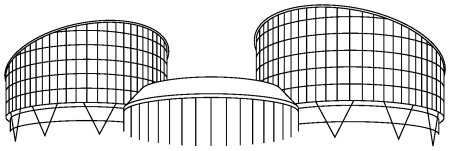

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ABUHMAID v. UKRAINE

(Application no. 31183/13)

JUDGMENT

STRASBOURG

12 January 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.

In the case of Abuhmaid v. Ukraine,

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

Angelika Nußberger, *President,*
Khanlar Hajiyev,
Ganna Yudkivska,
André Potocki,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 29 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 31183/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Hesham Ahmad Saddidin Abuhmaid, who holds a passport issued by the Palestinian Authority, ("the applicant"), on 14 May 2013.

2. The applicant was represented by Ms G. Bocheva and Ms K. Halenko, lawyers practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr I. Lishchyna of the Ministry of Justice.

3. The applicant initially alleged that his possible removal from Ukraine would be contrary to Articles 8 and 13 of the Convention and that the domestic examination of his expulsion case fell short of the requirements of Article 1 of Protocol No. 7. Subsequently, the applicant complained under Articles 8 and 13 of the Convention of uncertainty of his further stay and status in Ukraine.

4. On 5 September 2013 the applicant's complaints under Articles 8 and 13 of the Convention and under Article 1 of Protocol No. 7 were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. On 17 November 2014 the President of the Section decided to invite the parties to submit further observations regarding the factual developments which took place after the communication of the case. The applicant and the Government each submitted further observations and comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1970 in Rafah, Gaza. He currently lives in Kyiv.

A. Background information

7. Between 1977 and 1993 the applicant lived mainly in Rafah. He claimed to have been involved in the activities of Fatah, the Palestinian political organisation.

8. In 1993 the applicant went to Ukraine to study. The same year he entered Kyiv Polytechnic University. In 1999 the applicant finished his studies at the University and obtained a master's degree in biomedical electronics. In 2001 the applicant enrolled in a postgraduate course at the same University. In 2003 he withdrew from the course as he had no money to pursue his studies. The applicant claims that since 2003 he has been working as a freelance translator/interpreter for the Embassy of Libya in Kyiv and for various private companies (the applicant speaks fluent Arabic, English and Russian, and understands Ukrainian).

9. In 1998 the applicant married a Ukrainian national. In 2007 they divorced. In 2011 the applicant married another Ukrainian national; their marriage lasted for less than two months. In March 2013 the applicant entered into a relationship with another Ukrainian national. In January 2014 they married and currently live together as a family.

10. The applicant visited Gaza twice in 2000. According to the applicant, one of the visits was due to his father's death. Since December 2000 the applicant has remained in Ukraine without leaving its territory.

11. In 2001 the applicant was issued with a registration card by the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"). The card bears the name "Hicham Ahmad Sadiddin Hmeid". The applicant attributes the difference in the spelling of his name to varying transliterations of Arabic names. Similar cards were issued to the applicant's mother and sister, who currently reside in Rafah.

B. The legal basis for the applicant's stay in Ukraine prior to expulsion order

12. Prior to November 2009 the applicant was staying in Ukraine on the basis of passports of limited duration, issued by the Palestinian Authority, and temporary residence permits, which were regularly extended by the Ukrainian police. In 2008-09 an extension of the applicant's residence

permit was requested by the Embassy of Palestine and granted by the Ukrainian authorities, as at the time access to the Palestinian territories was problematic.

13. In 2003 the applicant started preparing documents to apply for a permanent residence permit on the basis of his marriage to a Ukrainian national. He could not complete his application because his then brother-in-law was opposed to the applicant being registered as resident in the flat in which the applicant, his then wife and brother-in-law resided at the time.

14. On 9 March 2010 the applicant applied to the migration unit within the Golosiyivkyy District Police Department in Kyiv for an extension of his residence permit. The police noted that the applicant's residence permit had expired in November 2009 and that since then the applicant had been in Ukraine in violation of migration regulations.

15. On 10 March 2010, at the request of the police, the Golosiyivskyy District Court in Kyiv, relying on Article 203 § 1 of the Code on Administrative Offences, ordered the applicant to pay a fine for violating migration regulations.

16. The applicant's identification documents were kept by the Golosiyivkyy District Police Department pending the outcome of the applicant's request for an extension of his residence permit.

17. According to the applicant, about a week later his residence permit was extended until 15 September 2011. The Government contested that submission, stating that no extension had been granted.

18. In the meantime, on 11 March 2010 the applicant was stopped by officers of the Solomyanskyy District Police Department in Kyiv for an identity check. As he had no identification documents, the applicant was arrested and taken to the police station. The applicant stated that his explanation that his documents were being kept at another police department had not been taken into account. On 12 March 2010 the applicant was taken to the Solomyanskyy District Court in Kyiv, which, having examined the material submitted by the police, fined the applicant for failure to carry identification and foreigner's registration documents.

19. On 28 April 2010 the applicant was stopped by officers of the Desnyanskyy District Police Department in Kyiv for an identity check. Having noted that the applicant was living in a flat in Kyiv without a rent contract or official registration, the officers asked the Desnyanskyy District Court in Kyiv to fine the applicant. By a decision of 28 April 2010, the court ordered the applicant to pay a fine for violating migration regulations.

20. The applicant did not appeal against the court decisions convicting him of administrative offences, as he had no legal representation and took the view that those decisions would not have any consequences for his stay in Ukraine.

21. On 16 September 2011 the applicant went to the migration unit of the Chief Police Department in Kyiv to apply for an extension of his

residence permit. On the way he was stopped by officers of the migration unit of the Solomyanskyy Police Department in Kyiv, who informed the applicant that there had been an order deporting him from Ukraine. The officers seized the documents the applicant had with him for his application for an extension of his residence permit, including his passport and marriage certificate. The documents have not been returned to the applicant. The applicant claimed that for that reason he could not provide a copy of his most recent residence permit.

22. Subsequently the applicant contacted a lawyer, who helped him to obtain copies of the decisions concerning his expulsion and to lodge an appeal against them (see paragraph 28 below).

C. Expulsion proceedings

23. On 17 March 2010 the Solomyanskyy District Police Department in Kyiv issued a decision stating that the applicant should be removed from Ukraine for violation of migration regulations and banning him from entry to the country until 12 March 2015 under section 32 of the Legal Status of Foreigners and Stateless Persons Act 1994 (see paragraphs 64-67 below). In the decision, it was noted that the applicant had come to Ukraine in 2005 for a private visit; that after the expiry of his residence permit he had remained in Ukraine illegally; that he had not requested an extension of his residence permit; that he had no relatives in Ukraine; that he had no work permit; that he had earned his life working at a market in Kyiv; and that he was "known to the police".

24. According to the Government, the applicant was informed of the decision of 17 March 2010 on the same day and asked for a court hearing on his expulsion case (see paragraph 27 below) in his absence. In support, they provided copies of written statements allegedly signed by the applicant and by a translator.

25. The applicant claimed that he had not been informed of that decision and that the written statements in that regard had been forged by the police. The applicant also argued that he had not been aware that subsequently, in May 2010, the police had initiated court proceedings for him to be forcibly removed from Ukraine.

26. In their written submissions made in the course of those proceedings, the police reiterated the findings in the decision of 17 March 2010 and requested the Kyiv Administrative Court to order the applicant's immediate forcible removal and his placement in a facility for temporary detention of foreigners and stateless persons for the period necessary to prepare the removal. In the latter regard, the police argued that there were reasons to believe that the applicant would try to remain illegally in Ukraine.

27. On 18 May 2010 the Kyiv Administrative Court heard the case in the absence of the parties, having noted that the applicant had submitted a

written statement that he did not wish to be present and that he agreed with the expulsion decision, and also that the police were not able to attend the hearing because of their high workload. The court relied on the findings in the decision of 17 March 2010 and allowed the claims of the police. In its decision, the court noted that its ruling was to be enforced immediately and that it could be appealed against within ten days under Articles 185-187 of the Code of Administrative Justice. If no appeal was lodged against the decision it would enter into force after the expiry of the ten-day period.

28. According to the applicant, he was informed of the decision of 18 May 2010 on 25 November 2011. On 29 November 2011 a lawyer submitted an appeal on the applicant's behalf, together with a request for renewal of the ten-day time-limit, to the Kyiv Administrative Court for further transfer to the Kyiv Administrative Court of Appeal.

29. In the appeal, the applicant argued that he had been studying in Ukraine between 1993 and 1999. In December 2000 he had returned from Palestine to Ukraine fearing persecution by the Israeli authorities. Without providing any further details, the applicant stated that he had been arrested and tortured by the Israeli authorities with the aim of obtaining his confession of cooperation with Hamas. The applicant further noted that he was married to a Ukrainian national, that he had been officially allowed to stay in Ukraine until 16 September 2011, and that on that day the police had seized his identification documents and ordered him to leave Ukraine. The applicant also expressed the wish to apply for asylum once the Migration Service started accepting asylum applications according to the new regulations (see paragraphs 75-79 below).

30. The applicant complained that the first-instance court had failed to examine all the facts pertinent to the case and to hear him. According to the appeal, the applicant had not been informed of the decision of 17 March 2010 and had not asked the court to hear the case in his absence.

31. He also argued that the first-instance court had not checked whether it was safe for the applicant to return to Palestine and had not been informed of the circumstances essential for the outcome of his case. In particular, the applicant argued that the Ukrainian police had withheld the information that he had a valid residence permit and that he had used to be married to a Ukrainian national. The applicant complained that the expulsion decision of 17 March 2010 had been taken in violation of Articles 2, 3 and 5 of the Convention, given the human rights situation in Palestine, and in violation of the domestic procedure.

32. On 14 November 2012 the Kyiv Administrative Court of Appeal heard the case in the absence of the parties. It is unknown whether the applicant or his lawyer intended to take part in the hearing and, if so, whether they informed the Court of Appeal accordingly.

33. The appeal was rejected as unsubstantiated. In particular, the Court of Appeal relied fully on the findings of the first-instance court and noted

that "the claimant, having been removed from Ukraine, had crossed the Ukrainian border despite the existing entry ban". The decision entered into force immediately.

34. On 6 December 2012 the applicant lodged with the Higher Administrative Court a cassation appeal challenging the factual and legal findings of the lower courts. The applicant also complained that his expulsion from Ukraine would be contrary to Article 8 of the Convention given his personal and family ties with that country.

35. On 3 October 2013 the Higher Administrative Court overturned the lower courts' decisions on the ground that they had failed to examine whether there were grounds preventing the applicant's expulsion under Ukrainian law. The Higher Administrative Court also noted that the lower courts had not given due consideration to the applicant's private and family life interests in Ukraine. The case was thus sent for re-examination to the first-instance court.

36. After another round of examination by the courts at the first and appeal levels of jurisdiction resulting in a decision ordering the applicant's forcible removal from Ukraine, in February 2014 the case was sent back to the start again by the Higher Administrative Court, for the same reasons as in its decision of 3 October 2013.

37. On 29 October 2014 the Desnyanskyy District Court, to which the case was eventually remitted, refused the application for the applicant's forcible expulsion.

38. The court held that the applicant's forcible removal from Ukraine would be in violation of his right to respect of family life as guaranteed by Article 8 of the Convention, having regard in particular to the fact that the applicant was married to a Ukrainian national. It also found that, in the event of his removal to Palestine, the applicant's life and security would be endangered, given the armed conflict on that territory, which would entail a violation of Ukraine's commitments under Articles 3 and 5 of the Convention. The court took the view that the applicant had grounds to be given the status of refugee or of a person in need of complementary protection. The court also noted that, by operation of the statutory one-year time-limit (see paragraph 58 below), the applicant could no longer be considered as having committed the administrative offences of which he had been convicted in 2010 (see paragraphs 15, 18 and 19 above).

39. That decision was not appealed against and became final.

D. The applicant's initial application for asylum

40. On 25 January 2012 the applicant lodged an asylum application with the State Migration Service. According to the applicant, in his application he stated that he feared persecution by Hamas if returned to Gaza, as he had been a member of Fatah.

41. According to the applicant, during the assessment of his asylum case migration officers questioned him on two occasions. They asked formal questions not related to the substance of his allegations.

42. On 1 August 2012 the applicant received a written notice dated 21 June 2012 that his asylum application had been refused by a decision of the State Migration Service of 17 May 2012 and that he could challenge it before the courts. No copy of the decision was given to the applicant.

43. On 3 August 2012 the applicant challenged the refusal of his asylum application before the Kyiv Administrative Court. In particular, the applicant argued that he had not been informed of the reasons for that decision, and that this prevented him from effectively appealing against it. The applicant also argued that the examination of his application had not been thorough and objective, as his questioning had been formalistic and no additional information had been sought concerning the general situation in Palestine or the applicant's personal circumstances from other State authorities, such as the State Security Service, or from the applicant himself, to check the reliability of his submissions. The applicant stated that he had not been given access to the evidence in the inquiry. He maintained his allegation that he was at risk of persecution by Hamas, and also argued that if returned to Gaza, as a male Palestinian he ran a real risk of ill-treatment by the Israeli authorities, even though he did not support Hamas. In that regard, he referred to the reports of Amnesty International and Human Rights Watch concerning the human rights situation in Palestine in 2012. The applicant also contended that the Migration Service had disregarded that, as a Palestinian refugee registered with UNRWA and outside its field of operation he was entitled to the same protection in Ukraine as refugees under the United Nations Convention Relating to the Status of Refugees of 1951.

44. On 20 September 2012 the court rejected the applicant's case, finding that the Migration Service had examined the matter thoroughly and fully and that the applicant's arguments were unsubstantiated. In particular, the court noted that the material relating to the applicant's asylum proceedings demonstrated that he did not run an individual and real risk of persecution by the Palestinian authorities, as Hamas and Fatah had entered into negotiations concerning a transitional government for Palestinian territories; he had not been subjected to such persecution at any time; the applicant had not provided any evidence that he would not be able to avail himself of the protection of his country of origin; he had travelled freely to and from Palestine; all his family lived there; and he did not face criminal prosecution there. The court also noted that the applicant had left his country of origin voluntarily for economic and personal reasons; he had had his residence permit in Ukraine repeatedly extended for personal reasons; and he had requested asylum only after he had not been able to legalise his further stay in Ukraine. Relying on the latter ground, the court found that

the applicant had missed the time-limit for lodging an asylum application pursuant to Article 5 of the Refugees and Persons in Need of Complementary or Temporary Protection Act of 2011. On the whole, the court found that it had been for the applicant to provide documents or persuasive arguments demonstrating that he had run a real and personal risk of persecution, which he had failed to do.

45. On 25 October 2012 the applicant lodged an appeal with the Kyiv Administrative Court of Appeal. In particular, he stated that his allegations of risk of persecution by Hamas and by the Israeli authorities were, *inter alia*, supported by the fact that his passport had been issued by the Palestinian Authority associated with Fatah, by his registration card issued by the UNRWA, and by various international reports, which neither the Migration Service nor the court of first instance had sought to obtain or examine. According to the applicant, the court's review of his case had not been full or thorough, thus falling short of the requirements of the Refugees and Persons in Need of Complementary or Temporary Protection Act of 2011, as interpreted by the Plenary Higher Administrative Court (see paragraphs 80-86 below).

46. On 4 December 2012 the Court of Appeal rejected the applicant's appeal, having agreed with the first-instance court in that the applicant had failed to substantiate his asylum application as required by the national law and pertinent international documents, including the European Union Council Directive of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status and the Guidelines on procedures and criteria for determining refugee status under the 1951 Geneva Convention, issued by the UNHCR in 2011.

47. The applicant appealed in cassation, stating that the lower courts had not fully examined the material pertinent to his case, which had resulted in a wrong dismissal of his asylum request, in violation of Articles 3, 8 and 13 of the Convention. As to Article 8, the applicant noted that he had studied in Ukraine between 1993 and 1999, that since 2000 he was permanently resident on its territory, and that he was married to a Ukrainian national.

48. On 7 February 2013 the Higher Administrative Court rejected the applicant's cassation appeal, having found no elements demonstrating that the lower courts had erred in the application of substantive or procedural law or that review of the evidence in the case was required.

E. The applicant's second application for asylum

49. In November 2014 the applicant lodged a new asylum application with the State Migration Service.

50. On 24 December 2014 the Kyiv Department of the State Migration Service refused to examine the application, finding that it was wholly unsubstantiated.

51. On 20 July 2015 the Kyiv Administrative Court overturned that decision, having found that the State Migration Service had failed to thoroughly examine the matter. The court in particular found that, although the arguments on which the applicant's new application for asylum had been based were the same as in the applicant's initial application, the new application needed to be reconsidered in the light of the decision of the Desnyanskyy District Court of 29 October 2014 and on the basis of the new Act on the Legal Status of Foreigners and Stateless Persons, which had entered into force on 25 December 2011. It therefore ordered the State Migration Service to reconsider the applicant's new asylum application.

52. The reconsideration of the applicant's new asylum application is currently pending. According to the Government, by operation of section 1 of the Refugees and Persons in Need of Complementary or Temporary Protection Act (see paragraph 79 below), this gives the applicant a lawful ground to stay in Ukraine for the duration of the said reconsideration.

F. The applicant's further attempts to regularise his residence in Ukraine

53. As he could not obtain asylum in Ukraine and in order to use all possible opportunities to legalise his stay in Ukraine in order to evade expulsion, in 2014 the applicant applied for leave to immigrate, principally relying on the fact that he was married to a Ukrainian citizen. The Migration Service refused to examine his application as there were inconsistences in the spelling of his name in the applicant's asylum seeker's certificate and in his passport and marriage certificate. The applicant's requests for the relevant changes to be made in the documents were allegedly ignored by the authorities.

54. The applicant further claimed that an official from the Migration Service told him that he would have to leave Ukraine and to apply for leave to immigrate from abroad in order to obtain leave to enter Ukraine lawfully.

55. According to the applicant, he could not leave Ukraine as he had nowhere to go. In Palestine his life and health would be endangered and he had not maintained close links with the place where he lived before he had moved to Ukraine. In his view, he could not apply for leave to immigrate into Ukraine, as he could not be considered as staying on its territory "on lawful grounds", which was required by the Immigration Act (see paragraph 74 below). According to the Government, the applicant could not apply for leave to immigrate while his asylum application was being examined. Furthermore, pursuant to Article 4 § 3 (1) of the Immigration Act leave to immigrate could be granted to an alien who had been married to a Ukrainian citizen for over two years (see paragraph 74 below). At the time, the applicant's marriage had lasted for less than two years. Thus, no leave to immigrate could be granted to him on that ground.

56. The parties did not inform the Court of any further developments in that regard.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Ukraine, 1996

57. The relevant extracts from the Constitution provide as follows:

Article 26

"Foreigners and stateless persons who are lawfully in Ukraine enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties to which Ukraine is a party.

Foreigners and stateless persons may be granted asylum under the procedure established by law."

Article 55

"Human and citizens' rights and freedoms are protected by the courts.

Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies exercising State power, local self-government bodies, officials and officers.

...After exhausting all domestic legal remedies, everyone has the right of appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law."

B. The Code of Administrative Offences, 1984

58. Article 39 of the Code provides that persons convicted of an administrative offence shall be considered as having no convictions, provided they commit no administrative offence for one year following the date of the sanction for the initial offence.

C. The Code of Administrative Justice, 2005

59. Article 2 of the Code provides that the task of the administrative judiciary is the protection of the rights, freedoms and interests of individuals and the rights and interests of legal entities in the sphere of public-law relations from violations by State bodies, bodies of local self-government, their officials, and other persons in the exercise of their powers. Under the

second paragraph of this Article, any decisions, actions or omissions of the authorities may be challenged before the administrative courts.

60. Pursuant to Article 48, foreigners and stateless persons enjoy the same capacity to have recourse to legal procedure as the citizens of Ukraine and, pursuant to Articles 16 and 56, are entitled to be legally assisted and represented in proceedings.

61. Article 49 provides for parties' right to be informed of the date, time and place of court hearings and to take part in them. Pursuant to Article 122, the first-instance court must examine the case at an open hearing to which the parties are invited, unless they express the wish to have the case examined by means of a written procedure. The parties may take part in hearings before the courts of appeal and of cassation. The parties should inform those courts accordingly (Articles 187 § 3 and 213 § 3). The courts of appeal and of cassation may decide to examine cases by means of a written procedure (Articles 196, 197 and 222).

62. Under Article 227 § 2 the court of cassation has the power to quash decisions of the lower courts and to order reconsideration of the case if it finds that there have been procedural violations which have "impeded the establishment of facts decisive for the correct determination of the case".

63. On 22 September 2011 Article 183-5 was added to the Code and entered into force on 15 October 2011. It provided particular rules for the consideration of cases concerning expulsion of foreigners and stateless persons. It provided for the compulsory presence of the parties during hearings before the court of first instance. The court's decision in such cases could be challenged on appeal within five days of its delivery and could be further challenged before the court of cassation. In May 2016 Article 183-5 was repealed. The rules for the consideration of cases concerning expulsion of foreigners and stateless persons are currently set out by Article 183-7.

D. The Legal Status of Foreigners and Stateless Persons Act, 1994 (repealed on 25 December 2011), as worded at the material time

64. Section 32 of the Act laid down the procedure for removal of foreigners and stateless persons from the territory of Ukraine.

65. It listed the grounds for removal, which included the commission of a crime, the failure to comply with the conditions of temporary stay, and danger to national security or public order. Compulsory removal was also to be ordered if there were grounds for refusal of entry specified in section 25 of the Act (such as submission of false information, breach of entry or customs regulations). Foreigners and stateless persons could also be removed if they engaged in activities detrimental to Ukraine's relations with another country, repeatedly committed administrative offences, or did not have legally obtained means sufficient to support their stay in and departure from Ukraine.

66. A removal decision was to be taken by the police, the border guards or the State Security Service. Notice of the decision had to be given to prosecutors within twenty-four hours. An appeal against the decision could be lodged with the courts.

67. A period of up to five days could be indicated in a decision that a foreigner or stateless person must leave the territory of Ukraine.

68. If the person concerned did not comply with the decision, he or she had to be forcibly expelled in accordance with an order of an administrative court. At the request of the police, the border guards or the State Security Service, the administrative court was also empowered to order the person's detention for the period necessary for the preparation of his or her expulsion, not exceeding twelve months, at a facility for temporary detention of foreigners and stateless persons illegally in Ukraine, if there were "reasonable grounds suggesting that [the person] would fail to leave" the territory of Ukraine.

69. According to section 32-1, foreigners or stateless persons were not to be removed to a country where they risked being subjected to torture or cruel, inhuman or degrading treatment or punishment.

E. The Legal Status of Foreigners and Stateless Persons Act, 2011 (entered into force on 25 December 2011)

70. The 2011 Act sets out the grounds on which foreigners and stateless persons can stay in Ukraine. In particular, according to sections 4 and 5, permanent or temporary residence permits can be issued to foreigners and stateless persons who fulfil the conditions set out in the Immigration Act of 2001, (see paragraph 74 below), who have been granted the status of refugee or of a person in need of complementary protection, who have come to study, who have been granted work permit, who have come to work at local offices of foreign or international companies, banks, religious and public organisations, who serve in the Ukrainian Army pursuant to a contract, or who have been granted leave to enter Ukraine on other lawful grounds. Those, who have been released from a facility for temporary detention of foreigners and stateless persons who are illegally in Ukraine (see paragraph 72 below) on the ground that the decision on their removal from Ukraine or on their detention was annulled or that the maximum duration of such detention expired, and who cannot be removed from Ukraine due to circumstances beyond their control, can also obtain a temporary residence permit.

71. Like the Act in force before 25 December 2011, the 2011 Act provides for a two-stage procedure of forcible removal of foreigners or stateless persons from Ukraine. Where there are grounds for such a removal (see below), the authorities take a decision ordering foreigners or stateless persons to leave Ukraine. If the foreigners or stateless persons concerned

fail to comply with such an order, they may be forcibly removed (expelled) pursuant to a decision of an administrative court. In particular, section 26 provides that the State Security Service, the border guards, or "the central executive authority ensuring the implementation of State policy in the sphere of migration" may take a decision ordering the (forcible) return of foreigners and stateless persons to the country of origin or to a third country if their conduct violates the regulations on their legal status or is contrary to the interests of national security of Ukraine or of public order, or if their return is necessary for the protection of the health, rights and lawful interests of Ukrainian citizens. Notice of the decision shall be given to prosecutors within twenty-four hours and a copy of the decision shall be given to the foreigner or stateless person concerned. The decision shall contain the reasons on which it is based, indicate a period during which the foreigner or the stateless person concerned must leave Ukraine (which shall not exceed thirty days), and specify the procedure for appeal (the decision may be appealed against to the courts) and the consequences of failure to comply with it. Foreigners and stateless persons who are below eighteen years of age or in whose respect the Refugees and Persons in Need of Complementary or Temporary Protection Act applies shall not be subjected to forcible return.

72. According to section 30, if foreigners or stateless persons fail to comply with the decision ordering their return within the set time-limit or if there are reasonable grounds suggesting that they will evade complying with such a decision, the State Security Service, the border guards, or "the central executive authority ensuring the implementation of the State policy in the sphere of migration" may expel the foreigners or the stateless persons from Ukraine on the basis of an administrative court's decision. The court's decision may be taken at the request of the said authorities, and is subject to appeal. For the purposes of foreigners' and stateless persons' "identification" and enforcement of the court's decision, they may be detained at a facility for temporary detention of foreigners and stateless persons who are illegally in Ukraine for a period of up to eighteen months. The prosecutors must be informed of such detention within twenty-four hours. Foreigners and stateless persons to whom the Refugees and Persons in Need of Complementary or Temporary Protection Act applies shall not be subjected to forcible expulsion.

73. Section 31 prohibits forcible return or expulsion of foreigners and stateless persons to countries (i) where their life or freedom is endangered for reasons of race, religion, origin, nationality, membership of a particular social group or political opinion; (ii) where they risk being subjected to the death penalty or execution, torture or cruel, inhuman or degrading treatment or punishment; (iii) where their life, health, security or freedom are endangered by widespread violence in the situation of an international or internal armed conflict or where there are systematic violations of human

rights, natural disasters or anthropogenic hazards, or where the medical treatment or assistance sufficient to maintain life are not available; or (iv) where they risk expulsion or forced return to countries in which such circumstances may emerge. This provision also bans collective forcible expulsions of foreigners and stateless persons.

F. The Immigration Act, 2001

74. The Immigration Act sets out the conditions and procedures for foreigners and stateless persons seeking leave to permanently reside in Ukraine. It applies both to those living abroad and to those staying in Ukraine on lawful grounds. In order to be given a permanent residence permit, immigrants have to obtain, in the first place, the authorities' decision granting them leave to immigrate. Section 4 of the Immigration Act provides that such leave can be granted, according to immigration quotas set by the Cabinet of Ministers, to notable scientists or artists; highly qualified professionals of which Ukraine's economy is in need; persons who invest a substantial amount of money into its economy; close relatives (siblings, grandparents and grandchildren) of Ukrainian nationals; former Ukrainian nationals; immigrants' parents, spouses and minor children; persons who have resided on the territory of Ukraine for at least three years after they have been recognised as victims of human trafficking; and persons who served in the Ukrainian Army for at least three years. The following categories of immigrants are entitled to be granted leave to immigrate, to which the aforementioned quotas do not apply: those who have been married to Ukrainian nationals for over two years; those whose parents or children are Ukrainian nationals; guardians of Ukrainian nationals; those whose guardians are Ukrainian nationals; those who have the right to claim Ukrainian nationality according to their place of birth; those whose immigration would be in the national interest; and those who are of Ukrainian origin or descent and are living abroad, as well as their spouses and children who come with them to live in Ukraine.

G. The Refugees and Persons in Need of Complementary or Temporary Protection Act, 2011

75. According to the glossary of terms set out in section 1 of the Act, a refugee is "a person who is not a citizen of Ukraine and who, because of well-founded fear of becoming a victim of persecution for reasons of race, religion, origin, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable to avail him or herself of the protection of that country or, because of such fear, is unwilling to avail him or herself of such protection, or who, not having a nationality and being outside the country of his former permanent

residence, is unable or is unwilling to return to it because of the said fear" (paragraph 1 (1) of section 1).

76. A person in need of complementary protection is a person who is not a refugee but who "needs protection because he or she had to come to or remain in Ukraine because of a threat to his or her life, security or freedom in the country of origin, as the person fears that he or she may be subjected to the death penalty, execution of the death sentence, torture, inhuman or degrading treatment or punishment, or owing to widespread violence resulting from a situation of international or internal armed conflict or systematic violations of human rights" (paragraph 1 (13) of section 1).

77. As amended on 13 May 2014, sub-paragraphs 14 and 21 of paragraph 1 of section 1 provide for temporary protection, as an exceptional measure limited in time, to those coming to Ukraine en masse and who are unable to return to their country of permanent residence as a result of foreign aggression, occupation of its territory, civil war, ethnic conflicts, natural disasters or industrial catastrophes, or other events disrupting public order in that country or part of it.

78. Those who have crossed the Ukrainian border illegally and entered the territory of Ukraine with the intention of being recognised as a refugee or as a person in need of complementary protection in that country must lodge an application with the Migration Service. In that event they will not be held liable for the illegal crossing of the border and/or illegal stay on the territory of Ukraine (paragraph 4 of Section 5).

79. The Migration Service, dealing with an application for refugee status or for the status of a person in need of complementary protection, issues a document confirming that an asylum seeker has requested protection in Ukraine (paragraph 1 of Section 8). Such a document gives lawful ground for the asylum seeker's stay in Ukraine until his or her status is finally determined or until he or she leaves its territory (paragraph 1 (3) of Section 1).

H. Resolution of the Plenary Higher Administrative Court on the judicial practice of consideration of disputes concerning refugee status, removal of a foreigner or a stateless person from Ukraine, and disputes connected with a foreigner's or stateless person's stay in Ukraine

80. The resolution in force at the time (March 2010) when the authorities decided to expel the applicant in the present case had been adopted by the Plenary Higher Administrative Court on 25 June 2009. It was amended on 20 June 2011.

81. On 16 March 2012 a new version of the Resolution was adopted by the Plenary Court.

82. Both the previous and the current versions of the Resolution provide that any decision, action or omission of the authorities relating to foreigners' and stateless persons' entry or stay, including detention, in Ukraine may be challenged before the administrative courts. Cases concerning foreigners' or stateless persons' liability for administrative offences have been excluded from the administrative courts' jurisdiction.

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

84. The Plenary Court has underlined that the administrative courts must take into account the provisions of the relevant international treaties, including the European Convention on Human Rights of 1950 and the United Nations Convention Relating to the Status of Refugees of 1951. In its 2012 Resolution, it notes that Article 3 of the European Convention on Human Rights takes precedence over the provisions of Article 33 of the United Nations Convention Relating to the Status of Refugees, which provide for the possibility of expulsion or return of refugees for the reason of threat to national security.

85. When dealing with cases concerning forcible removal of foreigners or stateless persons who state that they fear persecution in the country of origin, the administrative courts must examine whether those persons were provided with information, in a language they understood, concerning the right to request refugee status or the status of a person in need of complementary protection in Ukraine. If necessary, the courts must ensure that they have access to the relevant procedure before the migration authorities.

86. The 2012 Resolution indicates that the courts must also examine whether the persons concerned were provided with free of charge legal assistance pursuant to Sections 7, 8, 9 and 11 of the Free of Charge Legal Assistance Act of 2011. A decision refusing to grant refugee status or the status of a person in need of complementary protection may not serve as a ground for forcible expulsion of a foreigner or a stateless person. The administrative courts must examine whether there are lawful grounds for such expulsion.

III. THE COMMITTEE OF MINISTERS' RECOMMENDATION REC(2000)15 CONCERNING THE SECURITY OF RESIDENCE OF LONG-TERM MIGRANTS

87. On 13 September 2000 the Committee of Ministers adopted Recommendation Rec(2000)15 concerning the security of residence of long-term migrants, which states, *inter alia*:

> "... 1. As regards the acquisition of a secure residence status for long-term immigrants
>
> (a) Each member state should recognise as a "long-term immigrant" an alien who:
>
> (i) has resided lawfully and habitually for a period of at least five years and for a maximum of ten years on its territory otherwise than exclusively as a student throughout that period; or
>
> (ii) has been authorised to reside on its territory permanently or for a period of at least five years; or ...
>
> Each member state should have the option to add further conditions to those mentioned under sub-paragraph (i) above. Each member state should also have the option to extend the definition of a "long-term immigrant" to other categories of aliens.
>
> (b) A long-term immigrant as defined in paragraph (a) above should be entitled to a secure residence status in the member state concerned and, in particular, to the renewal of the relevant documents.
>
> ...
>
> 3. As regards the conditions for losing a secure residence status
>
> (a) The residence permit of a long-term immigrant may only be withdrawn if:
>
> (i) a residence permit has been acquired by means of proven fraudulent conduct, false information or concealment of any relevant fact attributable to the immigrant;
>
> (ii) he or she has resided effectively outside the member state for a period of more than six months without requesting the prolongation of this period;
>
> (iii) he or she has been convicted of serious crimes;
>
> (iv) he or she constitutes a serious threat to national security.
>
> ...
>
> (c) The renewal of a residence permit of a long-term immigrant should not be refused on the ground of short delays in the application for new residence documents.
>
> 4. As regards the protection against expulsion
>
> (a) Any decision on expulsion of a long-term immigrant should take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights' constant case-law, of the following criteria:
>
> – the personal behaviour of the immigrant;
>
> – the duration of residence;
>
> – the consequences for both the immigrant and his or her family;

– existing links of the immigrant and his or her family to his or her country of origin.

(b) In application of the principle of proportionality as stated in paragraph 4 (a), member States should duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant. More particularly, member States may provide that a long-term immigrant should not be expelled

– after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years' imprisonment without suspension; and

– after ten years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of five years' imprisonment without suspension.

After twenty years of residence, a long-term immigrant should no longer be expellable.

...

(d) In any case, each member State should have the option to provide in its internal law that a long-term immigrant may be expelled if he or she constitutes a serious threat to national security or public safety.

...

5. As regards administrative and judicial guarantees

(a) Any decision on withdrawal of a residence permit of a long-term immigrant should take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights' constant case-law referring to Article 8 of the European Convention of Human Rights, of the following criteria:

- personal behaviour of the immigrant;

- duration of residence;

- consequences for both the immigrant and his/her family;

- existing links of the immigrant and his/her family to his/her country of origin.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 13 OF THE CONVENTION

A. Submissions by the parties

88. Relying on Article 8 of the Convention, the applicant initially complained that his removal from Ukraine would entail unjustified interference with his personal and family life, as he had lived in Ukraine since 1993, had established close personal links with this country, and was

married to a Ukrainian national. The applicant further complained that the authorities had acted in bad faith when they sanctioned him for violating of migration regulations in March 2010.

89. In his submissions of 29 May 2015 the applicant claimed that he might be expelled from Ukraine in future, as, even though the authorities' application for his forcible removal from Ukraine had been refused by the decision of 29 October 2014, the expulsion decision of 17 March 2010 remained valid and he could not legalise his residence in Ukraine. The applicant further argued that he remained in a precarious situation regarding his life prospects. In particular, he had not been able to lodge an application for leave to immigrate and his asylum application had been refused on a number of occasions.

90. Relying on Article 13, the applicant alleged that the authorities had not carried out an independent and rigorous scrutiny of his allegations under Article 8 of the Convention and that the domestic proceedings to which he had recourse in his case had not complied with the requirements of an effective remedy within the meaning of the Convention. In particular, his appeals against the court decisions ordering his forcible expulsion had had no suspensive effect. The applicant also argued that the proceedings had been excessively long.

91. Articles 8 and 13 of the Convention read as follows:

Article 8

"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."

Article 13

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

92. In their initial observations on the case, the Government stated that the applicant's complaints were unsubstantiated as he had not provided sufficient evidence that he had established close social or any other personal links with Ukraine. In particular, he had married his first wife just to be able to register at her address and had not lived with her; his second marriage had lasted, at the time, less than two months; and he had no children or relatives in Ukraine.

93. They also argued that the applicant had breached migration regulations, for which he had been fined in March 2010, and therefore that there had been sufficient legal basis for the decision of 17 March 2010

ordering him to leave Ukraine. They were of the view that he had launched asylum proceedings solely to avoid expulsion and that he had come to Ukraine in search of employment, rather than because of a risk to his life or security in his country of origin.

94. In their further observations, the Government stated that, given the decision of 29 October 2014 refusing the applicant's forcible expulsion and the fact that the proceedings on the applicant's asylum application were pending, he was not to be removed from Ukraine.

95. According to them, even assuming the decision of 17 March 2010 could form a basis for the applicant's forcible expulsion in future, he could have challenged that decision before the courts.

96. In any event, the Government stated that there had been no violation of Article 8 of the Convention, as the applicant's complaint had been duly examined by the court in its decision of 29 October 2014.

97. The Government further contended that Ukrainian law provided for effective procedures enabling the applicant to regularise his stay in Ukraine, including the procedure regulated by Article 9 of the Immigration Act and Article 4 of the Legal Status of Foreigners and Stateless Persons Act of 2011, as well as by relevant regulations enacted by the Cabinet of Ministers to implement those Acts. However, as at the time the applicant's asylum application was being examined by the Migration Service, he could not apply for leave to immigrate. In any event, as his current marriage had lasted, at the time he had lodged his immigration application in 2014 (see paragraphs 9 and 53 above), less than two years, he had had no legal ground to be granted leave to immigrate.

98. The applicant contested the Government's submissions, contending that he had enjoyed private and family life in Ukraine during the period of over twenty-two years he had lived in that country. According to the applicant, he had had no practical opportunity to obtain a permanent residence permit (see paragraph 13 above) and had no prospect of regularising his stay and status in Ukraine, as the matters stood at the material time. Although the domestic court's decision of 29 October 2014 had enabled him to lodge with the authorities a new asylum application, that decision had not resolved the issue of uncertainty of his further stay and status in Ukraine.

99. He further stated that he had not challenged the decision of 17 March 2010 on appeal, as he had familiarised himself with it only in 2012, when he had studied case materials in the course of the proceedings on his forcible expulsion. In any event, should he have challenged that decision on appeal, this would not have remedied the alleged violations in his case.

B. Court's assessment

1. Admissibility

100. The Court notes that, given the parties' submissions and arguments, it must be determined in the first place whether Article 8 of the Convention applied in the present case. Secondly, if Article 8 is applicable, it must be determined whether the applicant can claim to be a "victim" of the violation alleged, given the factual developments which took place after the communication of the case to the respondent Government in September 2013 (see paragraphs 35-39 and 49-56 above). Thirdly, if the applicant can claim to be a "victim" of the violation alleged, it must be determined whether his complaints under this provision alone and/or taken in conjunction with Article 13 of the Convention satisfy the other admissibility conditions.

(a) Applicability of Article 8 of the Convention

101. The Court reiterates that a State is entitled, subject to its treaty obligations, to control the entry of aliens into its territory and their residence there; the Convention does not guarantee the right of an alien to enter or to reside in a particular country. Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence (see, among many other authorities, *Nunez v. Norway*, no. 55597/09, § 66, 28 June 2011).

102. However, domestic decisions in immigration matters may interfere with a right protected under paragraph 1 of Article 8 (see, among others, *Hamidovic v. Italy*, no. 31956/05, §§ 36-38, 4 December 2012). In particular, as Article 8 *inter alia* protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8 (see *Maslov v. Austria* [GC], no. 1638/03, § 63, ECHR 2008).

103. The Court observes that the applicant has lived in Ukraine for over twenty years, initially for the reason that he had been studying there and then on the basis of temporary residence permits issued by the authorities (see paragraphs 8 and 12 above). In that country he obtained higher education and has worked at different jobs. Thus, he must have accumulated social ties to the community in which he lived. While there is no detailed information as to its scope in terms of contacts, friendships and other relationships, it would be too formalistic to suggest that the applicant has not enjoyed private life in Ukraine.

104. The Court further observes that the applicant's current marriage (see paragraph 9 above) cannot be relied upon in the context of the present

case, as it occurred at a time when the applicant's right to stay in Ukraine was already insecure (see *Udeh v. Switzerland*, no. 12020/09, § 50, 16 April 2013).

105. In the light of the foregoing, the Court considers that Article 8 of the Convention applies to the present case and that it is more appropriate to examine the matter in so far as it concerns the applicant's private life (see, *mutatis mutandis*, *Üner v. the Netherlands* [GC], no. 46410/99, § 59, 5 July 2005).

(b) Victim status

106. The Court has held in a number of cases under Article 8 of the Convention relating to the deportation or extradition of non-nationals that the regularisation of an applicant's stay, or the fact that the applicant was no longer under the threat of being deported or extradited – even if the case was still pending before the Court – was "sufficient" in principle to remedy a complaint under Article 8 (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 261, ECHR 2012 (extracts), with further references). Furthermore, in cases where the applicant has not been granted a residence permit, the Court has held that it was no longer justified to continue to examine the application, within the meaning of Article 37 § 1 (c) of the Convention, and decided to strike it out of its list of cases because it was clear from the information available that the applicant no longer faced any risk, at the moment or for a considerable time to come, of being expelled and subjected to treatment contrary to Article 8 of the Convention, and that he or she had the opportunity to challenge any new expulsion order before the national authorities and if necessary before the Court (see *Khan v. Germany* [GC], no. 38030/12, §§ 34 and 36-42, 21 September 2016, with further references).

107. In the present case, the domestic courts' initial decisions granting the authorities' application for the applicant's forcible removal were overturned, and that application was ultimately refused (see paragraphs 35-38 above). In addition to this, the applicant was given the opportunity to submit a new asylum application to the migration authorities, the examination of which is currently pending (see paragraphs 49 and 52 above). This provides him with a lawful ground to stay in Ukraine for the duration of that examination (see paragraphs 52 and 79 above).

108. Thus, as matters currently stand, having regard in particular to the pending proceedings on the applicant's asylum application and the domestic court's decision of 29 October 2014, the applicant arguably does not face any real and imminent risk of expulsion from Ukraine. The applicant's forcible expulsion can only be authorised by the courts, whereas there is no information that the authorities intended either to challenge the decision of 29 October 2014 refusing their application for his forcible expulsion or to submit a new application with a view to giving effect to the decision of

17 March 2010 ordering the applicant to leave Ukraine. Therefore, the Court finds that the applicant can no longer claim to be a "victim" of the alleged violation of Article 8 of the Convention, in so far as it concerns his possible removal from Ukraine, and that this complaint must be rejected pursuant to Article 35 §§ 3 (a) and 4.

109. In view of the above finding, the applicant may not be considered as having an "arguable claim" for the purposes of Article 13 of the Convention in so far as his complaints under this provision taken in conjunction with Article 8 of the Convention concern the alleged risk of his forcible removal from Ukraine (see, *mutatis mutandis*, *Khodzhamberdiyev v. Russia*, no. 64809/10, § 80, 5 June 2012).

110. However, the applicant's prospects of further stay in Ukraine have remained uncertain – so far, he has not been able to regularise his status in that country, which allegedly runs counter the guarantees of Articles 8 and 13 of the Convention.

111. The Court considers that, to the extent the Government's arguments that the applicant could remain in Ukraine and that there were procedures which might have enabled him to regularise his stay and status in Ukraine (see paragraphs 95 and 98 above) may be seen as an objection as to the applicant's victim status in respect of his complaints under Articles 8 and 13 of the Convention of the uncertainty of his stay in Ukraine and his inability to regularise his status in that country, it is closely linked to the substance of that complaint. Therefore, it must be joined to the merits.

(c) As to whether the applicant's complaints under Articles 8 and 13 of the Convention of uncertainty of his stay in Ukraine and his inability to regularise his status in that country satisfy the other admissibility conditions

112. The Court finds that the applicant's complaints under Articles 8 and 13 of the Convention of uncertainty of his stay in Ukraine and his inability to regularise his status in that country raise issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court does not discern any grounds to declare these complaints inadmissible.

(d) Complaints of arbitrariness of the applicant's conviction for violating migration regulations

113. As to the applicant's complaints of arbitrariness of his conviction for violating migration regulations, even assuming they cannot be rejected for non-exhaustion of domestic remedies, they were introduced more than six months after the impugned decisions had been adopted (see paragraphs 15, 18 and 19 above). Accordingly, those complaints must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

(e) Conclusion

114. In the light of the foregoing, the Court declares the applicant's complaints under Articles 8 and 13 of the Convention of uncertainty of his stay in Ukraine and his inability to regularise his status in that country admissible and the remainder of the applicant's complaints under those provisions inadmissible.

115. Having regard to the nature of the applicant's admissible complaints, the Court considers that they fall to be examined under Article 13 taken in conjunction with Article 8 of the Convention.

2. Merits

116. The Court notes that the essential question to be determined in the context of this part of the case is whether the Ukrainian legal system provided for a procedure enabling the applicant to defend effectively his private-life interests in so far as they were affected by the uncertainty of his status and stay in Ukraine.

117. According to the Government, there were procedures which might have enabled the applicant to regularise his stay and status in Ukraine (see paragraphs 94 and 97 above). The applicant contested that argument.

118. The Court notes that in certain circumstances Article 8 may be read as imposing on States a positive obligation to provide an effective and accessible means of protecting the right to respect for private and/or family life (see *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X; *Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; and *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III). To a certain extent, the protection afforded under Article 8 in this respect may overlap with specific guarantees of Article 13 of the Convention. In particular, both provisions require a domestic remedy allowing the competent national authority to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to such an obligation (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 291, ECHR 2011, and, for instance, *Koch v. Germany*, no. 497/09, § 69, 19 July 2012).

119. Turning to the present case, the Court considers that respect for the applicant's private life in combination with the requirement of effective domestic remedies entailed a positive obligation on the respondent State to provide an effective and accessible procedure or a combination of procedures enabling him to have the issues of his further stay and status in Ukraine determined with due regard to his private-life interests. Having regard to the guidelines of the Committee of Ministers concerning the security of residence of long-term migrants, it can be argued that, essentially, the decision-making process should have been focused on two

principal questions: (i) whether the applicant should be allowed to stay in Ukraine given his private-life situation, notably his social ties to the country, and the possibility of maintaining those ties elsewhere, and (ii) whether there were any legitimate grounds outweighing his private-life interests (see paragraph 87 above).

120. The Court observes that prior to the events in 2010 when the authorities considered his possible expulsion (see paragraph 23 above), the applicant had been living in Ukraine for about seventeen years mainly on the basis of temporary residence permits (see paragraphs 8 and 12 above). In the meantime, in 2001, that is about nine years before the applicant faced the risk of expulsion in 2010, Ukraine enacted the Immigration Act setting out conditions and procedures for foreigners and stateless persons seeking leave to permanently reside in that country (see paragraph 74 above). In the present case, it was not argued that those conditions and procedures were unclear, inaccessible or otherwise deficient to the effect that the applicant could not make use of them to regularise his stay and status in Ukraine. Although it is true that only certain private and family considerations, in particular those mentioned in section 4 of the Act, can form a basis for leave to immigrate, it was not demonstrated that the applicant could not meet one or more of those conditions given his social and family relationship during the time he lived in Ukraine. In this context, it must be reiterated that States enjoy a certain margin of appreciation when it comes to setting conditions for the entry of aliens into their territory and their residence there (see *Osman v. Denmark*, no. 38058/09, § 54, 14 June 2011) and there is no evidence that impugned conditions in Ukraine were unreasonable or arbitrary. In this context, the Court reiterates that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. Nor does it guarantee the right to obtain a particular type of residence permit (see *Aristimuño Mendizabal v. France*, no 51431/99, §§ 65-66, 17 January 2006).

121. It is to be noted that at some point of time the applicant tried to regularise his stay and status in Ukraine in accordance with the Immigration Act of 2001 (see paragraph 13 above). Although that was an unsuccessful attempt, there is nothing to suggest that this could be attributed to a deficiency in the relevant regulations or that he could no longer have access to those procedures.

122. Furthermore, the applicant's private-life situation was, to a certain extent, taken into account in the decisions of the Higher Administrative Court and in the judgment of the Desnyanskyy District Court of 29 October 2014 adopted in the proceedings concerning the applicant's forcible expulsion from Ukraine (see paragraphs 35-37 above). The latter court held, *inter alia*, that the applicant's forcible removal from Ukraine would be in violation of his right to respect of his family life as guaranteed by Article 8

of the Convention. Eventually, the proceedings ended in a refusal of the authorities' application for the applicant's forcible expulsion from Ukraine.

123. The judgment of the Desnyanskyy District Court of 29 October 2014 did not provide the applicant with a clear ground for his further stay in Ukraine, as this matter in principle could not be decided in the framework of those proceedings. Nor was it demonstrated that the court proceedings, which, as the Government suggested, the applicant should have instituted to challenge the decision of 17 March 2010 ordering him to leave Ukraine, could have resulted in a decision effectively regularising the applicant's stay and status in Ukraine (see paragraphs 69 and 71-73 above). Nevertheless, as noted above, the authorities no longer intended to remove the applicant from Ukraine (see paragraph 108 above) and, according to the most recent information submitted by the Government, eventually there were lawful grounds for the applicant to remain, albeit temporarily – pending a decision on his asylum application, in Ukraine (see paragraph 52 above).

124. Even though the proceedings on his asylum application are not designed to deal with migrants' claims for leave to remain in Ukraine based on their private-life interests in that country, the applicant's private- and family-life situation or its certain aspects may be examined or taken into account in the context of one or more of the issues to be determined in those proceedings, as it transpires to have been the case during the examination of the applicant's first asylum application (see paragraph 44 above). Also, in so far as the applicant's second application is concerned, the Kyiv Administrative Court instructed the migration service to reconsider the matter in the light of the decision of the Desnyanskyy District Court of 29 October 2014, which addressed, to a certain extent, the applicant's private- and family-life situation (see paragraphs 37, 51 and 123 above).

125. In the light of the foregoing, the Court finds that the issues of uncertainty of the applicant's stay in Ukraine and his inability to regularise his status in that country were not resolved by the refusal of the applicant's forcible expulsion and that it is not clear whether they could have been effectively resolved with the help of the procedures under the Immigration Act (see paragraphs 120 and 123 above, and compare and contrast with *Khan*, cited above). Nevertheless, the Court does not have to rule on the Government's objection as to the applicant's victim status for the reasons stated below.

126. Having regard to all the above procedures and circumstances cumulatively and also to the fact that the applicant can still have access to different domestic procedures which might result in the regularisation of his stay and status in Ukraine (see paragraphs 120-124 above), the Court concludes that it cannot be said that the respondent State disregarded its positive obligation to provide an effective and accessible procedure or a combination of procedures enabling him to have the issues of his further stay and status in Ukraine determined with due regard to his private-life

interests. It follows that there has been no violation of Article 13 taken in conjunction with Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 7

127. The applicant complained that the decision ordering his expulsion had been contrary to Article 1 of Protocol No. 7 and that the domestic law did not provide for the procedural safeguards required by that provision. In particular, the decisions of 17 March and 18 May 2010 on his expulsion had been taken in his absence and without giving him a possibility to submit any arguments in his defence. The applicant also complained that he had been ordered to leave Ukraine despite the fact that at the time he had had a valid residence permit.

128. Article 1 of Protocol No. 7 reads as follows:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

129. The Government contested the applicant's submissions, arguing, in particular, that the applicant had not been "lawfully" resident in Ukraine at the time the decisions ordering his expulsion had been taken.

130. The Court does not find it necessary to determine whether the applicant's complaints in this part of the case are compatible *ratione materiae* with Article 1 of Protocol No. 7, within the meaning of Article 35 § 3 (a), as, in any event, they must be declared inadmissible. In particular, the Court refers to its findings regarding the applicant's complaints under Articles 8 and 13 of the Convention, in so far they concern the alleged danger of the applicant's forcible removal from Ukraine, which are equally pertinent to this part of the case (see paragraphs 108 and 109 above). The Court further notes that, although there might have been certain shortcomings in how the courts at the first and appeal levels of jurisdiction dealt with the applicant's forcible removal case, both in terms of procedure and scope of their examination, eventually those shortcomings were remedied in the course of the proceedings before the Higher Administrative Court and in the proceedings culminating in the decision of 29 October 2014, the applicant having been given ample opportunity to oppose his forcible removal from Ukraine effectively. It follows that this part of the

application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objection as to the applicant's victim status in so far as his complaints under Articles 8 and 13 of the Convention concern the uncertainty of his stay in Ukraine and his inability to regularise his status in that country;

2. *Declares* the applicant's complaints under Article 13 taken in conjunction with Article 8 of the Convention of uncertainty of his stay in Ukraine and his inability to regularise his status in that country admissible and the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 13 taken in conjunction with Article 8 of the Convention and that it is not necessary to consider the Government's preliminary objection.

Done in English, and notified in writing on 12 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

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

A.N.
M.B.

PARTLY CONCURRING OPINION OF JUDGE VEHABOVIĆ

I agree with the outcome in this case but I dissent from the decision of the Chamber not to deal with the applicant's complaints under Article 8 of the Convention alone but only under Article 13 in conjunction with Article 8.

My opinion is that the Chamber did not address the applicant's complaints from the standpoint of Article 8, which is essential for his case and from which all his other arguments arise.

The applicant complained that his removal from Ukraine would entail unjustified interference with his personal and family life, as he had lived in Ukraine since 1993, had established close personal links with the country, and was still married to a Ukrainian national (Article 8). The applicant further complained that the authorities had acted in bad faith when they had fined him for violating migration regulations in March 2010. Relying on Article 13, he alleged that the authorities had not carried out an independent and rigorous scrutiny of his allegations under Article 8 and that the domestic proceedings to which he had had recourse had not complied with the requirements of an effective remedy. In particular, his appeals against the court decisions ordering his forcible expulsion had not had suspensive effect. The applicant also submitted other arguments, for example that the proceedings had been excessively lengthy, that the decision ordering his expulsion had been contrary to Article 1 of Protocol No. 7 and that the domestic law did not provide for the procedural safeguards required by that provision.

In the case of *B.A.C. v. Greece* (no. 11981/15, § 46, 13 October 2016, not yet final) the Court found that Article 8 of the Convention had been breached on account of the State's failure to discharge its positive obligation

> "... consistant à mettre en place une procédure effective et accessible en vue de protéger le droit à la vie privée, au moyen d'une réglementation appropriée tendant à faire examiner la demande d'asile du requérant dans des délais raisonnables afin de raccourcir autant que possible sa situation de précarité ..."

In addition to the very lengthy period of uncertainty endured by the applicant in that case (more than twelve years) and his consequently precarious situation, the Court also had regard to the negative consequences which this had for the enjoyment of his right to respect for his private life (ibid., §§ 41-44). The general circumstances of that case and the conclusions that can be drawn from it are of a similar nature to the present case.

In addition, the circumstances of the present case can be contrasted with those of the applicant in the case of *Aristimuño Mendizabal v. France* (no. 51431/99, 17 January 2006), where the lengthy period of uncertainty and precariousness endured by the applicant – it took the authorities fourteen years to issue her with an official residence permit – led the Court to find a breach of Article 8 since the authorities' conduct was not in

accordance with the law. The Court also identified the negative consequences which this delay entailed for the applicant (ibid., § 71).

In the present case, the Chamber failed to properly identify the stage during the applicant's stay in Ukraine at which an issue first arose regarding his right to respect for his private life, in terms of the uncertainty which he endured and the precariousness of his situation.