

large number of border-crossing points, it is not possible for any independent institution to verify whether it is indeed the fact that only a handful of individuals applies for asylum upon arrival each year and that the obligation to refer persons to the asylum procedure is uniformly respected. Despite its repeated requests, UNHCR does not yet have predictable access to Kyiv's Boryspil International Airport and is concerned about reports that individuals sometimes remain in the airport for several days in unsuitable conditions without access to legal assistance. As human rights commentators have noted, 'there is no legislation currently in force that would regulate detention in transit zones of the airports'.

27. It is challenging to measure lack of access to the territory and to seek legal redress, as these persons are often sent back across borders before having contact with UNHCR or lawyers working in Ukraine. However, in early 2012, UNHCR became increasingly concerned about asylum-seekers' lack of access to the territory following two cases in which lawyers resorted to the European Court of Human Rights to issue interim measures under Rule 39 after the Ukrainian authorities had reportedly denied asylum-seekers access to the territory ...

...

79. Despite active interventions by UNHCR and human rights lawyers to prevent forcible return of persons with international protection needs, UNHCR continues to document cases of *refoulement* from Ukraine. Comprehensive data is not available, particularly as *refoulement* at the border remains a largely hidden phenomenon. However, based on available information, in 2012, UNHCR counted three persons as having been *refouled*. This compares to 13 persons in 2011, five in 2010, 17 in 2009 and 12 in 2008.

80. Most *refoulement* from Ukraine has occurred in one of the following four situations. First, given that persons with international protection needs may not receive legal aid or interpretation at border crossing-points or temporary holding facilities, they are not able to apply for asylum before their deportation and detention is ordered. They are at risk of *refoulement* if the authorities are able to remove them expeditiously. However, in practice, logistical and financial considerations prevent a quick removal, and persons are held in detention at Migrant Custody Centres for several months ...

...

Third, UNHCR remains concerned about the rejection of asylum-seekers at the border which may result in their *refoulement*. As noted above, UNHCR is aware of two instances in 2012 where asylum-seekers tried to obtain access to the asylum procedure at the border and were denied; only the intervention of the European Court of Human Rights under its interim measures (Rule 39) was able to prevent their *refoulement*. Also, the fact that persons from at-risk countries, such as Syria, are rejected at the border, suggests indirectly that there may be a broader problem of asylum-seekers being denied access to the territory of Ukraine ..."

III. COUNTRY REPORTS FOR 2011 AND 2012 ON HUMAN RIGHTS PRACTICES BY THE UNITED STATES DEPARTMENT OF STATE WITH RESPECT TO KYRGYSTAN

61. In its Country Reports on Human Rights Practices for 2010, released on 8 April 2011, the United States Department of State noted with respect to Kyrgyzstan:

"...

On November 17, the trial of 28 persons accused of complicity in the shooting deaths of protestors on April 7 opened in a Bishkek sports palace. Several persons were tried in absentia, including former president Bakiyev, his brother Janysh Bakiyev, the former head of the Presidential Guard Service, and former prime minister Daniyar Usenov. Other defendants included [O.M.], the former head of the Presidential Secretariat, and several special GKNB operations officers. Human rights activists claimed that the charges against the defendants were arbitrary and that they were not allowed to see all of the evidence against them, as is required by law. During the first session of the trial, members of the audience surged onto the stage, threatening defendants and their attorneys, who subsequently refused to participate in the trial unless the government ensured their security. At year's end, following the explosion of a bomb outside the trial site, the trial was on hold while authorities looked for a more secure venue.

Prisoners arrested in connection with political activity received the same protections as other prisoners.

..."

62. In its Country Reports on Human Rights Practices for 2011 and 2012, released on 24 May 2012 and 19 April 2013 respectively, the United States Department of State referred to widespread instances of abuse in detention, involving women and juveniles, whereas allegations of torture "frequently [had gone] uninvestigated". For instance, the relevant part of the 2012 report reads as follows:

"According to 2011 statistics, the Prosecutor General's Office reported that 87.3 percent of torture cases occurred in temporary detention facilities. The victims included 21 women and 12 juveniles. At least five cases of suspected torture led to death. In the first six months of the year, the Prosecutor General's Office registered 174 complaints of torture but refused to initiate criminal proceedings in all but 11 cases. It filed 17 criminal cases involving torture; of those, 12 went to the courts for consideration. At year's end none of the cases filed had resulted in conviction."

63. In the 2012 report it was noted that the trial of those accused of complicity in the shooting deaths of protesters in 2010, including the first applicant and several other defendants *in absentia*, had been delayed for nearly two years and had been resumed in the end of 2012.

THE LAW

I. SCOPE OF THE CASE

64. The Court notes that, after the communication of the case to the respondent Government, the applicants lodged a new complaint under Article 6 § 1 of the Convention. In particular, in their submissions dated 29 May 2013 the applicants complained that because of their removal from Ukraine they had been placed at risk of flagrant denial of justice in Kyrgyzstan.

65. In the Court's view, the applicants' new complaint is not an elaboration of their original complaints to the Court on which the parties have commented. The Court considers, therefore, that it is not appropriate to take that matter up in the context of the present case (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

66. The Court further notes that the complaints under Articles 3 and 13 regarding the removal from Ukraine appear on their face to have been raised by both applicants. However, they essentially concern issues relating to the first applicant's situation only – it has not been claimed, in particular, that the Ukrainian authorities should have examined whether the second applicant ran a risk of ill-treatment in Georgia or Kyrgyzstan before removing him with his mother (see paragraphs 67-68 and 71-74 below). The scope of the above-mentioned complaints is therefore limited to the rights of the first applicant.

II. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION RELATING TO THE FIRST APPLICANT'S REMOVAL FROM UKRAINE

67. The first applicant complained that her removal to Georgia without consideration of the risk of ill-treatment, arbitrary arrest and unfair trial she had been facing in Kyrgyzstan and in the absence of any guarantees against arbitrary deportation to that country by the Georgian authorities had been contrary to Article 3 of the Convention. She argued that there had been a real risk that both she could be "left unprotected" in Georgia and removed to Kyrgyzstan where she would have faced "real harm".

68. Relying on Article 13 taken in conjunction with Article 3 of the Convention, the first applicant complained that she had had no effective means to prevent or remedy the alleged violation of Article 3 in Ukraine.

69. The provisions of the Convention on which the first applicant relied 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 this 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. Submissions by the parties

1. The Government

70. The Government stated that the first applicant could not be considered as a victim of a violation of Article 3 and/or Article 13 of the Convention, as she had not been forced to leave Ukraine and had done so voluntarily with the assistance of the Ukrainian authorities. The Government further argued that the first applicant had not submitted any documents concerning the alleged risk of ill-treatment in Kyrgyzstan to the Ukrainian authorities and that she had not been removed to that country.

2. The first applicant

71. The first applicant contested those submissions. In particular, she insisted on her version of events (see paragraphs 20-31 above). She also argued that, having removed her to Georgia, Ukraine had put her at a risk of *refoulement* to Kyrgyzstan, as at the time of her removal from Ukraine, Georgia had provided no guarantees of *non-refoulement* and subsequently the Georgian authorities had rejected her asylum application.

72. The first applicant also argued that her fears of ill-treatment if returned to Kyrgyzstan were well founded. Indeed, that had eventually been confirmed by the fact that she had been granted asylum in the Netherlands for that reason (see paragraph 38 above). In particular, the first applicant feared political persecution in Kyrgyzstan, which could have involved ill-treatment, arbitrary detention and unfair trial. In addition, because of her Ukrainian ethnic origin, she would not have protection in Kyrgyzstan. In that regard, she referred to, *inter alia*, Country Reports on Human Rights Practices for 2010-2012 of the United States Department of State (see paragraphs 61-63 above).

73. The first applicant also referred to the alleged murder of her husband, to the alleged ill-treatment and biased trial of her co-defendants, and to the Ukrainian border guards' alleged threats to deport the applicants to that country (see paragraphs 5, 10 and 27 above). She also stated that the Ukrainian border guards had disregarded the fact that as an unaccompanied woman with a four-year-old child, she had been concerned about the safety and security of her family.

74. The first applicant further argued that in circumstances where the Ukrainian authorities had refused to consider her asylum application, had held her in the airport transit zone and had not allowed her to meet with a lawyer or a representative from the UNHCR, she had been unable to make use of any domestic procedure to challenge the border guards' actions or to have her claims of risk of ill-treatment in Kyrgyzstan examined.

3. The third-party intervener

75. The UNHCR submitted that, according to its observations and to various international and Ukrainian sources, asylum-seekers faced serious difficulties when trying to access asylum procedures while at the Ukrainian border. In particular, the UNHCR stated:

> "... [A]sylum-seekers arriving at the border in Ukraine, in particular in international transit zones at the airports, can be prohibited from entering Ukraine and from seeking asylum. They are denied basic procedural safeguards and access to effective remedies and find themselves in substandard conditions of detention. Accordingly, UNHCR remains seriously concerned that the Ukrainian authorities routinely do not allow persons in need of international protection access to fair and efficient asylum procedures; nor do they conduct a close and rigorous scrutiny of these individuals' asylum requests. For the above-outlined reasons, as well as further details documented in UNHCR's [July 2013 Observations on the Situation of Asylum-seekers and Refugees in Ukraine], asylum-seekers attempting to seek protection in Ukraine may be at risk either of direct or indirect refoulement in violation of relevant existing international and European law standards.
>
> ..."

76. According to the UNHCR, there was no effective remedy to challenge the Ukrainian authorities' decisions to refuse the applicants leave to enter Ukraine, as an appeal against such decisions had no suspensive effect and a speedy examination was not guaranteed. Where an entry ban was imposed by a decision of the Ukrainian authorities, they were not required to disclose such a decision or to inform the person concerned of the reasons behind it. Furthermore, asylum-seekers trying to cross the Ukrainian border had no access to a lawyer or an interpreter, either under the law or in practice. In spite of an agreement between the Ukrainian authorities and the UNHCR giving it access to persons in need of international protection, no access was given to the UNHCR to such persons in airport transit zones.

B. The Court's assessment

1. Admissibility

77. The Court notes that the first applicant's complaints under Article 3 are based essentially on three arguments or allegations: (i) she risked ill-treatment in Kyrgyzstan if returned there by the Ukrainian authorities; (ii) the Ukrainian authorities removed her from Ukraine against her will; and (iii) although she informed them of her wish to claim asylum in Ukraine in the light of the above risks, the authorities gave no consideration to the question of whether her removal to a third country, namely Georgia would expose her to a risk of refoulement.

78. The Court considers that the Government's objection that the first applicant had left Ukraine voluntarily and therefore could not claim to be the victim of a removal allegedly in breach of her Convention rights is closely

linked to the substance of her complaints under Article 3 and, accordingly, joins that objection to the merits.

79. The Court further considers that the first applicant's complaints under Article 3 and also those under Article 13 have a certain evidentiary basis. Thus, without prejudging the merits of these complaints, the Court cannot reject them as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor can those complaints be rejected as inadmissible on any other grounds. They should therefore be declared admissible.

2. Merits

(a) General principles

80. The relevant general principles have been summarised in, among other authorities, *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 124-141, 21 November 2019).

81. The Court has in particular acknowledged the importance of the principle of *non-refoulement* (see, for example, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 286, ECHR 2011, and *M.A. v. Cyprus*, no. 41872/10, § 133, ECHR 2013 (extracts)). It reiterated that 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 breaching Article 3 in the destination country.

82. The Court has noted that the exact content of the expelling State's duties under the Convention may differ depending on whether it removes applicants to their country of origin or to a third country (see *Ilias and Ahmed*, cited above, § 128). In cases where the authorities choose to remove asylum-seekers to a third country, the Court has stated that this leaves the responsibility of the Contracting State intact with regard to its duty not to deport them if substantial grounds have been shown for believing that such action would expose them, directly (that is to say in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3 (see *M.S.S.*, cited above, §§ 342-43 and 362-68).

83. Consequently, the Court has indicated that where a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the main issue before the expelling authorities is whether or not the individual will have access to an adequate asylum procedure in the receiving third country. This is because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits, if such a request were made to the relevant authorities of that country (see *Ilias and Ahmed*, cited above, § 131). The Court has further clarified that in all cases of removal of an

asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum request on the merits, regardless of whether or not the receiving third country is a State Party to the Convention, it is the duty of the removing State to examine thoroughly the question of whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement.* If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum-seeker should not be removed to the third country concerned (see *Ilias and Ahmed*, cited above, § 134).

84. In particular, while it is for the persons seeking asylum to rely on and to substantiate their individual circumstances that the national authorities cannot be aware of, those authorities must carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. The assessment must be conducted primarily with reference to the facts which were known to the national authorities at the time of expulsion, but it is the duty of those authorities to seek all relevant generally available information to that effect. General deficiencies well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies are in principle considered to have been known. The expelling State cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice (ibid., § 141).

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

85. Turning to the present case, the Court must first decide whether the first applicant brought any of her personal concerns as to the risk of direct or indirect return to Kyrgyzstan to the attention of the Ukrainian authorities and thus triggered Ukraine's duty under Article 3 not to remove an asylum seeker if such action would expose him or her, directly or indirectly, to treatment contrary to that provision (see paragraphs 82-84 above, with further references).

86. In this regard, the Court notes that the Government did not dispute the first applicant's statement, supported by the material in the case file, that, prior to her arrival in Ukraine, she had informed the UMS, of her intention to seek asylum in Ukraine and that she would use false identity documents to travel to that country (see paragraphs 13-18 above). Although the Ukrainian Border Control Service denied that the first applicant had informed them of her true identity and of her intention to seek asylum, they specifically acknowledged that they had been "complying with the instructions of the State Security Service of Ukraine, according to which entry to Ukraine [had been] prohibited to [O.M.]" (see paragraph 34 above).

87. According to the letters of 29 March 2012, copies of which are contained in the file, on that date the UNHCR office in Kyiv requested the Ukrainian Border Control Service to allow representatives of the UNHCR to meet with the first applicant in the Boryspil Airport transit zone in connection with her wish to apply for asylum in Ukraine (see paragraph 39 above).

88. Similar information regarding the first applicant's arrival and stay in the Boryspil Airport, as well as her wish to seek asylum in Ukraine, was transmitted to the Government later on 29 March 2012, at least an hour before her departure from Ukraine, along with the Court's decision indicating, *inter alia*, that they should not expel the applicants until further notice. That information contained references to the first applicant's real identity and to the fact that she had used a false passport with her photograph in the name of Darya Podolskaya (see paragraphs 43 and 44 above).

89. Thus, there is sufficient material demonstrating that before her eventual departure from Ukraine on 29 March 2012 the Ukrainian authorities, including the border guards, were aware of the first applicant's true identity and of her wish to claim asylum in Ukraine.

90. Moreover, it appears highly unlikely that the first applicant, having contacted the Ukrainian authorities while in Kazakhstan with a view to obtaining asylum protection, having obtained assurances of assistance from the UMS (see paragraphs 15 and 17 above), and having travelled with her four-year-old son to Ukraine with no intention of returning to Kazakhstan, would have decided, for no apparent reason, to abandon her efforts and not to avail herself of an opportunity to claim asylum at the Ukrainian border. In this connection, it is necessary to note that the first applicant submitted her asylum claim upon her arrival in Georgia (see paragraph 31 above).

91. In the light of the foregoing, the Court attaches more weight to the first applicant's version of the relevant events while she was in Ukraine and finds that the allegations that she risked ill-treatment in Kyrgyzstan were presented to the Ukrainian border control authorities to the extent necessary to trigger Ukraine's related duties under Article 3 of the Convention (see paragraphs 82-84 above).

92. The Court further notes that the first applicant's detailed, specific and consistent account of the relevant events in Ukraine demonstrates that the border guards denied her an opportunity to claim asylum and that she was removed from Ukraine against her will. Even though she did not provide documentary evidence in respect of all those submissions, the Court considers that while she was in the transit zone of Boryspil Airport she must have had very limited contact with the outside world and arguably no facilities to collect evidence or to make an official complaint. In this connection, it notes that the request under Rule 39 seeking to prevent the applicants' expulsion from Ukraine was lodged not by the first applicant herself, but by a lawyer acting on her behalf, who claims to have been denied access to the first

applicant, while she was still in Boryspil Airport (see paragraphs 41 and 42 above).

93. Thus, the Court cannot accept the Government's version of the relevant events which is couched in more general terms and does not address certain important aspects of the case, such as, for instance, the first applicant's communication with the UMS before her travel and the border guards' refusal to allow the lawyer from the HIAS and representatives from the UNHCR to meet with the first applicant (see paragraphs 17-19, 39 and 41 above).

94. The Court also takes into account the information submitted by the UNHCR pointing to the risk of arbitrary rejection of asylum-seekers at Ukraine's border (see paragraphs 60, 75 and 76 above). Indeed, the information about this risk is further corroborated by the Court's findings in *Kebe and Others* (cited above, §§ 104-8), a case the principal events in which took place around a month before the events being examined in the present case. In *Kebe and Others*, when carrying out border checks in February 2012 the border guards decided not to allow an asylum-seeker to enter Ukraine without giving any consideration to his need for international protection or assistance (ibid.).

95. In the light of the foregoing, the Court finds it established that in the present case the border control authorities removed the first applicant from Ukraine without examining her claim that she needed international protection in connection with the alleged risk of ill-treatment in Kyrgyzstan.

96. Since the first applicant was removed not to Kyrgyzstan, but to a third country – Georgia – it falls to be decided whether the Ukrainian authorities examined thoroughly whether Georgia's asylum procedure afforded sufficient guarantees to avoid her being removed, directly or indirectly, to Kyrgyzstan without a proper evaluation of any risks she might have faced from the standpoint of Article 3 of the Convention (see *Ilias and Ahmed*, cited above, §§ 134 and 137). Such assessment had to be conducted by the Ukrainian authorities out of their own motion and on the basis of all relevant and up-to-date information (see *Ilias and Ahmed*, cited above, § 141).

97. There is nothing in the present case to suggest that the Ukrainian authorities conducted any assessment to that effect when removing the first applicant to Georgia.

98. These considerations are sufficient for the Court to find that Ukraine failed to discharge its procedural obligation under Article 3 of the Convention to assess the alleged risks of treatment contrary to that provision before removing the first applicant from Ukraine. Therefore, there has been a violation of that provision.

99. Accordingly, it rejects the Government's objection as to the first applicant's victim status in that regard previously joined to the merits (see paragraph 78 above).

100. Having regard to the reasoning which has led it to conclude that the Ukrainian authorities' procedural obligation under Article 3 of the

Convention was breached in the present case, the Court does not consider it necessary to examine separately the same facts from the standpoint of Article 13 of the Convention (see, for example, *Ilias and Ahmed*, cited above, § 179, and *M.S.*, cited above, § 131, with further references).

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

101. The applicants complained under Article 5 § 1 of the Convention that on 29 March 2012 they had been unlawfully and arbitrarily detained by the Ukrainian border guards. They argued that their situation had been similar to that of one of the applicants in *Nolan and K. v. Russia* (no. 2512/04, 12 February 2009).

102. Relying on Article 5 § 2 of the Convention, the applicants complained that they had not been informed of the reasons for their detention.

103. The applicants complained under Article 5 § 4 of the Convention that because of the absence of any decision on their detention, they had been unable to challenge its lawfulness. Furthermore, they had had no access to legal assistance.

104. The relevant parts of Article 5 of the Convention, on which the applicants relied, read as follows:

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

105. The Government argued that the applicants had not been deprived of their liberty on 29 March 2012. There had been no coercion in the authorities' actions towards the applicants. They had not been restricted in their freedom of movement within the Boryspil Airport transit zone. Nor had they been prevented from leaving Ukraine. Their stay in that zone had depended "only on the first applicant's will and the availability of tickets". The Government

considered that those complaints were incompatible *ratione materiae* with Article 5 of the Convention.

106. The applicants disagreed, reiterating their version of the events in Ukraine (see paragraphs 20-31 above).

107. The UNHCR submitted that asylum-seekers arriving at Ukraine's international airports had been subject to *de facto* detention in the airport transit zones, for which no regulations existed in the domestic law. Consequently, in those zones asylum-seekers had been held isolated from the outside world, having no rights or opportunities to contact their families or legal representatives.

B. The Court's assessment

108. It is undisputed that the applicants' stay in the Boryspil Airport was not considered as detention under Ukrainian law. The material before the Court contains no decision or record pointing to possible application of the regulations on detention of migrants (see paragraphs 47 and 50-53 above) The parties disagree, however, on whether the applicants' stay in the Boryspil Airport nevertheless constituted a *de facto* deprivation of liberty and, consequently, whether Article 5 of the Convention applied.

1. General principles

109. The Court reiterates that Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects, manner and context of implementation of the measure in question (see *Creangă v. Romania* [GC], no. 29226/03, § 91, 23 February 2012, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 59, ECHR 2012). The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012).

110. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: (i) the applicants' individual situation and their choices, (ii) the applicable legal regime of the respective country and its purpose, (iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and (iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants (see *Ilias and Ahmed,* cited above, §§ 215-217, with further

references, and *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, § 138, 21 November 2019).

111. The Court further reiterates in this connection that the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good. An air traveller may be seen in this regard as consenting to a series of security checks by choosing to travel by plane. In particular, these security checks may include having his identity papers checked or having his baggage searched, and also waiting for further enquiries to be carried out to establish his identity or determine that he or she does not represent a security risk for the flight (see *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, § 40, 15 October 2013, with further references).

2. Application of the above principles to the present case

112. Turning to the present case, the Court notes that the parties disagreed on many points as to what happened to the applicants between their arrival in Ukraine and departure for Georgia. Having regard to its related findings regarding the first applicant's complaints Article 3 of the Convention, the Court is prepared to accept her detailed, specific and consistent account of the events also in so far as it concerns the applicants' complaints under Article 5 of the Convention (see paragraphs 92-95 above).

113. According to that account, upon their arrival in Ukraine the applicants were taken to the border guards' offices in the Boryspil Airport transit zone. The border guards seized the identity documents the applicants had with them and did not allow them to leave those premises. Nor did they allow the lawyer from HIAS and representatives from UNHCR to meet with the first applicant. Eventually, the applicants were escorted on to a plane which was to take them to Georgia. Those who escorted the applicants left the plane just before it took off. Thus, it appears that while in Ukraine for approximately eleven hours, between 10.15 a.m. and 9.17 p.m. the applicants were under the constant control and surveillance of the Ukrainian border guards in their premises (see paragraphs 20-31 above).

114. At the same time, the Court attaches importance to the context in which those control and surveillance measures were taken in the present case. The relevant material available to the Court demonstrates that this was done in the context of exercise by the Ukrainian border guards of their border-control powers, as set out in the State Border Control Act, including taking measures to ensure that the applicants were removed from the territory of Ukraine (see paragraph 46 above and compare *Z.A. and Others*, cited above, § 142).

115. It is true that during that time the border guards failed to examine whether the first applicant's removal would expose her, directly or indirectly, to treatment contrary to Article 3 of the Convention (see paragraph 97 above).

However, there is nothing to suggest that the duration, degree or intensity of the impugned measures of control and supervision exceeded what was strictly necessary for the Ukrainian border guards to comply with relevant formalities and to ensure the applicants' removal (see, *mutatis mutandis*, *Gahramanov*, cited above, § 44, and, by contrast, *Z.A. and Others*, cited above, § 148).

116. In this connection, the Court attaches particular importance to the fact that the first applicant was travelling with the second applicant knowingly using false identity documents. Consequently, the first applicant must have foreseen that in their situation verifications and other formalities during the border control in Ukraine might take substantial time, during which they would not be able to leave the airport premises and would remain under the control and supervision of the authorities.

117. Thus, the situation in the present case differs from that in *Kasparov v. Russia* (no. 53659/07, 11 October 2016). In that case, the Court found that the restrictions and checks to which the applicant had been subjected in connection with his attempt to check-in for an internal flight in Russia had exceeded "the time strictly necessary for verifying the formalities normally associated with airport travel" (ibid., §§ 37-47). Moreover, no question arose as to the identification of the applicant in that case.

118. The Court also recalls that in *Mahdid and Haddar v. Austria* it found that the applicants, who had been staying in the transit zone of Vienna airport and who had been placed under police surveillance for several hours in order to ensure their deportation on a flight to Tunisia, had not been "deprived of (their) liberty" within the meaning of Article 5 § 1 of the Convention (see *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, ECHR 2005 XIII (extracts)).

119. The Court further notes that in the case of *Nolan and K.*, where it found that the conditions of one of the applicants' stay in Sheremetyevo Airport in Moscow were equivalent in practice to a deprivation of liberty, after the border officials had refused him leave to enter the Russian territory, he was locked up overnight in a room in the transit zone of that airport (see *Nolan and K.*, cited above, §§ 20-26). In the present case, the applicants were not locked up in those premises, but stayed under the supervision by the border guards while the latter carried out the necessary verifications and other formalities (see paragraph 115 above). There is no indication that should the first applicant have agreed to leave Ukraine the applicants would not have been allowed to leave the border guards' premises (see paragraphs 27, 114 and 115 above).

120. In the light of the foregoing, the Court finds that the impugned measures of control and surveillance to which the applicants were subjected while in Ukraine did not amount to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention.

121. It follows that the applicants' complaints under Article 5 of the Convention are incompatible *ratione materiae* with its provisions and that

this part of the application must be declared inadmissible in accordance with Article 35 § 3 (a) and 4.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

122. The applicants complained that Ukraine had failed to comply with the interim measures indicated by the Court under Rule 39 of the Rules of Court in the present case. They relied on Article 34 of the Convention, which reads 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."

123. Rule 39 of the Rules of Court reads as follows:

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
>
> 2. Notice of these measures shall be given to the Committee of Ministers.
>
> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

124. The Government contested that argument, stating that the applicants had had the opportunity to lodge and to pursue their application with the Court while they were in Ukraine and/or in Georgia. The Government also reiterated that it had been the first applicant's own decision to leave Ukraine on 29 March 2012.

125. The Court reiterates that, by virtue of Article 34 of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of the right of individual application, which has been consistently reaffirmed as a cornerstone of the Convention system. A respondent State's failure to comply with an interim measure entails a violation of that right (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 102 29, ECHR 2005-I). Such measures are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual application and with a view to preventing imminent potential irreparable harm from being done. The fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred, despite a State's failure to act in full compliance with the interim measure, or that information obtained subsequently suggests that the risk of harm may have been exaggerated is irrelevant for the assessment of whether the respondent State has fulfilled its obligations under Article 34 (see *Paladi v. Moldova* [GC], no. 39806/05, §§ 88-89 and 104, 10 March 2009).

126. Turning to the present case, the Court notes that in spite of having been informed of the Court's decision indicating, *inter alia,* that the applicants should not have been removed from Ukraine, the Ukrainian authorities removed them to Georgia (see paragraphs 43, 44 and 95 above). No justification or acceptable explanation was given for the authorities' failure to comply with the Court's decision.

127. It is true that the Government were informed of the said decision only around two hours before the applicants' plane took off and, when they transmitted that information to the Border Control Service, the plane was to leave in about forty minutes (see paragraphs 31, 35, 43 and 44 above). However, the Government did not argue that the authorities had had no sufficient time or technical means to prevent the applicants' removal from Ukraine. In this context, the Court refers to its above findings that the border guards were aware of the first applicant's true identity and of her wish to claim asylum in Ukraine (see paragraph 89 above) and notes no information pointing to any facts which could have objectively impeded the authorities' compliance with the measure indicated by the Court under Rule 39.

128. Also, in so far as the Government pointed to the fact that the applicants could lodge the present application and further maintained it in the proceedings before the Court (see paragraph 124 above), the Court observes that this does not exclude the possibility that there has been an interference with their right of individual application (see, *mutatis mutandis*, *Vasiliy Ivashchenko v. Ukraine*, no. 760/03, § 109, 26 July 2012).

129. In the light of the foregoing, the Court finds that, by disregarding its decision under Rule 39, Ukraine has failed to comply with its undertaking under Article 34 of the Convention not to hinder in any way the effective exercise of the applicants' right of individual application.

V. OTHER COMPLAINTS

A. Alleged threats by the authorities

130. The first applicant complained of a violation of Article 3 of the Convention in that she had been threatened by the Ukrainian border guards that she would be deported to Kyrgyzstan or otherwise transferred under the control of the Kyrgyz authorities. She claimed that given her vulnerable situation and the possible ill-treatment she risked in Kyrgyzstan, the threats amounted to degrading treatment.

131. The Court is not of the view that the mental suffering which the applicant claimed to have endured would in any event have reached the level of severity normally associated with inhuman or degrading treatment prohibited by Article 3. Although the possibility of being handed over to the Kyrgyz authorities could have seemed real to the first applicant, travel was in fact arranged to a third country. Therefore, the Court finds that this complaint

must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Conditions in which the second applicant was held while in Ukraine

132. Without relying on any particular provision of the Convention, the applicants complained that while in the Boryspil Aiport the second applicant had been "detained" for eleven hours in a "locked room" with no appropriate food.

133. The Court has already found that while in Ukraine none of the applicants was detained within the meaning of Article 5 § 1 of the Convention (see paragraph 120 above). The Court also found that the applicants were not locked up in the Ukrainian border guards' premises (see paragraph 119 above).

134. In so far as the first applicant may be understood as complaining, on behalf of the second applicant, of a violation of Article 3, the Court considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, this complaint either does not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or does not disclose any appearance of a violation of that provision of the Convention. It follows that it must be rejected in accordance with Article 35 § 4.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

135. 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

136. The applicants claimed 10,000 euros (EUR) in respect of non-pecuniary damage on account of the allegedly arbitrary detention in Ukraine, the alleged pressure by the Ukrainian authorities and the alleged risk of their *refoulement* to Kyrgyzstan.

137. The Government contended that there was no causal link between the alleged violations and the alleged non-pecuniary damage and considered that the amount of the claim was excessive.

138. Making its assessment on an equitable basis, the Court considers it reasonable to award the first applicant EUR 7,500 regarding non-pecuniary damage, plus any tax that may be chargeable on that amount, and dismisses the remainder of the applicants' claim for just satisfaction.

B. Costs and expenses

139. The applicants did not submit claims for costs and expenses. Accordingly, the Court considers that there is no call to award them any sum on that account.

C. Default interest

140. 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. *Joins* to the merits the Government's objection as to the first applicant's victim status regarding her complaint under Article 3 of the Convention and rejects it;

2. *Declares* the first applicant's complaints under Articles 3 and 13 of the Convention concerning her removal from Ukraine and the alleged lack of effective domestic remedies in that regard admissible and the applicants' remaining complaints under Articles 3, 5 and 13 inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention;

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

5. *Holds* that the respondent State has failed to comply with its obligation under Article 34 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five 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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President