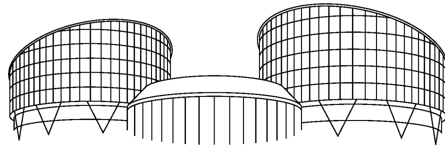

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF S.K. v. RUSSIA

(Application no. 52722/15)

JUDGMENT

STRASBOURG

14 February 2017

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of S.K. v. Russia,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 24 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 52722/15) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Syrian national, S.K. ("the applicant"), on 26 October 2015. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Ms I. Biryukova, a lawyer practising in Podolsk. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. On 26 October and 12 November 2015 the Court indicated under Rule 39 of the Rules of Court that the applicant should not be removed from Russia for the duration of the proceedings before the Court.

4. On 12 November 2015 the complaints under Articles 2, 3, 5, 8 and 13 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1986. Since February 2015 he has been kept in a detention centre for foreign nationals in the town of Makhachkala, Dagestan Republic, Russia.

A. The applicant's arrival in Russia and prosecution for administrative offences

6. The applicant arrived in Russia in October 2011. He was in possession of a visa declaring the purpose of his visit as business. The applicant's visa was due to expire in October 2012. However, the visa allowed the applicant to stay in Russia for no longer than ninety days in the course of a single visit. As submitted by the Government, he was therefore expected to leave Russia in early 2012.

7. The applicant did not leave and started to live together with Ms B., a Russian national. In November 2013 they had a child together. In April 2014 they married.

8. In the meantime, on 15 and 19 February 2013 the applicant was found guilty of an offence under Article 18.10 of the Code of Administrative Offences (CAO), which provided that a foreigner could be punished for unlawful employment activities in Russia.

9. By judgment of 26 February 2015 the Sovetskiy District Court of Makhachkala found the applicant guilty of an offence under Article 18.8 § 1.1 of the CAO (see paragraph 24 below), of remaining in Russia after the expiry of the visa. It sentenced him to a fine and a penalty of forcible administrative removal (*принудительное административное выдворение*) from Russia. The District Court held as follows:

> "Article 18.8 § 1.1 of the CAO provides for the following penalties: a fine of between 2,000 and 5,000 roubles with or without administrative removal from Russia ...
>
> The subsidiary penalty of administrative removal from Russian may be imposed with due regard to the information that confirms the actual need to impose such a penalty on the defendant, as well as the information that confirms the proportionality of this penalty as the only acceptable measure for achieving a balance between the public and private interests at stake ...
>
> The defendant has no legal grounds for remaining in Russia. If a fine is imposed, the defendant will add himself to the group of illegal labour immigrants who do everything to avoid compliance with the Russian migration legislation. The penalty of administrative removal is also necessary for the sake of national security, to avoid the spread of various infectious diseases such as HIV, tuberculosis and leprosy, and to ensure the optimal balance of labour resources and in order to support, as a matter of priority, the employment of Russian nationals ..."

10. In the same judgment the District Court ordered that, while awaiting enforcement of the administrative removal, the applicant be placed in a special detention facility for foreigners in the town of Makhachkala.

11. Lawyer D. lodged a statement of appeal on behalf of the applicant against the judgment of 26 February 2015. It appears that the applicant raised arguments relating to his family life in Russia; it is unclear whether he raised any argument relating to a risk to his life and physical integrity in the event of enforcement of the penalty of forcible removal.

12. On 4 March 2015 the Supreme Court of the Dagestan Republic upheld the judgment. The appeal court held as follows:

> "Article 18.8 § 1.1 of the CAO provides for the following penalties: a fine of between 2,000 and 5,000 roubles with administrative removal from Russia ...
>
> [The applicant] has committed a violation of the regime applicable for the presence of foreigners in Russia, by way of omitting after 7 October 2012 to leave Russia ...
>
> The court dismisses [the applicant's] argument relating to his family life in Russia ... The marriage with Ms B. was concluded on 28 April 2014, which was a long time after the commission of the offence by [the applicant] ... The administrative offence record did not contain any information relating to his family life in Russia. No such information was adduced during the proceedings before the first-instance court ...
>
> [The applicant's] prolonged violation of the migration legislation since October 2012 amounts to abuse of Russia's hospitality and thus should be treated as a breach of the receiving country's interests ..."

13. On an unspecified date the applicant received a copy of the appeal decision.

14. The penalty of administrative removal was not enforced. According to the Government, the bailiff service instituted enforcement proceedings on 12 March 2015, but they were not pursued on account of an application lodged by the applicant for temporary asylum (see below).

B. Application for temporary asylum

15. On 5 May 2015 the applicant applied for temporary asylum. He referred to the ongoing intensive military actions in Syria, in particular in his home town of Aleppo. He further argued that given his age, he would be drafted by the governmental forces for active military service, thereby putting his life and physical integrity in danger.

16. It appears that the applicant engaged lawyer K. to assist him in those proceedings and had a meeting with him in the detention centre. On 2 June 2015 the applicant called the lawyer from the detention centre, complaining of beatings. On the same day, the lawyer was refused access to the applicant in the detention centre, apparently because he should have obtained authorisation for the visit from the regional migration authority. The lawyer wrote to the regional prosecutor's office complaining of a violation of the applicant's rights and physical integrity.

17. On 4 June 2015 the lawyer made a further unsuccessful attempt to gain access to the applicant.

18. On 6 August 2015 the local migration authority dismissed the applicant's application for temporary asylum. The applicant sought review of this refusal before the Federal Migration Service ("the FMS"). On 24 September 2015 the FMS upheld its decision, stating as follows:

> "In February 2012 there were no large-scale military operations in Syria; there were only localised hostilities between governmental forces and opposition groups. Despite the above, the applicant failed to leave Russia ... At the time he did not apply for

asylum and continued to stay in Russia unlawfully until the imposition of the penalty of administrative removal.

The following violations of the migration rules for foreigners should be pointed out:

The applicant arrived in Russia under a business visa, whereas his actual goal was employment. Thus, his declared aim did not correspond to the actual aim for arriving in Russia.

The applicant was unlawfully engaged in employment activities ...

In February 2013 he was twice prosecuted for administrative offences. However, even after this, he did not seek asylum, while neglecting the real possibility of his future deportation from Russia ...

The Ministry of Foreign Affairs points out that Syrian nationals who return to their homeland or who are deported or expelled there may arrive in Damascus and then proceed to other regions that are controlled by governmental forces."

19. On 14 October 2015 the applicant, assisted by lawyer M., sought judicial review of the refusal of temporary asylum under the Code of Administrative Procedure ("the CAP") and asked the Leninskiy District Court of Makhachkala to put in place an interim measure by way of suspending enforcement of the judgment of 26 February 2015. On 16 October 2015 the court refused to deal with the case, concluding that it had to be lodged before a court with jurisdiction in the area of the applicant's current "place of residence"; his stay in the detention centre did not qualify as a place of residence.

20. Assisted by Ms Biryukova (who is his representative before this Court) the applicant resubmitted his application for judicial review to the Basmannyy District Court of Moscow. On 27 October 2015 the District Court left the matter without examination because the applicant had not indicated the date and place of his birth; had not specified whether he had a law degree, which was relevant because the case could only be lodged by a person in possession of a law degree; and had not provided evidence that his representative had a law degree. The applicant was required to remedy the above defects by 18 November 2015.

21. By a judgment of 9 December 2015 the District Court upheld the refusals of temporary asylum. The court held that the applicant was at risk of violence which was no more intensive than for other people living in Syria:

"The grounds for granting temporary asylum on account of humanitarian considerations include the following situations: a grave medical condition for which the foreigner will not receive the requisite medical care in the country of nationality, thus putting his or her life at risk; a real threat to his or her life or liberty on account of hunger, epidemics, emergency situations of environmental or industrial origin or on account of an internal or international conflict that encompasses the entire territory of the state of nationality; a real threat of being subjected to torture or another cruel, inhuman or degrading treatment or punishment in the country of nationality.

Under Article 62 of the Code of Administrative Procedure the parties to the case must prove the circumstances to which they refer as the basis for their claims or objections, unless otherwise provided for by the Code.

> Assessing the evidence submitted to it, the court concludes that [the applicant] has not adduced convincing arguments that he is at risk of being persecuted by the authorities or by groups of the population on account of his religion, race or membership of a social group ... Despite the difficult social and political situation in Syria, there are no grounds to consider that his life will be at a higher risk than that of other people living in this country ... According to information from the Federal Migration Authority, people returning to Syria may reach directly the city of Damascus, which is under the control of the government. ...”

22. The applicant received a copy of the judgment in February 2016 and lodged an appeal. He argued that the first-instance court had not paid proper attention to his argument relating to the risk to his life and physical integrity in the event of his removal to Syria; the migration authority had not refuted his argument while the court had shifted the burden of proof onto the applicant and had placed undue emphasis on the illegality of the applicant’s presence in Russia. His appeal was dismissed by the Moscow City Court on 8 June 2016. The appeal court held as follows:

> “The first-instance court considered that the applicant did not fall within the scope of the notion of “refugee” under the Refugees Act ... In view of the applicant’s failure to submit specific facts disclosing that in the event of his removal to Syria he would be exposed to a real threat to his security ... or that he was persecuted in this country, the appeal court agrees with the first-instance court ... The appeal court also notes that the applicant arrived in Russia in 2011 but only sought temporary asylum in 2015.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Federal Code of Administrative Offences (CAO)

1. Liability for breaching migration regulations

23. Article 18.8 of the CAO punishes various violations of the migration legislation. Until August 2013, Article 18.8 § 1 of the CAO provided that a foreign national who infringed the residence regulations of the Russian Federation, including by entering or living on the territory without a valid document, by non-compliance with the established procedure for residence registration or by failing to leave Russia after expiry of an authorised period of stay, would be liable to an administrative fine with or without administrative removal.

24. In July 2013 paragraph 1.1 was introduced into Article 18.8 to make the following actions or omissions punishable from August 2013 by both a fine and administrative removal from Russia: the absence of documents confirming the right to stay or reside in Russia; and the failure to leave Russia after expiry of an authorised period of stay.

25. Article 18.10 provided at the material time that a fine with or without administrative removal could be imposed on a foreign national for unlawful employment activities in Russia.

26. Pursuant to Article 31.2, a judgment on the merits in respect of an administrative-offence charge is enforceable after it has acquired legal force.

27. Article 30.12 provides that first-instance and appeal judgments which have become final can be challenged by way of review.

28. Pursuant to Article 31.6, a judge shall suspend enforcement of his or her judgment in the administrative-offence case where a prosecutor or another public official has lodged a request for review of this judgment under Article 30.12, or in other situations prescribed by the CAO. No suspension is possible if review is being sought by a defendant (Ruling no. 5 of 24 March 2005 by the Plenary Supreme Court of Russia, paragraph 37).

29. Article 3.10 of the CAO provides that a judge is empowered to require detention of a foreigner in a special detention facility with a view to enforcing the penalty of forcible removal.

2. *Examination of risk to life and physical integrity in CAO cases*

30. The respondent Government submitted several court decisions in support of their argument that the courts in CAO cases were empowered to take cognisance of an argument based on the risk of ill-treatment in order to oppose a penalty of administrative removal:

- Acting as the reviewing court in a CAO case (apparently concerning offences committed in or before April 2013 when the penalty of removal was not mandatory but could be imposed as an additional sentence together with a fine), the Supreme Court of Russia issued decision no. 19-AD13-6 of 13 December 2013. It reads as follows:

> "Article 7 of the International Covenant on Civil and Political Rights (as interpreted by the United Nations Human Rights Committee) and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide that a person should not be extradited where there are substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.
>
> Under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (as interpreted by the European Court of Human Rights), inhuman treatment or punishment includes treatment that is usually of a premeditated nature, lasts for hours or where, as a result of such mistreatment or punishment, one has sustained real physical harm or profound physical or mental suffering ...
>
> Pursuant to Article 3 of the Convention against Torture, when assessing the presence or absence of the above circumstances, it is necessary to take into account the general situation regarding observance of human rights in the requesting State and the specific circumstances of the case, which taken together may confirm the presence of serious grounds to believe that the person runs a risk of being subjected to the above-mentioned mistreatment or punishment.
>
> In this connection, courts may take into account the person's testimony, witness statements, the notes issued by the Russian Ministry of Foreign Affairs concerning the respect for human rights in the requesting State, that State's assurances, as well as

reports and other documents issued in respect of that State by international inter-governmental organisations ...

A similar position has been expressed by the Plenary Supreme Court of Russia in its ruling no. 11 of 14 June 2012 concerning extradition cases ...

[The foreign national] explained to the first-instance court that he had not returned to his country in due time on account of the ongoing armed conflict there. The case file contains a letter from the Human Rights Ombudsman of the Stavropol Region who indicates that there is an ongoing armed conflict in the country, and that the socio-economic situation there is extremely difficult. Furthermore, the case file contains a letter from the Deputy Chief Bailiff of the Russian Federation dated 30 August 2013; he indicates that all departures for this country are prohibited. ...

The court decision should be amended by way of excluding the penalty of forcible removal from Russia."

- An undated judgment from the Moscow Regional Court reads as follows:

"The recommendations issued in October 2013 by the UNHCR indicate that the situation in Syria is likely to remain uncertain in the nearest future. The UNHCR welcomes the fact that certain countries have taken measures with a view to suspending enforcement of removal measures to Syria, including for foreigners who had been refused asylum. Such measures should remain in force until further notice.

[The foreign national] specified that his town of habitual residence had been taken over by terrorists; he was unable to maintain contact with his next of kin. He had not left Russia because he feared for his life on account of the war in Syria; he had lodged an application for refugee status in Russia ...

The court decision should be amended by way of excluding the penalty of supervised removal ..."

- By a judgment of 13 February 2014 the Leningrad Regional Court held in similar terms as above. It also stated:

"[The Syrian national] has lodged an application for temporary asylum ... The person who has been granted temporary asylum cannot be returned to his country against his will (section 12 of the Refugees Act). The relevant proceedings were pending at the time of the proceedings in the CAO case ... The impugned judgment should be amended by way of excluding the penalty of compulsory removal."

B. Legislation on refugee status and temporary asylum

31. Federal Law no. 4528-1 of 19 February 1993 ("the Refugees Act") contains rules concerning two procedures for the protection of foreigners: a refugee status procedure and temporary asylum procedure.

1. Refugee status procedure

32. Section 1(1) of the Refugees Act defines a refugee as a person who is not a Russian national and who has sufficiently justified grounds to fear becoming a victim of persecution on grounds of his race, religion, citizenship, membership of a social group or political views.

33. Pursuant to section 4(1) and (7) of the Refugees Act, a foreigner who has lodged an application for refugee status is provided with a certificate, which is the document that confirms the identity of the person seeking refugee status and permits a request for seeking admission to a temporary stay centre.

34. The Refugees Act provides the following safeguards to foreigners claiming refugee status in Russia:

> “**Section 10. Safeguards for personal rights**
>
> 1. A person who is seeking refugee status, already has it or no longer has it cannot be returned against his will to the country of his nationality or habitual residence while the circumstances listed in section 1(1) of the Act persist in that country.
>
> 2. Decisions and actions (inaction) by public authorities in relation to enforcement of the Act are amenable to challenge before a higher authority or a court.
>
> 3. Complaints should be lodged within the following time-limit:
>
> (1) one month of receiving written notification about the decision that has been taken or one month after a complaint has been lodged where no written reply to it is received;
>
> (2) three months of the date on which the person learnt about the refusal of refugee status.
>
> 4. Prior to the decision on the complaint, the applicant and his family members have rights and obligations as listed in sections 6 and 8 of the Act, in so far as these do not contradict their legal status.
>
> 5. Having received notification on the inadmissibility of the refugee application or on its refusal and having used the right to challenge the above decisions, the person must leave Russia together with his family members within three days of receipt of the notification, where there are no other legal grounds for remaining in Russia ...
>
> **Section 13. Removal (deportation) from Russia**
>
> 1. If, having received the notification on the inadmissibility of the application for refugee status or on its refusal, the foreigner does not challenge those decisions while refusing to leave Russia, he must be removed (deported) together with his family members ...
>
> 2. If, having challenged the above decisions the foreigner has no other legal grounds for remaining in Russia while refusing to leave it, he must be removed (deported) ...”

2. Temporary asylum procedure

35. Under section 1 of the Refugees Act, temporary asylum is defined as a possibility for a foreigner to reside in Russia on a temporary basis in accordance with section 12 of the Refugees Act, which reads as follows:

> “1. Temporary asylum is granted in accordance with the procedure established by the Government of the Russian Federation ...
>
> 2. Temporary asylum may be granted to a foreigner if he:
>
> (1) has met the grounds for refugee status but has limited his application to a request for leave to remain in Russia on a temporary basis;

> (2) has not met the grounds for refugee status as listed in the Act but humanitarian considerations prevent his removal from Russia.
>
> ...
>
> 4. ... A person who has been granted temporary asylum cannot be returned against his will to the country of his nationality (his previous habitual residence). ...
>
> 5. Temporary asylum is no longer valid:
>
> (1) when the circumstances giving rise to it have been removed;
>
> (2) if the person has acquired a right to reside permanently in Russia or has acquired Russian citizenship or another nationality;
>
> (3) if the person has left Russia for residence elsewhere.
>
> 6. Temporary asylum shall be revoked if the foreigner:
>
> (1) has been convicted by a final judgment for a criminal offence committed in Russia;
>
> (2) has provided false information or documents that then gave rise to the granting of temporary asylum, or has otherwise violated the present Act;
>
> (3) has been prosecuted for an administrative offence relating to drug trafficking ...
>
> 7. If the foreigner no longer has temporary asylum for one of the reasons listed in subsections 5(2)-(3) and 6(3) above and has no other grounds for remaining in Russia and has been requested to leave Russia, he or she must leave the country within a month."

36. The procedure for examining applications for temporary asylum was prescribed by the Russian Government in decree no. 274 of 9 April 2001. Temporary asylum is granted if there are grounds for recognising a foreigner as a refugee or if there are humanitarian grounds requiring the temporary presence of the person in Russia (for instance, on account of his or her state of health) until such grounds no longer exist or the legal status of the person has changed. Temporary asylum is granted for a period of one year; it can be extended each year for the same period at the foreigner's request. A person who has been granted temporary asylum cannot be returned, against his or her will, to the country of nationality or previous residence.

37. According to decree no. 274, pending examination of an application for temporary asylum a foreigner is given a certificate indicating that his or her application is being examined (§ 4); such certificate confirms the legality of a foreigner's presence in Russia during the period when the application is being examined or when a refusal of temporary asylum is being challenged (§ 5).

38. The Constitutional Court of Russia has held that temporary asylum should be understood as an extraordinary and complementary protective measure; while neither the Refugees Act nor Government decree no. 274 contains an exhaustive list of circumstances that may disclose "humanitarian considerations" and be a sufficient ground for granting temporary asylum in Russia, the relevant public authority does not enjoy

unfettered discretion in deciding on temporary asylum; such a decision should take account of the legal nature and intended use of that procedure and the constitutional principle recognising human rights and freedoms as the highest value, as enshrined in Article 2 of the Constitution (decision no. 1317-O-P of 30 September 2010).

C. Code of Administrative Procedure

39. Since September 2015 the Code of Administrative Procedure (CAP) has replaced the Code of Civil Procedure as regards various disputes involving public authorities.

40. Chapter 7 of the CAP provides for "measures of preliminary protection". Following introduction of a case against the State, the claimant may seek measures of preliminary protection. A court is empowered to grant such measures if:

(1) prior to resolving the case there is a manifest threat of a violation of the claimant's rights, freedoms and legitimate interests; or

(2) the protection of the claimant's rights, freedoms and legitimate interests will be rendered impossible or difficult without such measures.

41. Article 85 of the CAP empowers a court to suspend the impugned administrative decision, prohibit specific actions or issue other measures of preliminary protection. Such measures must be related to the impugned claim pending before the court and must be proportionate to such claim.

III. OTHER RELEVANT MATERIAL

A. UNHCR documents

42. The 2011 UNHCR Resettlement Handbook states that the 1951 Convention does not require that a person's departure from his/her country of origin or habitual residence was caused by a well-founded fear of persecution. Grounds for recognition as a refugee may arise when the individual concerned is already out of the country – in such situations, the person may become a refugee while being in the host country (*sur place*).

43. The 2011 UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees states as follows:

> "164. Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol. They do, however, have the protection provided for in other international instruments, e.g. the Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts.

> 165. However, foreign invasion or occupation of all or part of a country can result - and occasionally has resulted – in persecution for one or more of the reasons enumerated in the 1951 Convention. In such cases, refugee status will depend upon whether the applicant is able to show that he has a 'well-founded fear of being persecuted' in the occupied territory and, in addition, upon whether or not he is able to avail himself of the protection of his government, or of a protecting power whose duty it is to safeguard the interests of his country during the armed conflict, and whether such protection can be considered to be effective."

44. The Court has also had regard to the UNHCR Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions (2 December 2016, HCR/GIP/16/12, in particular paragraphs 10, 17-19, 22 and 32-33); the UNHCR Guidelines on Temporary Protection or Stay Arrangements, February 2014.

B. Reports on Syria

45. According to the Russian Official Statistics Agency, as of 1 January 2013/2014/2015/2016 there were 52/ 1,158/ 1,924/ 1,302 Syrians nationals having temporary asylum in Russia respectively; in 2010-16 two Syrian nationals (in total or per year) received refugee status.

46. For a number of reports concerning the situation in Syria before and during 2015, see *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, §§ 76-81, 15 October 2015.

47. The Court has had regard to more recent reports and documents such as:

- UNHCR's Report "International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic. Update IV" (HCR/PC/SYR/01, November 2015):

> "2. Nearly all parts of Syria are embroiled in violence, which is playing out between different actors in partially overlapping conflicts and increasingly involves different regional and international actors. The country is deeply fractured as parties to the conflict, including Syrian military forces, the group "Islamic State of Iraq and Al-Sham" (hereafter ISIS), anti-government armed groups, and Kurdish forces (People's Protection Units, YPG), exercise control and influence in different parts of the country. As international efforts to end the conflict in Syria have yet to yield results, the conflict continues unabated with devastating consequences for the Syrian population, including rising civilian casualties, large-scale displacement inside and outside the country, and an unprecedented humanitarian crisis. Tenuous local ceasefires have been brokered in some areas between government and anti-government forces, resulting in temporary de-escalations of fighting at the local level. ...
>
> 7. The number of persons killed as a result of the conflict since its start in 2011 is estimated to range between 145,000 and over 250,000. The greatest number of casualties has been recorded in the governorate of Rural Damascus, followed by Aleppo, Homs, Idlib, Dera'a and Hama governorates. While men (both fighters and civilians) account for the highest number of deaths, women and children are reported

to account for one quarter of all civilian deaths. As a result of the conflict, the deterioration of Syria's healthcare system has reportedly led to hundreds of thousands of ordinarily preventable deaths from chronic diseases, premature deaths due to normally nonfatal infectious diseases, neonatal problems and malnutrition. In addition, over one million people have reportedly been wounded as a direct result of the conflict, often leading to long-term disabilities, while many more are suffering from the psychological consequences of having been witness to violence, the loss of family members, displacement and deprivation. ...

17. A particular and deepening feature of the conflict is that different parties to the conflict frequently impute a political opinion to larger groups of people, including families, tribes, religious or ethnic groups or whole towns, villages or neighbourhoods, by association. As such, members of a larger entity, without individually being singled out, become the targets for repercussions by different actors, including government forces, ISIS, and anti-government armed groups, for reason of real or perceived support to another party to the conflict. According to consistent reports, whole communities which are perceived to be holding a particular political opinion or affiliation in relation to the conflict are targeted by aerial bombardments, shelling, siege tactics, suicide attacks and car bombs, arbitrary arrest, hostage-taking, torture, rape and other forms of sexual violence, and extra-judicial executions. The perception of sharing a political opinion or affiliation in relation to the conflict is often based on little more than an individual's physical presence in a particular area (or the fact that he/she originates from a particular area), or his/her ethnic, religious or tribal background. The risk of being harmed is serious and real, and in no way diminished by the fact that the person concerned may not be targeted on an individual basis. ...

27. With the conflict in Syria in its fifth year, the humanitarian situation continues to deteriorate rapidly. The total number of people in need of humanitarian assistance inside Syria has reached 13.5 million ...

37. In exceptional cases in which the 1951 Convention inclusion criteria may not be met, consideration needs to be given to broader refugee criteria elaborated in regional refugee instruments, or other forms of international protection, including subsidiary protection, or protection from *refoulement* derived from universal or regional human rights norms, or based on national legislative standards. ..."

- United Kingdom: Home Office, Country Information and Guidance - Syria: the Syrian Civil War, 19 August 2016:

"3.1.1 Caselaw has established that it is likely that a failed asylum seeker or forced returnee would, in general, on return to Syria face a real risk of arrest and detention and of serious mistreatment during that detention as a result of imputed political opinion. It noted that the position might be otherwise for someone perceived as a supporter of the Assad regime.

3.1.2 However, since this caselaw was promulgated in 2012, the situation is now such that actual or perceived Assad supporters may have a well-founded fear of persecution, depending on where they are.

3.1.3 The humanitarian crisis, which continues to deteriorate, is such that for most returnees removal would breach Article 3 of the ECHR.

3.1.4 The level of indiscriminate violence in the main cities and areas of fighting in Syria is at such a level that substantial grounds exist for believing that a person, solely by being present there for any length of time, faces a real risk of harm which threatens their life or person ...

> 3.1.5 If a person faces a well-founded fear of persecution, they are unlikely to be able to obtain protection from the authorities.
>
> 3.1.6 It is unlikely that a person will be able to reasonably internally relocate to another part of the country, because of the highly limited ability to move, and move safely, from one part of Syria to another, and the unpredictability and scale of violence, and the humanitarian situation faced by the displaced, in areas of proposed relocation ...”

- On 30 October 2016 the United Nations Special Envoy for Syria mentioned the high number of rockets indiscriminately launched by armed opposition groups on civilian suburbs of western Aleppo in the last forty-eight hours. Credible reports quoting sources on the ground indicated that scores of civilians in west Aleppo had been killed, including several children, and hundreds wounded due to relentless and indiscriminate attacks from armed opposition groups. The Special Envoy reiterated the Secretary General’s condemnation of recent attacks on schools on both sides, as well as the use of heavy airpower on civilian areas that characterised the fighting in Aleppo.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION

48. The applicant complained that his administrative removal from Russia to Syria would have entailed in 2015 and would still entail at present a violation of Articles 2 and 3 of the Convention, which read as follows:

Article 2

> “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Article 3

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

A. The parties' submissions

1. The Government

49. The Government argued, in substance, that the applicant was responsible for the situation in which he found himself. Having arrived in Russia in October 2011 with a visa which he knew would expire, he had overstayed his visa and had started to work illegally. In 2012 and 2013 he had taken no steps to regularise his presence in Russia by way of ordinary procedures, applying for a new visa, a temporary residence permit or Russian citizenship. Before being convicted in 2013 under Article 18.10 of the CAO he could have pursued extraordinary procedures, for example by applying for refugee status or temporary asylum. At the time, the applicant had not been in detention and had been free to use legal assistance and translation services, if necessary, in order to legalise his stay in Russia, or to leave Russia for other countries, probably offering better opportunities in his situation.

50. The Government submitted that the applicant's appeal against the first-instance judgment in the administrative offence case and his delayed application for temporary asylum could not be viewed as proper exhaustion of domestic remedies in the particular circumstances of the case.

2. The applicant

51. The applicant acknowledged that he had violated the migration legislation. However, such violation did not, *per se*, mean that his grievances falling within the scope of Articles 2 and 3 of the Convention were inadmissible. It was both unreasonable and irrelevant (for instance, on account of Directive 2005/85/EU of 1 December 2005) to dismiss an asylum application as inadmissible for the sole reason that it had been lodged belatedly. Russian law required an immediate application for refugee status only from those who crossed or attempted to cross the border illegally. The applicant had arrived in Russia legally in 2011. Having arrived in Russia in October 2011, the applicant had become a refugee "*sur place*" on account of the intensified hostilities in Syria in 2013-15. The applicant had raised the pertinent arguments before the national authorities, namely in the temporary asylum procedure (see paragraphs 15 and 22 above). It was incumbent on the authorities to dispel any doubts that his return to Syria would not be safe.

B. The Court's assessment

1. Admissibility

52. The Government argued in substance that the applicant should have taken in due time – that is, long before 2015 – measures to regularise his stay in Russia. In particular, he should have applied for a new visa, a

temporary residence permit or Russian citizenship. He could also have applied for refugee status or temporary asylum. The Government claimed that the applicant's appeal against the ruling on his administrative removal and his delayed application for temporary asylum could not be viewed as exhaustion of domestic remedies in the particular circumstances of the case.

53. The Court observes that the Government's exhaustion claim is that the applicant could have avoided the removal order and its consequences if he had regularised his status before his business visa expired. However, the fact that by behaving differently the applicant could perhaps have avoided the measures about which he complains is not a matter for consideration in the context of exhaustion of domestic remedies: Article 35 of the Convention requires exhaustion in respect of the alleged breach of the Convention which, in the present case, would flow from execution of the removal order which was first made in February 2015. The Government do not contend that Convention-compliant remedies were available to challenge that removal order, and that the applicant failed to pursue them. Therefore, the Government's objection concerning exhaustion of domestic remedies should be dismissed.

54. The Court considers that the complaints under Articles 2 and 3 raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

2. Merits

55. The applicable general principles were summarised by the Court in *L.M. and Others v. Russia*, cited above, §§ 119-22. In particular, the Court stated as follows:

> "119. The Court notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of expulsion (see *H.L.R. v. France*, 29 April 1997, § 41, Reports of Judgments and Decisions 1997-III); however, it has never ruled out the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *N.A. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008)."

56. In that judgment the Court assessed in September 2015 a similar complaint concerning the situation in Syria and the circumstances of the applicants' cases (§§ 123-126) as disclosing a violation of Articles 2 and 3 of the Convention. The Court noted that it had not yet adopted a judgment to evaluate the allegations of a risk of danger to life or ill-treatment in the context of the ongoing conflict in Syria, and that this was undoubtedly at least in part due to the fact that, as it appeared from the relevant UNHCR

documents, most European countries did not at the time carry out involuntary returns to Syria.

57. In the present case the applicant's complaint before the Court has been made in the context of the continuing hostilities in Syria, and in particular in his home town of Aleppo, as well as on account of the possibility that he would be drafted into active military service, thus intensifying the risks to his life and limb.

58. If an applicant has not already been removed, the material point in time for an assessment must be that of the Court's consideration of the case (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports* 1996-V). Since the nature of the Contracting States' responsibility under Article 3 of the Convention in cases of this kind lies in the act of exposing an individual to a real risk of death or 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. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007, and *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, §§ 107-08, Series A no. 215).

59. In the present case the parties have not made any specific submissions nor provided any material concerning the evolution of the situation in Syria between late 2015 (*a fortiori*, since February 2015 when the impugned removal order was issued) and the date of the Court's deliberations. In the Court's view, it was in the first place incumbent on the respondent Government to provide evidence that the general situation in Syria was not of the kind warranting protection under Article 3 of the Convention (see *J.K. and Others v. Sweden* [GC], no. 59166/12, § 98, ECHR 2016; as regards the domestic assessment, see paragraphs 82 and 98 below).

60. In determining whether it has been shown before the Court that the applicant runs a real risk of suffering treatment proscribed by Article 2 or 3, the Court will assess the issue in the light of all the material placed before it and the material obtained *proprio motu* (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, ECHR 2012). Having obtained some relevant recent information (see paragraph 47 above), the Court observes that the security and humanitarian situation and the type and extent of hostilities in Syria deteriorated dramatically between the applicant's arrival in Russia in October 2011 and the removal order issued in February 2015, but also between that time and the refusal of his temporary asylum application.

61. The available information contains indications that, despite the agreement on the cessation of hostilities signed in February 2016, various parties to the hostilities have been employing methods and tactics of warfare which have increased the risk of civilian casualties or directly targeting

civilians. The available material discloses reports of indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians and civilian objects (see, by way of comparison, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 241-50, 28 June 2011).

62. The Government may be understood to be maintaining that the applicant would be safe and would not be exposed to a risk of ill-treatment upon arriving in Damascus, then in transit and upon arriving in his hometown or settling in another part of Syria (see paragraphs 18 and 21 above). The Court reiterates in this connection that Article 3 of the Convention does not, as such, preclude Contracting States from placing reliance on the existence of the alternative of internal flight 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 (see *Sufi and Elmi*, cited above, §§ 265-66, with further references). In the present case the Court has not been provided with any material which would confirm that the situation in Damascus is sufficiently safe for the applicant, who alleges that he would be drafted into active military service, or that the applicant could travel from Damascus to a safe area in Syria.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ITS ARTICLES 2 AND 3

64. The applicant also argued that he had no effective remedies for the above complaint, in breach of Article 13 of the Convention, which reads as follows:

> "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. The Government

65. The Government argued that in February 2015 the applicant had been convicted on a charge of failure to leave Russia after the expiry of his visa; that was an instantaneous unlawful act committed in 2012. At that time, Article 18.8 § 1.1 of the CAO provided for a penalty of a fine, administrative removal being an additional penalty left to the discretion of the court. In the circumstances of the case, the courts had considered that this second penalty was justified and had provided reasons for their finding. The CAO did not preclude the examination of the complaints pertaining to a

risk of torture or ill-treatment on account of an eventual removal measure. The courts could carry out such an examination by way of making a direct reference to the Convention or the Court's case-law.

66. The Government argued that the temporary asylum procedure was an effective remedy against forced return to Syria, as confirmed by the statistical data. In 2013 and 2014 some 1,073 and 413 Syrian nationals respectively sought refugee status in Russia; no such application was granted. However, in the same years some 1,776 and 1,262 Syrians sought temporary asylum; 1,191 and 1,281 applications were granted.

67. Moreover, the non-judicial procedure for temporary asylum (examination of an application first by the local migration authority and then by the Federal Migration Authority) and the judicial review of an eventual decision by the courts at two levels of jurisdiction both have suspensive effect. This conclusion followed from sections 10, 12 and 13 of the Refugees Act. In the present case, the final court decision requiring the applicant's administrative removal had not been enforced precisely because the proceedings concerning temporary asylum had been pending.

2. *The applicant*

68. The applicant argued that he had raised the arguments relating to Articles 2 and 3 of the Convention before the national authorities, namely in the temporary asylum procedure (see paragraphs 15 and 22 above). He argued that there was no statutory provision specifically requiring that a pending application for temporary asylum should have automatic suspensive effect *vis-à-vis* a removal order. The applicant disagreed with the Government, arguing that section 10 of the Refugees Act only concerned a ban on removing a foreigner pending an application for refugee status. The bailiff service in charge of enforcing the removal order had not issued a decision suspending such enforcement, for instance on account of the pending application for temporary asylum. Moreover, the applicant had had difficulties in communicating with his lawyer, which had adversely affected the accessibility of the temporary asylum procedure.

B. The Court's assessment

1. *General principles*

69. 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 Article 13 and Article 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

70. The Court has reiterated on numerous occasions that Article 13 of the Convention guarantees the availability at national level of a remedy to

enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII). However, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudła*, cited above, § 157).

71. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective (see *Klass and Others v. Germany*, 6 September 1978, § 67, Series A no. 28). When the "authority" concerned is not a judicial authority, the Court makes a point of verifying its independence (see, for example, *Leander v. Sweden*, 26 March 1987, §§ 77 and 81-83, Series A no. 116, and *Khan v. the United Kingdom*, no. 35394/97, §§ 44-47, ECHR 2000-V) and the procedural guarantees it offers applicants (see, *mutatis mutandis*, *Chahal*, cited above, §§ 152-54).

72. Judicial review proceedings constitute, in principle, an effective remedy within the meaning of Article 13 of the Convention in relation to complaints arising in the context of expulsion and extradition, provided that the courts can effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate (see *Tershiyev v. Azerbaijan*, no. 10226/13, § 71, 31 July 2014).

73. Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Rotaru v. Romania* [GC], no. 28341/95, § 69, ECHR 2000-V).

74. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. Where a complaint concerns allegations that the person's expulsion would expose him or her to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment were to materialise, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III). Any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 also requires independent and rigorous scrutiny (see *Jabari*, cited above, § 50), and reasonable promptness (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136,

ECHR 2004-IV; and *De Souza Ribeiro v. France* [GC], no. 22689/07, § 81, ECHR 2012).

75. In this type of cases, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 66, ECHR 2007-II, and *Hirsi Jamaa and Others* [GC], cited above, § 200). The requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. This is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention. Therefore, the Court has previously rejected arguments referring to administrative or other "practice" as sufficient grounds for a suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I; *Gebremedhin [Gaberamadhien]*, cited above, § 66; and *M.A. v. Cyprus*, no. 41872/10, § 137, ECHR 2013 (extracts)). It has further pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis (see *Čonka*, cited above, § 82).

76. Article 13 of the Convention does not compel Contracting States to set up a second level of appeal in this type of cases, it being sufficient that there is at least one domestic remedy which fully satisfies the requirements of this Article, namely that it provides for independent and rigorous scrutiny for a complaint relating to Article 3 of the Convention and has automatic suspensive effect in respect of the impugned measure (see *A.M. v. the Netherlands*, no. 29094/09, §§ 62 and 70, 5 July 2016).

77. The same principles apply when expulsion exposes an applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention (see *L.M. and Others v. Russia*, cited above, § 108).

2. *Application of the principles in the present case*

78. The applicant's complaint under Articles 2 and 3 of the Convention has been declared admissible. The Court considers that he had an "arguable" complaint in that regard for the purposes of Article 13 of the Convention.

79. The Government submitted that, in CAO cases the courts were not precluded from examining the risks of violation of Articles 2 and 3 of the Convention, and that in the applicant's case the court had imposed the penalty of administrative removal with due regard to all the relevant considerations. The Government also alleged that the temporary asylum procedure was an effective remedy against forced return to Syria (see paragraph 66 above), and that it had suspensive effect *vis-à-vis* the penalty of administrative removal, even where that penalty had already become final. Lastly, the Government mentioned that an application for refugee status was also an effective remedy in immigration cases.

(a) Proceedings under the CAO

(i) Automatic suspensive effect of an appeal

80. The Court first notes that the impugned interference arises from the trial judgment imposing the penalty of administrative removal. The Court observes that an ordinary appeal against a penalty of removal imposed by a first-instance court had an automatic suspensive effect under Article 31.2 of the CAO (see paragraph 26 above), in the sense that by operation of the law (and without leaving any discretion to a non-judicial or judicial authority) the removal was not to be carried out until the statutory time-limit for appeal had expired or until the appeal decision in the CAO case had been delivered. There is nothing to suggest that this provision was not sufficiently clear and precise or that it was not properly interpreted and applied in the majority of cases (see, however, *Muminov v. Russia*, no. 42502/06, § 102, 11 December 2008, where the removal had been unlawfully carried out before the appeal decision). The applicant was therefore protected from removal by virtue of Article 31.2 of the CAO until 4 March 2015, when the Supreme Court of the Dagestan Republic upheld the penalty of administrative removal.

81. While reiterating that Article 13 of the Convention does not compel Contracting States to set up a further level of appeal in this type of cases, the Court notes that the CAO provides for review of final judgments before a regional court and then before the Supreme Court of Russia under Article 30.12 of the CAO (see paragraph 27 above). However, it appears that only a prosecutor can request a suspension under Article 31.6 of the CAO (see paragraph 28 above) and that such suspension is not "automatic". Consequently, the review procedure before a regional court and the Supreme Court of Russia is not an "effective remedy" for the purpose of Article 13 of the Convention in the context of a complaint arising under Articles 2 and 3 of the Convention.

(ii) Independent and thorough scrutiny in the CAO case

82. First of all, the Court notes that the respondent Government have not cited a CAO provision or any other statutory provision which would require examination of the risks relating to Articles 2 and 3 of the Convention in cases entailing the penalty of administrative removal. However, having examined the material submitted by the respondent Government (in particular, the interpretation given to the CAO by the Supreme Court of Russia in a case decided in 2013, see paragraph 30 above), the Court does not exclude that theoretically there might be room in certain CAO proceedings for the examination of the risks pertaining to Articles 2 and 3 of the Convention (see, in the same vein, *L.M. and Others v. Russia*, cited above, § 115). Nevertheless, the Court is not convinced that any meaningful examination of the risks could be done in the present case as explained below.

83. “Independent and thorough scrutiny” also implies that the remedy is capable of offering protection against removal where such scrutiny discloses substantial grounds to believe that there is a real risk of ill-treatment that the defendant would run in the case of the penalty of removal being imposed and enforced. The state of domestic law and judicial practice is not straightforward as regards the granting of adequate relief by way of refusing or revoking an order for administrative removal in immigration-related cases, where, as in the present case, a foreigner has been sentenced to the mandatory penalty of removal but runs a risk of death or ill-treatment in the country of his nationality.

84. The Court notes in this connection that in 2013 the CAO was amended to make administrative removal a mandatory penalty for certain offences, including under its Article 18.8 § 1.1. The Government submitted that the applicant had been prosecuted for an offence that he had committed in 2012. It is true that the first-instance court stated that the penalty of administrative removal was optional. However, the appeal court corrected that view, finding that the penalty for the offence of which the applicant had been convicted was a fine with administrative removal (see paragraph 12 above). As clearly stated by the appeal court in the applicant’s CAO case (see paragraph 12 above), the applicant was convicted under Article 18.8 § 1.1 of the CAO that was introduced into the CAO in 2013 and provided for two mandatory penalties: a fine *and* administrative removal. So, the Court is not convinced that the courts had an opportunity to take into account arguments relating to Articles 2 and 3 of the Convention when imposing the sentence and thus to afford redress. In other words, the Court has no reason to consider on the basis of the material made available to it in the present case that it was open to the court to dispense with the penalty of removal on the strength of arguments relating to Article 2 or 3 of the Convention. Therefore, at the time, as the applicant was found guilty of the offence, the court had no choice but to impose that penalty, irrespective of the validity of the arguments relating to Article 2 or 3 of the Convention (see, by way of comparison, *Gablishvili v. Russia*, no. 39428/12, §§ 49-53 and §§ 56-57, 26 June 2014, and *Alim v. Russia*, no. 39417/07, § 95, 27 September 2011, which dealt with complaints under Article 8 of the Convention).

(b) Refugee status procedure

85. As to the refugee status procedure, the Court notes that it follows from the available information (see paragraphs 45 and 66 above) that in 2013-15 the migration authorities dismissed almost all Syrian nationals’ applications for refugee status. The respondent Government have not elaborated on whether, following the imposition of administrative removal, an application for asylum (refugee status) constituted an effective remedy within the meaning of Article 13 of the Convention. Thus, the Court will not consider it as such in the present case.

(c) Temporary asylum procedure

86. As regards the temporary asylum procedure, the Government argued that it was an effective remedy against forced return to Syria, and that it had automatic suspensive effect *vis-à-vis* the penalty of administrative removal, even where that penalty had already become final.

(i) Suspensive effect of the temporary asylum procedure vis-à-vis the penalty of administrative removal

87. The Court reiterates that, given the fundamental importance of the rights that are at stake in this type of case and given the irreversible nature of the harm that might occur, it is indispensable that for a domestic remedy to be effective in terms of Article 13 of the Convention, national law should provide that a domestic remedy *vis-a-vis* the impugned measure or decision should have "automatic suspensive effect" (see the cases cited in paragraph 75 above).

88. Section 12 of the Refugees Act states that the person who has been granted temporary asylum cannot be returned against his will to the country of his nationality or previous habitual residence (see paragraph 35 above).

89. As regards availability of suspensive effect before a decision on an application for temporary asylum is taken, the Court is not convinced by the Government's submission in the present case that sections 10, 12 and 13 of the Refugees Act, whether read separately or together, required that a pending application for temporary asylum had an "automatic suspensive effect" *vis-à-vis* the impugned measure, namely the final order for administrative removal in the present case. Section 10 of the Act exclusively concerns the refugee status procedure and does not refer to the temporary asylum procedure (see paragraph 34 above). Section 12 of the Act concerns specifically the latter, but only applies where the person has already been granted temporary asylum. Unlike section 10 § 1, section 12 does not state or even imply that no removal is permissible while an application is pending before the migration authority. Lastly, it is noted that section 13 describes the circumstances in which removal is effected following an unfavorable outcome of the application for refugee status (see paragraph 34 above).

90. The Government did not cite any other provision of Russian law which would unequivocally and automatically prevent enforcement of the final penalty of administrative removal on account of the applicant's pending application for temporary asylum. The CAO, which was the legal basis for issuing the impugned penalty of administrative removal, contained no provision requiring suspension of its enforcement on account of a pending application for temporary asylum. The Government submitted no document which would confirm their argument that the enforcement proceedings in respect of the penalty of administrative removal had been suspended on account of the temporary asylum application lodged in May 2015. For instance, there is no indication that any relevant assessment was

made and any relevant decision was taken by the bailiff office or another competent authority.

91. Concerning judicial review of a decision taken on the application for temporary asylum, the same considerations apply as regards the Refugees Act. The Court also notes that judicial review in this situation has been regulated since September 2015 by the Code of Administrative Procedure (“the CAP”). The Government have not suggested, and the Court does not find, that the CAP (see paragraphs 40-41 above) provides for an “automatic suspensive effect”, in particular where, as in the present case, a penalty of administrative removal has already become final.

92. The respondent Government have adduced no proof to confirm the existence of any clear, consistent and well-known administrative or judicial practice requiring the automatic suspension of any final removal measure pending the final resolution of proceedings concerning temporary asylum.

93. Therefore, having carefully examined the pertinent provisions of the domestic law, the Court is not satisfied that a pending application for temporary asylum or pending judicial review of a refusal of temporary asylum had “automatic suspensive effect” in respect of the removal, ordered under the Code of Administrative Offences.

94. The Court concludes that, while a successful application for temporary asylum would be capable of suspending enforcement of a penalty of administrative removal, in the present case the applicant was refused temporary asylum and thus did not obtain suspensive effect in respect of the final penalty of administrative removal.

(ii) Independent and thorough scrutiny

95. The Court first observes that the applicant made no arguments relating to any formal obstacles adversely affecting the accessibility of the temporary asylum procedure (see, by way of comparison, in the context of Article 3 of the Convention, *L.M. and Others v. Russia*, cited above, § 105).

96. Second, as regards the pertinence of this remedy for an Article 2 or 3 issue, it is noted that the Refugees Act and Government decree no. 274 do not contain precise criteria for granting temporary asylum to foreign nationals in Russia where the grounds listed in section 1 of the Refugees Act, such as persecution on grounds of race, religion, citizenship, membership of a social group or political views (see paragraph 32 above), are not directly pertinent, as in the present case. The Court has taken note of the position expressed by the Constitutional Court (see paragraph 38 above) and has not been given sufficient reason to rule out that the temporary asylum procedure was, in theory, capable of a thorough assessment of the risks arising under Articles 2 and 3 of the Convention. In fact, the Court has taken note of the typical situations for granting temporary asylum as listed by the District Court in its judgment of 9 December 2015 in the applicant’s case, albeit without reference to any relevant international or domestic material (see paragraph 21 above). It is conceivable that the risk arising in

relation to the context of ongoing grave hostilities in a foreigner's home country could fall within the scope of one of the situations listed. The Court also notes that the granting of temporary asylum prevents a foreigner's removal from Russia, albeit for a limited period of time.

97. Therefore, the Court does not rule out that this form of temporary protection could be an "effective" solution in the applicant's situation, given that his grievance under Articles 2 and 3 of the Convention was based on the facts arising from the ongoing and particularly grave situation of hostilities in his home country (see, by way of comparison, *Khamrakulov v. Russia*, no. 68894/13, §§ 46-61, 16 April 2015; *Nabid Abdullayev v. Russia*, no. 8474/14, §§ 44 and 49, 15 October 2015, and *Turgunov v. Russia*, no. 15590/14, §§ 33 and 36, 22 October 2015).

98. However, the national authorities considered in the present case, without specifying why and unlike in other similar situations in 2015 (see paragraph 45 above), that the situation of ongoing hostilities in Syria did not justify temporary asylum. The Court also observes that the applicant's application for temporary asylum was dismissed with reference to a number of factors (failure to leave Russia in 2012; failure to apply for asylum at the time; continued unlawful stay and unlawful employment in Russia; and prosecution for administrative offences; see paragraph 18 above) which were unrelated to the Article 3 issues. Therefore, the domestic assessment was based on considerations that fell outside the scope of thorough scrutiny required under Article 3 of the Convention in this type of cases.

3. *Conclusion*

99. In the light of the above considerations as to both the administrative proceedings and the temporary asylum proceedings, the Court concludes that there has been a violation of Article 13 of the Convention in conjunction with its Articles 2 and 3.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

100. The applicant complained in October 2015 that his continuing prolonged detention was arbitrary and unnecessary in view of the fact that his removal to Syria was and remained impracticable. He also complained that there was no procedure for review of his continued detention. Article 5 of the Convention reads 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.

...

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

101. The Government argued that following the appeal decision in the administrative offence case, enforcement proceedings had been promptly instituted. However, those proceedings could not be pursued in view of the pending application for temporary asylum and the Court’s indication under Rule 39 of the Rules of Court. Thus, it could not be said that the domestic authorities had failed to display special diligence, adversely affecting the justification for the applicant’s continued detention. The Government also argued that it was open to the applicant to lodge an application for review proceedings under Article 30.12 of the CAO and seek annulment of the removal penalty on account of new circumstances making his removal impossible or his detention no longer necessary.

102. The applicant argued that the domestic regulation of detention with a view to enforcing the penalty of administrative removal was defective in terms of Article 5 of the Convention, as established by the Court in *Kim v. Russia* (no. 44260/13, judgment of 17 July 2014).

B. The Court’s assessment

1. Admissibility

103. The Court notes that the complaints under Article 5 §§ 1 and 4 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) Article 5 § 4 of the Convention

104. The Court observes at the outset that the applicant had a possibility to appeal against the detention as part of the judgment of 26 February 2015 when he lodged an appeal against the merits of this judgment. However, this would have related to his detention until 4 March 2015 when the appeal was examined. The Court notes in this connection that a judicial review of the kind required under Article 5 § 4 cannot be said to be incorporated in the initial detention order of 26 February 2015. The thrust of the applicant’s complaint under Article 5 § 4 was not directed against the initial decision on his placement in custody but rather against his inability to obtain a judicial review of his detention after a certain lapse of time.

105. It appears that under the CAO a judgment is enforceable within a two-year period after it becomes final and, by possible implication, it appears that detention of a foreigner may be allowable up to two years too. By virtue of Article 5 § 4 the applicant was entitled to apply to a "court" having jurisdiction to decide "speedily" whether or not his deprivation of liberty had become "unlawful" in the light of new factors which emerged subsequently to the decision on his initial placement in custody (see *Kim*, cited above, § 42).

106. Neither the CAO nor any other applicable legislation provided for a procedure enabling the applicant to "take proceedings" for the review of his detention and to obtain release (see *Kim*, cited above, § 43, and, by contrast, *J.N. v. the United Kingdom*, no. 37289/12, § 97, 19 May 2016). It is also noted that the CAO did not provide for a procedure whereby detention would be automatically reviewed after a certain period.

107. It appears that the procedure under Article 30.12 of the CAO for further review of the trial and appeal decisions in the administrative offence case was available to the applicant at any time, and was not subject to any time-limit. However, it only indirectly concerned the detention matter in so far as review of the administrative charge could lead to the annulment of the penalty of removal, thus removing the grounds for keeping the applicant in detention with a view to enforcing his removal. Furthermore, there is nothing to suggest that the reviewing court would be competent to deal with the "new circumstances" referred to by the Government, as that would go beyond the scope of the final decisions taken by the trial and appeal courts.

108. The Court reiterates that, since its *Azimov* judgment, which concerned a similar complaint (see *Azimov v. Russia*, no. 67474/11, § 153, 18 April 2013), it has found a violation of Article 5 § 4 in a number of cases against Russia on account of the absence of any domestic legal provision which could have allowed an applicant to bring proceedings for judicial review of his or her detention pending expulsion (see *L.M. and Others v. Russia*, § 141, and *Kim*, §§ 39-43, both cited above; *Rakhimov v. Russia*, no. 50552/13, §§ 148-50, 10 July 2014; and *Akram Karimov v. Russia*, no. 62892/12, §§ 199-204, 28 May 2014). In the *Kim* case, the Government acknowledged a violation of Article 5 § 4 and, having regard to the recurrent nature of the violation, the Court directed that the Russian authorities should "secure in [their] domestic legal order a mechanism which allows individuals to institute proceedings for the examination of the lawfulness of their detention pending removal in the light of the developments in the removal proceedings" (cited above, § 71).

109. Accordingly, the applicant in the present case did not have at his disposal a procedure for judicial review of the lawfulness of his detention. Therefore, the Court finds that there has been a violation of Article 5 § 4 of the Convention.

(b) Article 5 § 1 of the Convention

110. It is not disputed that the applicant's placement in a centre for foreigners in February 2015 amounted to "deprivation of liberty" and that the arrest and detention fell within the ambit of subparagraph (f) of Article 5 § 1 of the Convention.

111. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only for as long as removal proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009). The Court also reiterates that deprivation of liberty under Article 5 § 1 (f) of the Convention must conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law, so that deprivation of liberty may be lawful in terms of domestic law but still arbitrary, and therefore contrary to the Convention. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the grounds of detention relied on by the Government, the place and conditions of detention must be appropriate, and the length of the detention must not exceed that reasonably required for the purpose pursued (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 74, ECHR 2008; and *Rustamov v. Russia*, no. 11209/10, § 150, 3 July 2012, with further references).

112. The applicant raises no particular issue relating to the period from the applicant's arrest and detention until the trial judgment. The Court observes that the penalty of administrative removal became final and enforceable after the appeal decision in the case, that is on 4 March 2015.

113. The Court observes that no proceedings which could have had a bearing on the penalty of administrative removal were pending or "in progress" between 4 March and 5 May 2015.

114. On the latter date the applicant sought temporary asylum. The temporary asylum proceedings were still pending on 26 October 2015 when the Court made an indication under Rule 39 of the Rules of Court preventing enforcement of the penalty of removal. While the Court has identified certain deficiencies of the temporary asylum procedure (see, in particular, paragraphs 89-94 above) in the context of Article 13 of the Convention in conjunction with its Articles 2 and 3, it may be argued in the context of Article 5 § 1 of the Convention that a successful application for temporary asylum could have bearing on the removal measure by way of impeding its enforcement for the duration of the temporary asylum.

115. Nevertheless, in the Court's view, it should have been sufficiently evident for the national authorities already in February and March 2015 that the applicant's removal was not practicable and would remain unlikely in

view of the worsening conflict in Syria (see, in the same vein the Court's findings in September 2015 in *L.M. and Others v. Russia*, cited above, § 148). In these circumstances, it was incumbent on the domestic authorities to consider alternative measures that could be taken in respect of the applicant (see *Azimov*, cited above, § 173). However, once the order for the applicant's placement in a special detention facility for foreigners had been issued on 26 February 2015, the detention matter was not – and, as established above under Article 5 § 4 of the Convention, could not be – reassessed, in particular as to whether it would be practicable to ensure his removal to Syria (see also the Court's findings in paragraph 62 above).

116. The Court previously found violations of Article 5 § 1 of the Convention on account of the same statutory framework for detention of foreigners with a view to administrative removal (see *Azimov*, §§ 160-174; *Kim*, §§ 46-57; and *L.M. and Others v. Russia*, §§ 147-52, all cited above; *R. v. Russia*, no. 11916/15, §§ 103-107, 26 January 2016; compare *Chkhikvishvili v. Russia*, no. 43348/13, §§ 30-32, 25 October 2016). The Court finds no sufficient reason to reach a different conclusion in the present case.

117. There has therefore been a violation of Article 5 § 1 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLES 8 AND 13 OF THE CONVENTION

118. The applicant also complained that enforcement of the removal order would constitute a disproportionate interference with his family life, in breach of Article 8 of the Convention. He also referred in this connection to Article 13 of the Convention.

119. Having regard to the finding the applicant's removal would violate Articles 2 and 3 of the Convention (see paragraph 63 above), the Court considers that it is not necessary to examine whether, in this case, the complaints under Articles 8 and 13 of the Convention are admissible and whether there have also been violations of those provisions (see, for the approach, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

V. RULE 39 OF THE RULES OF COURT

120. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

121. The Court considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 3 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. 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

123. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage on account of his complaints under Articles 2, 3, 5 and 13 of the Convention.

124. The Government contested this monetary claim, arguing that it was limited to the issues arising under Articles 2 and 3 of the Convention and that no compensation was normally awarded on account of a potential violation.

125. The Court considers that the finding of a violation under Article 13 of the Convention and the finding of a potential violation under Articles 2 and 3 of the Convention constitute just satisfaction on account of non-pecuniary damage. As to the findings under Article 5 of the Convention, the Court notes that the applicant did link his monetary claim to his grievances relating to the deprivation of his liberty. The Court thus awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

126. The applicant also claimed EUR 4,100 and EUR 287 for the expenses incurred before the Court on account of Ms Biryukova's fees and postal and sundry expenses respectively.

127. The Government argued that the claim should be dismissed because there was no contract between the lawyer and the applicant or at least a document setting out the lawyer's hourly rate; in any event, the lawyer's fees were excessive in view of the simplicity of the case.

128. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court awards EUR 1,500 under all heads.

C. Default interest

129. 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.

VII. ARTICLE 46 OF THE CONVENTION

130. In his observations the applicant referred to the Court's findings in the *Kim* judgment (cited above, §§ 70-72) concerning general measures in relation to detention with a view to enforcement of the penalty of administrative removal under Russian law. The applicant submitted that no such measures had been put in place after the judgment in *Kim* had become final in October 2014 and that his continued detention was subject to regulation within the same defective legislative framework.

131. The Court finds it appropriate to examine whether in the present case it is necessary to make any findings under Article 46 of the Convention, which reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

132. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects.

133. In principle, it is not for the Court to determine possible appropriate measures of redress for a respondent State to carry out in accordance with its obligations under Article 46 of the Convention. With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, 17 January 2012; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 148, ECHR 2009; and

Broniowski v. Poland [GC], no. 31443/96, § 194, ECHR 2004-V). The Court's concern is to facilitate the rapid and effective suppression of a malfunction in the national system of human-rights protection. In that connection, it considers that general measures at the national level are undoubtedly called for in the execution of the present judgment (see *Driza v. Albania*, no. 33771/02, § 125, ECHR 2007-V (extracts)).

134. In the present case the Court has concluded that the applicant's removal on the basis of the judgment of 26 February 2015, which forms the basis of his initial placement in the detention centre for foreigners, would be in breach Articles 2 and 3 of the Convention. The Court has also concluded that the applicant's continued detention there since March 2015 does not comply with Article 5 § 1 of the Convention. In addition, as the Court has already found, this detention has not been accompanied by the requisite procedural guarantees. General measures are expected from the respondent State in order to correct this situation (see *Kim*, cited above, § 71).

135. In view of the above considerations, the Court finds that it is necessary to indicate individual measures for the execution of this judgment (see *L.M. and Others v. Russia*, cited above, §§ 168-69, and *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13, 74569/13 and 7157/14, §§ 65-66, 3 November 2015). Having regard to the particular circumstances of the case and to the urgent need to put an end to the violation of the Convention it has found under Article 5 of the Convention the Court considers that the respondent State should ensure, by appropriate means, that the applicant is no longer exposed to this violation. In the Court's view, the appropriate way to deal with the matter would be to release the applicant without delay and no later than on the day following notification that the present judgment has become final.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Articles 2 and 3, Article 5 §§ 1 and 4 and Article 13 of the Convention admissible;

2. *Holds* that removal of the applicant from Russia to Syria on the basis of the judgment of 26 February 2015 would give rise to violations of Articles 2 and 3 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with its Articles 2 and 3;

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

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

6. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 8 of the Convention alone or in conjunction with its Article 13;

7. *Holds*
(a) that the respondent State 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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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;

9. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to remove the applicant from Russia until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 14 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President