CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 1383/04
by Iryna and Ivan OVDIENKO
against Finland

The European Court of Human Rights (Fourth Section), sitting on 31 May 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 13 January 2004,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mrs Iryna Ovdienko and Mr Ivan Ovdienko, are Ukrainian nationals who were born in 1958 and 1987 respectively and live in Finland, apparently in Kotka. They were represented before the Court by Ms Sari Sirva, a lawyer for the Refugee Advice Centre in Helsinki. The respondent Government were represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties and as they appear from the documents, may be summarised as follows.

The first applicant is of Russian origin. She owned a private plastic surgery clinic with her husband in Ukraine. She alleges that in 1999 they were harassed by the authorities and subsequently were forced to close down the clinic. She claims that she was assaulted in January 1999 and her son was assaulted in November 1999 and kidnapped and raped in December 2000. She seems to imply that the authorities were involved, alleging that she was called during the night of the kidnapping and urged to hand over the documents of the clinic in return for the second applicant's liberty. She claims to have made complaints to the militia, the prosecutor's office, the Parliament and the Party, trying to get protection from Ukrainian authorities. On 18 November 2000 the General Prosecutor's office discontinued the investigation of the criminal case concerning the second applicant. Allegedly the applicants were advised to leave Ukraine and told that they could not be helped.

According to the applicants, the Supreme Council of Ukraine had, after several persistent pleas and complaints of the applicants' family, heard the General Prosecutor's Office on the rape complaint of the second applicant on 10 January 2001. The applicants, discouraged by the response of the Ukrainian authorities decided to flee from Ukraine while the first applicant's husband remained in Ukraine to pursue the investigation of the above mentioned alleged crimes. The first applicant alleges that some time afterwards the house of her husband's parents was burned down, killing both parents and that the husband was murdered at the end of 2001, allegedly by the mafia. She claims to have received phone calls (in Norway and Finland) in which she was informed that they would soon be expelled to Ukraine and that somebody would be waiting for them when they arrived.

On 14 June 2001 the applicants arrived in Finland on a four-day tourist visa in a group of ten Ukrainian citizens, all of whom subsequently applied for asylum in Finland. On 16 June 2001 they sought asylum, claiming harassment and assaults in Ukraine. Allegedly the voyage to Finland had cost them approximately USD 1,000.

On 13 July 2001 the Directorate of Immigration (*ulkomaalaisvirasto, utlänningsverket*) rejected their application for asylum and residence permits. They moved to Norway but they were returned to Finland, in accordance with the Dublin Convention (the Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities) on 16 May 2002, at which point they re-applied for asylum.

On 9 September 2002, the Directorate of Immigration rejected the application for asylum and a residence permit for the second time. The Directorate found, *inter alia*, that the applicants had not shown that they had exhausted domestic remedies available in Ukraine. Furthermore, their failure to mention the second applicant's kidnapping on their first asylum application rendered their claims partly unreliable. Nor did it find evidence that the events had occurred because of the applicants' Russian origin, as was claimed, or any well-founded fear of persecution or inhuman or degrading treatment, or need of protection or any other grounds to grant them residence permits.

On 21 October 2002 the applicants appealed to the Administrative Court of Helsinki (*hallinto-oikeus, förvaltningsdomstolen*).

On 23 October 2002 the second applicant paid a visit to mental health care professionals. A medical certificate, dated of 15 January 2003, was submitted to the Administrative Court of Helsinki on 7 May 2003.

On 8 August 2003 the Administrative Court rejected the appeal. It held, *inter alia*, that there was no evidence of any neglect by the Ukrainian authorities to give the applicants access to domestic remedies and that the state of health of the second applicant could not be considered sufficient reason to prevent his return to Ukraine. It also found that the applicants had not had any difficulties leaving Ukraine using their own passports, that they were not politically active, that they had not been arrested or convicted and that there was no warrant for their arrest.

According to a medical certificate of 1 September 2003, the second applicant was diagnosed with post-traumatic stress syndrome and psychotic depression and he was considered a severe suicide risk.

On 4 September 2003 the applicants applied for leave to appeal and the suspension of enforcement to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*), which refused leave to appeal on 28 October 2003.

The second applicant was treated for severe depression in a closed youth psychiatric ward. He was admitted into compulsory health care on 14 November 2003. According to a medical certificate dated 9 December 2003 he required long-term treatment, namely psychotherapy 2-3 times per week for several years in a stable and safe environment.

The applicants renewed their application for asylum and residence permits on 15 December 2003. On 30 January 2004 the second applicant's

compulsory health care ended. On 18 February 2004 their third application for asylum and residence permits was rejected by the Directorate of Immigration on the grounds that the applicants had not submitted new evidence. It is not known whether they appealed.

In a medical certificate of 1 March 2004 it was stated that the second applicant's mental health had improved during the compulsory care. His condition was found to have worsened during a check on 24 February 2004, but was however better than before he entered compulsory care. According to this report the second applicant was still severely depressed and the underlying trauma was still deemed to need therapy for 2-3 years in a safe environment with the same therapist.

On 17 March 2004, the second applicant was again referred by a medical doctor to a mental hospital for observation. On 19 March 2004, he was admitted into compulsory mental health care as a severe suicide risk. The decision was valid until 19 June 2004 provided that the second applicant's health so required. According to a medical statement dated 25 March 2004 the second applicant had convinced himself that he would not go back to Ukraine alive. His health deteriorated quickly after the end of his previous hospitalisation and his depression was now seen as psychotic. The second applicant's treatment was regarded as in its early stages and the responsible medical doctor emphasised that during and after hospitalisation the second applicant would be in need of constant psychotherapy for several years. On 18 June 2004 the decision on the second applicant's compulsory mental health care was renewed, apparently, until 18 December 2004.

B. Relevant domestic law and practice

Section 1, subsection 1 of the Aliens Act (*ulkomaalaislaki, utlänningslagen*; 378/1991, "the Act") provides that the Act, any provisions and stipulations enacted by virtue of it, and international agreements by which Finland is bound shall be applied to aliens' entry into and departure from Finland and to their residence and employment in the Country.

Section 1, subsection 4 (179/1998) of the Act provides that the application of the Act may not restrict aliens' rights any more than necessary.

Section 1 c (537/1999) of the Act provides that in any decisions issued under this Act that concern a child under eighteen years of age, special attention shall be paid to the best interest of the child and to circumstances related to the child's development and health.

Section 30, subsection 1 (537/1999) of the Act provides that an alien shall be granted asylum and issued a residence permit if, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, he/she resides

outside his/her country of origin or habitual residence and if, owing to such fear, he/she is unwilling to avail himself/herself of the protection of the said country.

If an alien is not granted asylum but it is not considered safe for him/her to return to his/her country of origin, a residence permit may be issued under Section 31 of the Aliens Act, which provides that an alien residing in Finland may be issued a residence permit on the basis of his/her need of protection if he/she, in his/her home country or country of habitual residence, is threatened by capital punishment, torture or other inhuman or degrading treatment or if he/she cannot return there because of an armed conflict or environmental catastrophe.

According to the Governmental Bill (50/1998) amending the 1991 Act, this reflects international human rights instruments, especially Article 3 of the Convention.

Furthermore, section 20, subsection 1, point 3 of the Act provides that an alien who enters Finland without a residence permit may be issued a fixed-term residence permit in Finland if [...] refusing a residence permit would be clearly unreasonable. Issuing a residence permit under this point is exceptional and it is, according to an established practice, only possible when for example the applicant is in immediate need of medical treatment and cannot travel due to his/her weakened health, or the necessary treatment cannot be issued in the receiving country.

Section 33 (154/1995) of the Act provides that the asylum application is decided by the Directorate of Immigration.

Section 37, subsection 1, point 1 of the Act provide for the grounds for refusal of entry. An alien may be refused entry if he/she does not meet the preconditions for entry laid down in section 8. In accordance with subsection 2, an alien whose continued residence in Finland would require a residence permit, but to whom it has not been issued, may also be refused entry.

Section 38 (537/1999) of the Act includes the procedure for refusal of entry. An alien shall be refused entry as soon as it has been possible to ascertain that his/her entry into or residence in Finland cannot be permitted. All relevant matters and circumstances are required to be taken into account in their entirety when considering the refusal of entry. These include at least the duration of his/her stay in Finland, the relationship between a child and a parent, family ties and other ties to Finland. According to subsection 2, no one may be returned to an area where he/she may be subjected to the treatment referred to in section 30 or 31 or to an area from which he/she could be further sent to such an area.

Section 57, subsection 2 (130/2002) of the Act provides that an alien has a right to appeal to the Administrative Court of Helsinki against the decisions concerning asylum, residence permits and a refusal of entry made by the Directorate of Immigration. Subsection 4 (537/1999) provides that a

decision of the Administrative Court can be appealed against only if the Supreme Administrative Court grants leave to appeal. Leave may be granted only if it is important to have the issue decided by the Supreme Administrative Court for the application of the law in other similar cases or for reasons of uniform judicial practice or if there are other weighty grounds for granting leave to appeal.

According to section 62, subsection 3 (648/2000) of the Act, a decision made by virtue of section 38 can be executed immediately after the negative decision of the Administrative Court has been issued unless the Supreme Administrative Court rules otherwise.

According to section 32 of the Administrative Judicial Procedure Act (*hallintolainkäyttölaki, förvaltningsprocesslagen; 586/1996*), the appellate authority may prohibit the execution of the decision, order a stay or issue another order relating to the execution of the decision when an appeal has been lodged.

Section 33, subsection 1 of the Act on Specialized Medical Care (*laki erikoissairaanhoidosta, lagen om specialiserad sjukvård; 1062/1989*) provides that the start and end of a patient's medical care period is decided by the chief physician in accordance with the general guidelines issued by the medical director, or by some other physician in the hospital district joint municipal board in accordance with instructions issued by the chief physician.

COMPLAINTS

The applicants complained under Article 3 of the Convention that their removal from Finland to Ukraine would interrupt the necessary psychiatric treatment of the second applicant and affect his mental health to such an extent that the risk of suicide could materialise. The applicants accepted that it was not likely that the police would undertake any removal measures during the second applicant's hospitalisation. They however maintained that the uncertainty of the situation had devastating impact on the second applicant's mental health.

The applicants also referred to their previous problems in their home country and claimed that the Ukrainian authorities could not and would not protect them sufficiently.

THE LAW

The applicants complained that the state of health of the second applicant constituted an impediment to their removal to Ukraine. They relied on Article 3, which reads as follows:

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

1. The Government's submissions

First, the Government submitted that the psychiatric problems of the second applicant had not been mentioned in any of the interviews or documentation until the applicants' letter of 7 May 2003 to the Administrative Court, i.e. after the second asylum application had been rejected by the Directorate of Immigration. The Government noted that although the problems were said to be related to the traumatic events that had happened to the second applicant prior to his arrival in Finland, no symptoms appeared until almost two years after his arrival in Finland. In fact, the applicants mentioned the kidnapping and raping of the second applicant as a reason for their application only one year after they had first applied for asylum.

Furthermore, the Government contested the applicants' claim that no, or no sufficient psychiatric treatment was available in Ukraine as they had stated in their appeal of 4 September 2003 to the Supreme Administrative Court (p. 4) that in 2001 in Ukraine, on the recommendation of a psychotherapist, the second applicant had suspended his studies in the music school for six months and after psychotherapeutic treatment had returned to his school and obtained excellent final grades in the seventh grade. In the Government's view this indicated that the second applicant had already suffered from mental health problems in Ukraine and that he had been successfully treated for them there. However, this was neither mentioned in their first nor in their second application for asylum.

In the Government's view the present case was comparable to the case *Bensaid v. the United Kingdom* (no. 44599/98, ECHR 2001-I).

The Government further noted that the fact that the circumstances of the second applicant would be less favourable in Ukraine than those enjoyed by him in Finland was not decisive from the point of view of Article 3 of the Convention.

The Government noted that the applicants had, at different stages of the national proceedings, provided different information on what had taken place in Ukraine before they left. Also the reasons for their application had changed during the proceedings. The applicants had asserted that the uncertainty as to whether they would be allowed to stay in Finland of the

situation had had a devastating impact on the second applicant's mental health. Their prolonged stay, however, appeared to be largely the effect of their failure to provide the authorities with exact information about the past events.

Furthermore, the medical condition of the second applicant was being treated apparently with medication and recurring therapy sessions while in hospital. There was no indication that similar treatment would not be available for him in Ukraine. Neither did the overall condition of the second applicant prevent him from travelling.

The Government noted that according to the procedure followed by the police, removal of the applicant while in hospital was not likely to happen, taking into consideration Section 33 of the Act on Specialized Medical Care. When a patient was to be removed from the hospital and consequently from the country, the individual case was examined by the doctors with knowledge of the patient's health at the time and the possibilities for his treatment in his country of origin.

The Government further noted that, according to the World Health Organisation Project Atlas from the year 2001, there was available mental health care in Ukraine, especially through private or non-governmental organisations. There were also several international organisations providing medical and health care. In addition, the information received from the Finnish embassy in Ukraine and the Ukrainian consul in Helsinki showed that a person could receive psychiatric treatment when needed. According to this information there were out-patient facilities, especially in Kiev, and at the international airport, there was a medical department which could assess the need for transportation to a hospital.

2. The applicants' submissions

The applicants in their application maintained that the second applicant's state of mental health was serious. His forced removal could affect him negatively to such an extent that the risk of suicide might materialize. Subjecting him to circumstances and surroundings that have seriously traumatised him would amount to inhuman and degrading treatment.

The applicants emphasised the age of the second applicant. According to the well established international law, most importantly Article 3 of the United Nations Convention on the Rights of the Child, the best interests of a child must be taken into consideration. His best interests were to have a stable life and continue the psychiatric treatment which he would need in an intensive form several years.

They further maintained that they would face a serious risk of inhuman treatment if returned to Ukraine based on their previous problems in their home country.

The applicants have not made any further observations of substance in response to the observations by the respondent Government.

3. The Court's assessment

The Court observes at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

The Court has examined whether there is a real risk that the applicants' removal would be contrary to the standards of Article 3 in view of the second applicant's present medical condition. In so doing, it has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the second applicant's state of health (see *Bensaid v. the United Kingdom*, cited above, § 35, *Ahmed v. Austria*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2207, § 43, and *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, pp. 792-93, § 50).

In the present case, the second applicant has been diagnosed as suffering from severe depression associated with a risk of suicide. Since October 2002 he has been treated in psychiatric therapy and twice in compulsory health care, from 14 November 2003 to 30 January 2004, from 19 March 2004 until 19 June 2004, and after renewal, apparently until 18 December 2004.

The Court accepts the seriousness of the second applicant's medical condition. However, the Court notes that although the applicants claim that the second applicant has been mentally traumatised by experiences in Ukraine, this allegation has not been substantiated. While it is true that symptoms of post-traumatic stress syndrome may materialise years after events, the Court notes that in the present case the applicants did not refer to the kidnapping and rape, which allegedly traumatised the second applicant, until their second application for asylum. He did not receive any treatment for his mental problems in Finland until October 2002. Nor did the applicants rely on any mental problems in their submissions to the immigration authorities until May 2003, i.e. after they had lodged their appeal to the Administrative Court against a negative decision by the

Directorate of Immigration on their second application for asylum, and almost a year after they applied for asylum for the second time.

According to a medical report of 1 March 2004, the second applicant was recommended weekly care for 2-3 years, and according to the most recent medical report of 25 March 2004, he needed psychiatric treatment in hospital due to his severe psychotic depression and, after hospitalisation, open psychotherapy for years. The applicants have not claimed before the Court that medical treatment as such would not be available in Ukraine. Taking into account the information before it, the Court finds that in any case it has not been shown that the second applicant would not receive adequate care in Ukraine. Thus the Court finds unsubstantiated the applicants' argument that it is in the second applicant's best interest to continue a stable life and psychiatric treatment in Finland.

The Court acknowledges that the removal decision may have caused the second applicant mental stress. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the receiving State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The case does not disclose the exceptional circumstances of *D. v. the United Kingdom* (cited above, § 49), where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts.

The Court finds, therefore, that the implementation of the decision to remove the applicants to Ukraine would not violate Article 3 of the Convention on account of the second applicant's health condition.

Insofar as the applicants assert that they face a risk of inhuman treatment in Ukraine due to their previous problems there, the Court has to establish whether their personal situation is such that their return to Ukraine would contravene Article 3 of the Convention.

The Court notes that the Directorate of Immigration and the Administrative Court found that the applicants faced no real risk of treatment contrary to Article 3 due to their situation in Ukraine. In the present case, the Court, like the Directorate and the Administrative Court, finds it significant that the applicants have offered no reliable evidence in support of their claims. The fact that the Ukrainian prosecuting authorities discontinued the criminal investigation concerning the second applicant's assault does not in itself in any way prove that the applicants would be subject to harassment by the authorities or that the authorities have refused to provide the applicants with adequate protection.

Furthermore, the Court is struck by the fact that the applicants did not make any specific allegation of the kidnapping of the second applicant in December 2000 until their second application, although they must have been aware that such information would be of importance to the

immigration authorities. This calls into question the general credibility of the statements made by the applicants before the Finnish authorities. Nor is there evidence supporting their allegations that they have had problems in the home country due to their Russian origin.

Having regard to the above, the Court finds that it has not been established that there are substantial grounds for believing that the applicants face a real risk of being subjected to treatment contrary to Article 3 of the Convention in Ukraine.

It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President