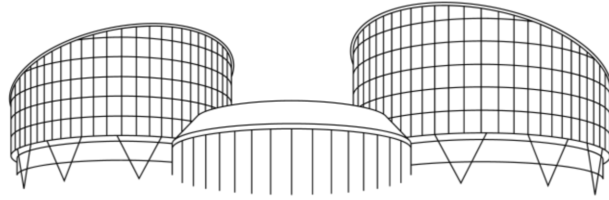

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KAMALIYEVY v. RUSSIA

(Application no. 52812/07)

JUDGMENT
(Merits)

STRASBOURG

3 June 2010

FINAL

03/09/2010

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

In the case of Kamaliyevy v. Russia,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 11 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 52812/07) 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 Mr Abdugani Kamaliyev, a national of Uzbekistan, and his wife Mrs Maymuna Kamaliyeva, a national of Russia ("the applicants"), on 3 December 2007. On 20 August 2008 the second applicant died, and the application is continued on her behalf by the first applicant.

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

3. The applicants alleged, in particular, that the first applicant's expulsion to Uzbekistan would subject him to a risk of ill-treatment, that he would be tried there in flagrant denial of justice, and that his expulsion would violate their right to respect for their family life. They referred to Articles 3, 6 and 8 of the Convention, as well as Article 2 of Protocol No. 2.

4. On 3 December 2007 the President of the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the first applicant to Uzbekistan pending the Court's decision. On 5 December 2007 the first applicant was deported to Uzbekistan.

5. On 20 May 2008 the President of the First Section decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of

the application at the same time as its admissibility. It was also decided at that time that the interim measure should remain in force.

6. The Court decided on 11 May 2010 to lift the interim measure.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant was born in 1958. He is currently serving a prison sentence in Uzbekistan. His representatives have had no contact with him since his expulsion. The second applicant was born in 1958 and lived in the Tyumen Region, Russia. She died in August 2008.

A. The applicants' marriage and the acquisition by the first applicant of a Russian passport

8. According to the first applicant, then named Tursinov, he arrived in Russia from Uzbekistan in 1997. The Government disputed the date of the first applicant's arrival in Russia, pointing to the absence of any documents in connection with it.

9. On 29 November 2000 he obtained Russian internal identity papers (“the passport” in question).

10. On 28 December 2000 the first applicant married the second applicant and took her surname, Kamaliyev. On 16 February 2001 he obtained a new passport, containing his new name.

11. In their submissions of September and December 2008 the Government stated that at the relevant time the first applicant had been in a valid marriage concluded in Uzbekistan in 1979, from which he had four children. They submitted a copy of the certificate of the first applicant's marriage, issued by the Namangan Department of the Ministry of Justice of Uzbekistan in April 2008.

12. On 10 January 2004 a new Russian internal passport was issued to the first applicant, who had reached the age of forty-five.

13. On 10 February 2006 the Federal Migration Service (FMS), following an internal investigation, established that the first applicant's passport had been issued in breach of the lawful procedure and declared it invalid. The FMS found that the first applicant had obtained a Russian identity document without having properly obtained Russian nationality and that his name had not been entered in the relevant registers. The first applicant had never applied for, or received Russian nationality and the identity document in question could not be held as proof to the contrary.

The head of the police unit which had issued the passport had been subjected to disciplinary measures for breaching the relevant legislation.

14. In February 2006 the police, aided by the FMS, seized the applicant's internal passport. It appears that after that the first applicant remained in Russia without obtaining any other residence documents.

15. On 6 March 2006 the Prosecutor's Office of the Central District of Tyumen found that the archives of the passport service which had issued the first applicant's passport in 2000 had been destroyed in January 2005, in line with instructions issued at the time. It concluded that there were no reasons to open a criminal investigation into the actions of the officers of that department.

B. Attempted extradition of the first applicant

16. On 16 March 1999 the deputy prosecutor of the Namangan Region in Uzbekistan issued a decision to charge and detain the first applicant for attempted subversion of the constitutional regime. It appears that some time later an international search warrant was issued.

17. On 31 October 2005 the head of the police department of the Namangan Region in Uzbekistan informed his counterpart in the Tyumen Region that the first applicant was being sought in Uzbekistan for a breach of State security and asked him to locate the applicant. The same letter indicated the first applicant's address in Tyumen and stated that he had unlawfully obtained a Russian passport.

18. On 9 February 2006 the applicant was arrested with a view to extradition and placed in the Tyumen Region temporary detention centre no. IZ-72/1 (*ФГУ ИЗ-72/1*).

19. On 23 March 2006 the deputy Prosecutor General of Uzbekistan requested the applicant's extradition on the ground that he was charged with belonging to an extremist religious organisation, known as “Wahhabi”, incitement of religious hatred and attempted subversion of the constitutional regime. The crimes had been committed in 1990-1993.

20. On 5 May 2006 the Kalininskiy District Court examined a request by the Tyumen Regional Prosecutor to have the applicant placed in detention with a view to his extradition to Uzbekistan, where he was accused of inciting racial, national or religious hatred, attempted subversion of the constitutional regime, and the creation and leadership of extremist organisations of a religious, separatist, fundamentalist nature, or other prohibited organisations, crimes which were defined by Articles 156 § 2 (d), 159 § 3 (b) and 244 § 2 respectively of the Criminal Code of Uzbekistan.

21. The court, having noted that those acts were also punishable under Articles 282 § 2, 280 and 282-1 of the Criminal Code of the Russian Federation and that the applicant was an Uzbek citizen, ordered that the

applicant be placed in detention pending extradition. The court noted that the applicant had unlawfully obtained a Russian passport.

22. On 20 December 2006 the Deputy General Prosecutor refused to extradite the first applicant because the acts with which he had been charged did not constitute a crime under Russian law and because the prescription period for other acts had expired.

23. On 26 December 2006 the Tyumen Regional Prosecutor ordered the applicant's release.

C. Application for refugee status

24. On 1 August 2006 the first applicant requested the Tyumen Regional Department of the FMS to grant him refugee status. In his application he indicated that he had Uzbek nationality, but that in 2000 he had received a Russian passport and had married the second applicant. The first applicant gave the unstable economic and political situation and absence of work as the reasons for his departure from Uzbekistan. He denied that he had ever committed a crime in Uzbekistan.

25. On 11 November 2006 he was questioned by officials of the FMS about the details of his claim. In the questionnaire the first applicant indicated his nationality as Uzbek and submitted details of his national identity papers. He also submitted that he had divorced his first wife in 1996 in Uzbekistan. As regards his Russian passport, the first applicant submitted that a relative of his wife had helped him to obtain the documents. That man, whose name he could not recall, had died in 2002. As to his fear of persecution in Uzbekistan, the first applicant explained that he had learned of the criminal proceedings pending against him there when he was detained in Russia in February 2006. He denied having any connection to the charges brought against him and stated that he did not believe that he would have a fair trial in Uzbekistan. The first applicant also stated that he feared for his safety in that country.

26. The outcome of this request is unclear. The first applicant did not refer to this application in the subsequent proceedings.

D. The first applicant's expulsion to Uzbekistan

27. On 23 November 2007, during an identity check, the applicant was arrested in Tyumen as an unlawfully resident alien.

28. On the same day the Tsentralnyy District Court of Tyumen reviewed the applicant's administrative offence case. According to the transcript of the hearing, the first applicant stated that he had lived in Russia since 1997, had traded in fruit and then married. He stated that in 2006 his Russian passport had been taken away from him as part of the procedure for obtaining nationality, but that he did not know the outcome of that

procedure. He denied having committed any violations of the Russian legislation. When asked by the judge whether he had been aware that a search warrant had been issued for him in Uzbekistan, the first applicant replied that he had not committed any crimes. He also stated that he had changed his family name because of his marriage. The District Court found the first applicant guilty of a violation of the residence rules for aliens, in that he had failed to take any steps to get a residence permit or to obtain nationality by legal means. It imposed a fine of 2,000 Russian roubles (RUB) and ordered that the first applicant be expelled from Russia.

29. On 30 November 2007 the applicant's lawyer lodged an appeal against the decision of 23 November, arguing that the extradition would sever the applicant's ties with his Russian family, in view of the ensuing five-year ban on re-entering the country. He therefore asked the Regional Court to alter the sentence and not to order the first applicant's deportation.

30. On 3 December 2007, on instructions from the first applicant, "Civil Assistance" (*Комитет "Гражданское содействие"*) an NGO which specialises in providing assistance to refugees from Central Asia, submitted to the European Court of Human Rights a request for suspension of the first applicant's extradition to Uzbekistan. They stated that the first applicant had been charged in Uzbekistan with crimes against the state security and membership of a religious organisation, that he would certainly be detained upon arrival and that the risk of torture for this category of persons was recognised by all available international sources. In that letter the representative indicated that the next flight from Tyumen to Uzbekistan was scheduled for 2 a.m. on 5 December 2007 (4 December 2007, 10 p.m. CET). There is a two-hour difference between Moscow and CET and another two-hour difference between Tyumen and Moscow.

31. On the same day, on 3 December 2007, the Court indicated to the Russian Government that, under Rule 39 of the Rules of Court, it was adopting an interim measure for suspension of the extradition. The letter to the Government, indicating the application of a preliminary measure, was received by the Office of the Representative at 7.50 p.m. CET. According to the Government, on 4 December 2007 the information about the application of the interim measure was forwarded to the Ministry of the Interior and the FMS.

32. The applicants' representative submitted that on 4 December 2007 she had forwarded a copy of the Court's letter of 3 December 2007 indicating the preliminary measure to the office of the Tyumen Prosecutor's Office and the Main Department of the Interior of the Tyumen Region.

33. On 4 December 2007 the Tyumen Regional Court held a hearing in the absence of the first applicant and his legal counsel. The court established that the applicant was a citizen of Uzbekistan, that the Russian passport had been issued in breach of the relevant provisions, that the applicant had not submitted a request for naturalisation to the competent police department

and that, according to the consular register of the Ministry of Foreign Affairs, he had not obtained Russian nationality. Equally, between 10 February 2006, the date on which his passport had been confiscated, and 23 November 2007, the day on which his identity papers were checked, the applicant had been unlawfully present on the territory of Russia and had taken no steps to declare his residence. The court held that the argument with regard to the potentially lengthy separation of the applicant and his wife and that alleging the applicant's lack of fault in the issue of the Russian passport were incidental. The court upheld the decision of 23 November 2007.

34. The applicants' representative informed the Court of that decision on the same day. On 4 December 2007 the Court forwarded an additional letter to the Office of the Representative, alerting them to the decision of the Tyumen Regional Court and drawing their attention to the fact that the first applicant's expulsion from Tyumen had been scheduled for 5 December 2007, 2 a.m. local time. This letter reached the Office in Moscow at 10.30 p.m.

35. On 5 December 2007 at 2.25 a.m. local time the first applicant was deported to Uzbekistan.

E. Subsequent events

36. According to the applicants, upon his arrival in Tashkent the first applicant was arrested and charged with the crimes for which his extradition had been sought from Russia earlier. The second applicant informed the Court in February 2008 that in January 2008 she had received a phone call from her husband's relatives in Uzbekistan. They claimed that he had been detained at the Namangan Detention Facility and that he had been subjected to torture. After that she was unable to reach the first applicant's relatives by phone.

37. In response to the Court's request, in December 2008 the Government submitted that they had obtained unofficial information that on 26 February 2008 the first applicant had been tried and found guilty in Namangan. He was sentenced to eleven years in prison for incitement to racial hatred, attempts to overthrow the constitutional regime and participation in prohibited religious organisations. The Government had no further information about the first applicant's whereabouts from the Uzbek authorities. They indicated that as the first applicant had been a national of Uzbekistan and did not have Russian nationality, there were no legal grounds for the Russian authorities to intervene on his behalf. The applicants' representatives had no way of contacting him in detention. It appears that in 2008 he was serving his sentence in the Tashkent Region.

38. On 20 August 2008 the second applicant died.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

39. For a summary of the relevant Russian law and practice on issues of detention, extradition and expulsion of foreign nationals, see *Muminov v. Russia* (no. 42502/06, §§ 45-62, 11 December 2008).

40. For a review of the situation in Uzbekistan at the relevant time, see *Muminov* (cited above, §§ 67-72) and *Ismoilov and Others v. Russia* (no. 2947/06, §§ 74-79, 24 April 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 6 OF THE CONVENTION

41. The applicants complained that the first applicant's deportation to Uzbekistan had been in violation of Articles 3 and 6 of the Convention, which read as follows:

Article 3

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

Article 6

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ..."

A. Arguments of the parties

42. The Government argued that the applicants' claim should be dismissed for failure to exhaust domestic remedies. They stressed that in the proceedings before the district and regional courts adjudicating on his deportation, the first applicant had not raised his fear of being subjected to torture or inhuman and degrading treatment, or a flagrant denial of justice, as arguments against his deportation. They argued that the domestic courts were the relevant authority before which these complaints should have been raised and produced a number of recent court decisions from the Tyumen region and from other regions whereby the sanction of administrative deportation had been lifted or the proceedings discontinued in view of various personal circumstances of the defendants. The Government further

pointed to the fact that the Uzbek authorities denied the allegations of systematic torture of detainees.

43. The applicants requested the Court to dismiss this objection. They submitted that the first applicant had effectively been prevented from raising his complaints under Articles 3 and 6. He had only had a limited possibility to argue his case before the judge of the Centralnyy District Court of Tyumen, since he had been unrepresented. Later, in the Tyumen Regional Court, neither he nor his lawyer had been present. Furthermore, the effectiveness of the alleged remedy had not been proved by the respondent Government, which had failed to demonstrate that the courts could have discontinued the administrative proceedings on the grounds of the alleged threat of torture in the country of destination. The applicants relied on international reports which pointed out that torture and ill-treatment of prisoners, especially of those suspected of political or religious crimes, had been systematic. They argued that the judiciary in Uzbekistan had been criticised by outside observers as lacking independence and unable to issue impartial decisions.

B. The Court's assessment

44. It is recognised by the parties, and follows from the documents reviewed by the Court, that in the proceedings before the Centralnyy District Court and the Tyumen Regional Court the first applicant did not raise, either expressly or in substance, the complaints under Articles 3 and 6 of the Convention that he has brought before this Court. The applicant and the Government dispute the effectiveness of the remedy in question.

45. The Court reiterates that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999, § 55). Article 35 must also be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (*Hilal v. the United Kingdom* (dec.), no. 45276/99, 8 February 2000).

46. More specifically, where the applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect (*Jabari v. Turkey* (dec.), no. 40035/98, 28 October 1999). Judicial review, where it is available and where the lodging of an application for

judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to have recourse to before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal.

47. As a general rule, applicants are required to raise in substance and in due form in the domestic proceedings the complaints addressed to the Court, including the procedural means that might have prevented a breach of the Convention (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 59, Series A no. 146).

48. Turning to the circumstances of the present case, the Court notes that the first applicant was removed from Russia to Uzbekistan by way of administrative expulsion imposed as a sanction for the breach of the residence regulations. This happened eleven months after the Russian authorities had refused to extradite him on charges of involvement in subversive activities in Uzbekistan. The relevant provisions of the Code of Administrative Offences provided that a breach of residence regulations was punishable by a fine, which could be accompanied by administrative expulsion. The determination of the offence and of the sanction lay within the competence of the district court judge and was subject to appeal to the regional court. The appeal had a suspensive effect on deportation.

49. Thus, the Court is satisfied that the judicial procedure related to the administrative offence was, in the circumstances, a proper remedy for the purposes of Article 35. The examples concerning the practice of administrative removal supplied by the Government support this assertion and bear on the possible prospects of success of that remedy.

50. The first applicant claims that even if the remedy was effective in principle, he had been prevented from using it. He indicated that he had been unrepresented at the hearing at the district court and had been unable to plead in person or through his counsel before the regional court.

51. The Court notes that, as it follows from the transcript of the hearing at the Central District Court of 23 November 2007, the first applicant had stated that he had fully understood Russian and that he did not require legal representation or an interpreter. These points were not raised in the appeal submitted by the first applicant's counsel on 30 November 2007. The only grounds for appeal were the first applicant's family ties and the modalities under which his Russian passport had been found invalid (see paragraphs 28-29 above).

52. In such circumstances, the Court finds that the first applicant has not come up with any plausible explanation for his failure to raise his grievances in substance before the domestic courts, which represented, in the present case, the remedy to be used.

53. Finally, the Court reiterates that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and

effective (see, *mutatis mutandis*, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 34, ECHR 1999-I). Exceptionally, and in view of the absolute prohibition of treatment contrary to Article 3, the Court has previously considered whether an applicant's claim about the existence of a real risk of torture had received an adequate assessment by the authorities even if brought to their attention outside of the judicial challenge to the removal order. However, the first applicant did not pursue his application for refugee status lodged in 2006 and did not refer to it in the proceedings at issue. This case should therefore be distinguished from *Muminov v. Russia*, where the Court attached a great weight to the fact that the applicant, in violation of the domestic law, was deported for a breach of residence regulations while the determination of his asylum application was pending (*Muminov,* cited above, § 87).

54. In these circumstances, the Court finds that the first applicant failed to exhaust domestic remedies in respect of his complaints under Articles 3 and 6 of the Convention. Consequently, the Court rejects this part of the application for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

55. The applicants complained that the first applicant's deportation to Uzbekistan had been in violation of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

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

B. Merits

1. Arguments of the parties

57. The Government submitted that the marriage between the applicants had been invalid from the start. They alleged that when marrying the second applicant, the first applicant had failed to produce a divorce certificate from his first marriage in Uzbekistan, as required by the Russian legislation. In any event, assuming that there had been an interference with the applicants' family life, the Government argued that it was lawful, pursued legitimate aims and was proportionate, given that the first applicant had failed to take steps to regularise his stay in Russia over a lengthy period of time. The illegally obtained Russian passport could not have served as a basis for that stay, and in any event that document had been seized in February 2006. In November 2007 the first applicant had nevertheless been found to be residing in Russia unlawfully. The Government considered that the first applicant should have been fully aware of the illegal nature of his stay by that time and of the consequences of it. In respect of the proportionality of the interference, the Government stressed that in his submissions before the national courts the first applicant had failed to argue clearly that his marriage to the second applicant was an impediment to deportation, referring rather broadly to his “family situation”, without submitting any supporting documents. As a final argument, the Government did not consider that the first applicant's deportation constituted an obstacle to the continuity of the applicants' family life, since the second applicant could have easily adapted to life in Uzbekistan, in view of her Tatar ethnic origin and the similarity of the Uzbek and Tatar languages.

58. The applicants argued that they had lived as a married couple since 2000 and that their marriage had not been found null. In the administrative proceedings the first applicant referred to his marriage in Russia as a reason not to deport him to Uzbekistan. The deportation was an interference with their family life. The applicants argued that the first applicant's Russian nationality made that deportation unlawful. Adversely, they argued that if the Court found that the first applicant was not a Russian national, the interference should be considered disproportionate. They stressed that the domestic courts had failed to balance their interests against the perceived aims of the deportation and that their arguments had been summarily dismissed. They also remarked that the Government's assertion about the second applicant's possible integration in Uzbekistan was irrelevant, since the authorities had been aware of the criminal charges pending against the first applicant in that country and the fact that he would most probably be arrested upon arrival.

2. The Court's assessment

59. Turning to the present case, the Court, firstly, finds it established that the first applicant does not hold Russian nationality. It follows from the note issued by the FMS in February 2006 that the first applicant had never applied for or received Russian nationality and that his name was not entered into any of the relevant registers, but rather that he had obtained a passport, presumably through illegal means (see paragraph 13 above). By the same decision disciplinary measures were imposed on the officer who had issued it. That passport was seized in February 2006 and the first applicant did not contest that decision. In March 2006 the Prosecutor's Office considered opening criminal proceedings against the officers who had issued the passport to the first applicant but did not, in view of the fact that the relevant archives had been destroyed (see paragraph 15). The first applicant himself referred to his nationality as Uzbek in the documents related to his refugee status and in the proceedings related to his extradition. In the questionnaire filled in on 11 November 2006 the first applicant stated that he had obtained the passport through an intermediary, whose name he could not recall and who had allegedly died in 2002 (see paragraph 25). Thus, contrary to the applicants' assertion before this Court, it follows from the documents submitted by the parties that the first applicant did not hold Russian nationality. The Court also finds that at least after February 2006 he could no longer have been unaware of the fact that he had no valid residence papers.

60. Next, the Court observes that the applicants married in December 2000. Notwithstanding the Government's challenge to the validity of that alliance, the Court notes that the marriage was officially recognised by the respondent State and thus is prepared to assume that the applicants were engaged in a genuine family relationship. The Court also finds that the interference was in accordance with the law, namely Article 18.8 of the Code of Administrative Offences, and that it pursued legitimate aims, such as the economic well-being of the country and the prevention of disorder and crime.

61. The key question for the Court is whether the measure was necessary in a democratic society. The relevant criteria that the Court uses to assess whether an expulsion measure is necessary in a democratic society have recently been summarised as follows (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 57-58, ECHR 2006-XII):

> “57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland*, [cited above]; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of

Boultif the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

- the nature and seriousness of the offence committed by the applicant;

- the length of the applicant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the applicant's conduct during that period;

- the nationalities of the various persons concerned;

- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

- whether the spouse knew about the offence at the time when he or she entered into a family relationship;

- whether there are children of the marriage, and if so, their age; and

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled."

62. Turning to the circumstances of the present case, the Court first notes that the offence for which the first applicant was expelled consisted of a breach of the registration rules for foreign nationals. This offence is punishable under the Code of Administrative Offences by a fine of RUB 500 to 1,000 (about 11 to 23 euros (EUR)) and possible administrative removal. While this offence does not appear to be particularly serious, the authorities noted that in February 2006 the first applicant had been found to be in possession of an invalid Russian identity document, and that after that he had taken no steps to regularise his stay. Thus, his stay in Russia was illegal for a long period of time and certainly after the document in question had been seized. Nevertheless it did not appear that the first applicant had taken any steps to regularise his status. The domestic courts attached particular weight to this fact when deciding on the first applicant's expulsion.

63. The Court further notes that the first applicant pleaded not to be expelled in view of his marriage to a Russian national before the district court and, through his lawyer, before the appeal court. These arguments were examined and dismissed by the courts, which concluded that, in the circumstances of the case, the applicants' family situation did not outweigh the interest of public order.

64. Furthermore, the Court notes that the applicants raised no additional arguments related to their family or social ties which, in accordance with the Court's case-law cited above, could have influenced the balancing exercise.

65. In such circumstances, the Court concludes that in striking a balance between achieving the legitimate aim and the applicants' protected interests, the State did not exceed the margin of appreciation which it enjoys in the area of immigration matters. Consequently, there was no violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 OF THE CONVENTION

66. The first applicant argued that the seizure of the Russian passport in February 2006 had constituted an interference with his right to freedom of movement. Article 2 of Protocol No. 4 provides:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. ..."

67. The Court has already found that the first applicant had not possessed Russian nationality and that he could not claim to have resided there lawfully at the time when the passport had been seized. Consequently, Article 2 of Protocol No. 4 is not applicable in the instant case and this complaint is inadmissible for being incompatible *ratione materiae,* pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

68. The applicants' representative complained that by expelling the first applicant on 5 December 2007 despite the measure indicated by the Court under Rule 39 of the Rules of Court, Russia had failed to comply with its undertaking under Article 34 of the Convention not to hinder the applicant in the exercise of his right of individual application. Article 34 of the Convention provides:

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

Rule 39 of the Rules of Court provides:

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

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. Arguments of the parties

69. The Government admitted that the first applicant's deportation to Uzbekistan had occurred in breach of Rule 39 of the Rules of Court. They referred, however, to the objective impediments which had prevented the authorities from complying with the interim measure in question. These impediments arose in view of the short notice involved and the difference in time between Strasbourg, Moscow and Tyumen. They submitted that the Court's letter of 3 December 2007 had reached their office in the evening of that day, after working hours. They further explained that on 4 December 2007, after they had been notified of the Court's indication under Rule 39, they had sent the relevant requests to the Ministry of the Interior and the Federal Migration Service of Russia. On the same day the appropriate territorial body of the FMS had been identified. The information in question was not transferred in time in view of further time difference between Moscow and Tyumen, from where the deportation was scheduled. The Government cited the need to contact the federal ministries which in turn requested information from the local authorities. The preparation of these inquiries, their posting and the obtaining of necessary information required some time. Late at night on 4 December 2007 information arrived about the first applicant's deportation by plane from Tyumen, at 2. a.m. local time on 5 December 2007. The Court's second letter of 4 December 2007 about the scheduled flight had arrived after the deportation had already occurred.

70. The applicants disputed the relevance of the difficulties cited by the Government. They pointed out that taking into account the time difference, more than 24 hours elapsed between the notification of the respondent Government of the interim measure and the deportation. They also pointed out that Mrs Ryabinina, the applicants' counsel, had on 4 December 2007 notified the law-enforcement authorities in Tyumen by fax of the Court's ruling. They argued that the Russian authorities had deported the first applicant in full knowledge of the interim measure to the contrary imposed by the Court.

B. The Court's assessment

1. General principles

71. The Court reiterates that, by virtue of Article 34 of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application.

72. In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 108, ECHR 2005-I; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 473, ECHR 2005-III; and *Aoulmi v. France*, no. 50278/99, § 103, ECHR 2006-I (extracts)).

73. Thus, indications of interim measures given by the Court permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention (see *Mamatkulov and Askarov*, cited above, § 125; *Shamayev*, cited above, § 473; and *Aoulmi*, cited above, § 108).

74. Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the interim measure indicated by the Court (*Paladi v. Moldova* [GC], no. 39806/05, § 88, ECHR 2009-...). In examining a complaint under Article 34 concerning the alleged failure of a Contracting State to comply with an interim measure, the Court will not re-examine whether its decision to apply interim measures was correct. It is for the respondent Government to demonstrate to the Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation (*Paladi*, cited above, § 92).

2. Application of the above principles to the present case

75. The Court observes that the Government did not dispute their obligation under Article 34 of the Convention to comply with the measure indicated by the Court. Rather, they contended that the competent authorities had done everything in their power to comply with that measure; however, in view of the short notice and the difference in time between Strasbourg, Moscow and Tyumen the information had failed to reach the intended recipients before the expulsion had occurred.

76. The Court notes that the letter concerning the application of Rule 39 was published on its secure website at 9.50 p.m. Moscow time on 3 December 2007. The Government do not indicate when they actually

acquainted themselves with its content, but presumably no later than on the morning of 4 December 2007. They then forwarded the information to the Ministry of the Interior and to the relevant territorial branch of the FMS. Moreover, on 4 December 2007 the applicants' representative herself forwarded the Court's notification to the Tyumen Prosecutor's Office and the local department of the Ministry of the Interior. In the course of the same day, the representative learnt of the Tyumen Regional Court's decision to uphold the deportation order on appeal and alerted the Court. She also indicated that the next flight to Uzbekistan from Tyumen was scheduled for 5 December 2007, 2 a.m. local time (midnight in Moscow and 10 p.m. CET). By a second letter, published on its secure website on 4 December 2007 at 10.30 p.m. Moscow time, the Court informed the Government of these developments (see paragraphs 31-35 above).

77. To sum up, the first applicant was put on a plane about 26 hours after the notification of the interim measure to the respondent Government. This time-period included one full working day, when all the relevant offices had been open and no difficulties in communication had been reported. The Court is cognisant of the inevitable difficulties which arise when differences in time are involved; however in the present case they clearly were not of such nature as to explain the failure to transmit the message to the service responsible (compare with *Muminov*, cited above, § 135). Indeed, in the first letter of 3 December 2007 the Court had already indicated the first applicant's place of detention and it should have been relatively simple to identify the responsible body. The Court also remarks that in the case under examination, the first applicant's deportation was upheld by the Tyumen Regional Court and the necessary formalities to carry it out were completed in an even shorter period of time.

78. The Government relied on the need to contact various ministries in Moscow and to obtain information from the local services before any steps could be ordered. The working day of 4 December 2007 was thus, they argued, not sufficient to comply with the measure indicated by the Court. The Court does not find such an excuse compatible with the nature of urgent requests aimed at preventing a person's imminent deportation. By their definition, these decisions are not complex to implement, since all that is needed is to inform the local authority responsible for carrying out the deportation and/or the administration of the detention centre about the temporary ban on the person's removal from the territory of the contracting State. In view of all the information in its possession, the Court is not satisfied that the Government in the present case took all reasonable steps to comply with the Court's ruling.

79. In the light of the above, the Court concludes that the Government have not shown that there was an objective impediment to compliance with the interim measure indicated under Rule 39 of the Rules of Court. Accordingly, there has been a violation of Article 34 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

80. The first applicant also complained that the seizure of his Russian passport in February 2006 had violated his right to be presumed innocent. He stated that the procedure under which his expulsion had been decided had been unfair. He invoked Article 6 of the Convention. However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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."

82. The representative claimed, on the first applicant's behalf, monetary compensation in respect of non-pecuniary damage, leaving the amount to be awarded to the Court's discretion. She also invited the Court "to recognise the detriment to the applicant's 'life plan'... caused by his unlawful removal from Russia in violation of the Convention". She further requested that the respondent Government be required to undertake, via their diplomatic contacts in Uzbekistan, measures aimed at re-establishing contact with the first applicant and his relatives, commuting his sentence by way of amnesty or pardon, securing his eventual release and facilitating his departure for a country which would be willing to accept him. The applicants' representatives also claimed a total of 16,264 euros (EUR) in reimbursement of costs and expenses.

83. The Court has previously found that as a result of a failure by a country to comply with its obligations under Article 34 of the Convention the applicants can suffer a non-pecuniary damage which cannot be repaired solely by such a finding (see *Mamatkulov and Askarov*, cited above, § 134).

84. The Court observes, however, that that the second applicant died in 2008 and the first applicant is currently serving a sentence of imprisonment in Uzbekistan. His representatives have had no contact with him lately. Thus, the Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it should be reserved and the subsequent procedure fixed, having regard to any agreement which might be reached between the Government and the applicant (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by four votes to three that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 34 of the Convention;

4. *Holds* unanimously that the question of the application of Article 41 is not ready for decision; accordingly
   (a) *reserves* the question;
   (b) *invites* the Russian Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

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

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Rozakis, Steiner and Spielmann is annexed to this judgment.

S.N.
C.L.R.

PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, STEINER AND SPIELMANN

1. The majority have found no violation of Article 8 of the Convention.

2. We are unable to agree with this finding.

3. The first applicant arrived in Russia from Uzbekistan and got married to Mrs Maymuna Kamaliyeva in 2000. Notwithstanding their failure to have him extradited to Uzbekistan in 2006, the Russian authorities did not hesitate to expel the first applicant in 2007, thus failing to comply with a decision of the Court under Rule 39 and hence in violation of Article 34 of the Convention. This was an administrative expulsion, for a minor offence, in contravention of the proportionality requirement under Article 8 of the Convention.

4. Indeed, as the Court has rightly accepted, both applicants were in a genuine family relationship (see paragraph 60). The Court also found that the offence for which the first applicant had been expelled (breach of the registration rules for foreign nationals, punishable by a fine of about 11 to 23 euros (EUR)), does not appear to be a particularly serious one (see paragraph 62).

5. The majority have justified their decision by the fact that the domestic courts dismissed the arguments raised by the first applicant (see paragraph 63). This should not have been decisive. In our view, the mere fact that the domestic courts examined the first applicant's arguments should not lead the Court to conclude that the applicants' family situation did not outweigh the interests of public order, in the absence of a detailed analysis of the proportionality requirement. Once again, and regrettably so, the Court has had the reflex action of applying the concept of the margin of appreciation to the circumstances of the case without examining whether the domestic courts complied with the *Üner* criteria, reiterated in paragraph 61 of the judgment.

6. In our view, the application of those criteria should have led the Court to conclude that the expulsion violated Article 8 of the Convention. Indeed, applying those criteria, we would like to emphasise that the offence committed by the first applicant was a petty one, that he stayed for many years in Russia, that he was married to a Russian national and behaved well during his stay. Moreover, the expulsion should also be seen in context. The authorities knew that the first applicant was under the threat of prosecution in Uzbekistan for offences for which extradition had previously been refused by the Deputy General Prosecutor (paragraph 22). The mere fact that the first applicant had not taken any steps to regularise his status (paragraph 62) should not have been decisive.

7. Under those circumstances, and for these reasons, we are of the opinion that Article 8 of the Convention has been violated.