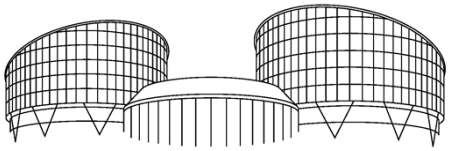

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF R.K. v. RUSSIA

(Application no. 30261/17)

JUDGMENT

STRASBOURG

8 October 2019

FINAL

08/01/2020

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

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

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

Vincent A. De Gaetano, *President,*
Georgios A. Serghides,
Helen Keller,
Dmitry Dedov,
Jolien Schukking,
María Elósegui,
Gilberto Felici, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 30261/17) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the Democratic Republic of the Congo ("the DRC"), Mr R.K. ("the applicant"), on 24 April 2017.

2. The applicant was represented by Mr Maivand Abdul Gani, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr M. Galperin, Permanent Representative of the Russian Federation to the European Court of Human Rights.

3. The applicant alleged, in particular, that his being returned to the DRC would breach his rights guaranteed by Articles 2 and 3 of the Convention and that, in breach of Article 13, he had not had effective remedies in respect of this claim. The applicant also alleged that his detention in Russia had been in breach of Article 5 of the Convention

4. On 25 April 2017 the Court decided to indicate to the Russian Government, under Rule 39 of the Rules of Court, that the applicant should not be expelled to the DRC for the duration of the proceedings before the Court. The applicant's case was also granted priority (under Rule 41) and confidentiality (under Rule 33), and the applicant was granted anonymity (Rule 47 § 4).

5. On 11 July 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1990 in Kinshasa and is a national of the Democratic Republic of the Congo ("the DRC").

7. On 20 October 2015 the applicant arrived in Moscow by plane from Kinshasa on a valid student visa and did not leave after the term of his visa had expired on 29 November 2015.

A. Temporary asylum proceedings (March 2016-April 2017)

8. On 10 March 2016 the applicant asked the Moscow regional department of the Federal Migration Service ("the Moscow Region FMS") to grant him temporary asylum in the Russian Federation. In his application for asylum, he submitted that he is a former member of the AJK (*Alliance des Jeunes Kabilistes*), an association composed of young supporters of President Joseph Kabila in the DRC. According to the applicant's account of events,

> "On 19 January 2015 I took part in organising a political protest against President Kabila, who was seeking to run for a third presidential term [beyond the two-year mandate]. At first, AJK was supporting the government in power and the President. However, when [that government] broke their campaign promises, the AJK party split, and on 19 January 2015 the part of the AJK opposed to the government blocked roads and approached the National Assembly to demand that the President withdraw his candidacy ... We burned car tyres, [and] overturned cars. I was in charge of public propaganda. The demonstration was supressed [by the President's supporters], some participants were imprisoned and others were murdered. I managed to go into hiding, I escaped to a suburb of Kinshasa ... Nobody tried to find me... People who were looking for me sought information on my whereabouts from the migration centre in Congo. My friend told me about it in an email ... [I] decided to apply for a Russian visa ... the Russian embassy was in the vicinity of the safe place where I was staying at the time... [After the events in question], my sisters were raped and beaten by the authorities who came to look for me at their place of their residence...I do not wish to return to the DRC, owing to persecution by the government there... I will never be able to go back to the DRC ..."

9. On 11 April 2016 the Moscow Region FMS found no grounds for granting the applicant temporary asylum, and dismissed his application as unsubstantiated. In particular, the migration authorities relied on the report by the Africa Desk of the Russian Ministry of Foreign Affairs, examined the applicant's request for temporary asylum and assessed the situation in the DRC and held as follows:

> "... during his [asylum] interview ... the applicant did not state that he had any problems with the national authorities... Taking into account his profile, there are no grounds to believe that he would be persecuted on the basis of his ... political convictions ... The political situation in the county is volatile and influenced by the

> upcoming presidential and parliamentary elections. The main intrigue and tension between supporters of President Kabila and his opponents result from the plan to change the Constitution of the DRC in order to allow President Kabila to stay for a third term. The conflict leads to street protests, clashes with police and attempts to seize government buildings... There is no ethnic, religious, political and other discrimination by the authorities. There are no grounds for political emigration ... the main reason for departure is the dire socio-economic situation. ... It follows that [the applicant's] request is unsubstantiated ..."

10. The applicant appealed, reiterating his statements about his personal situation and complaining of a failure by the Moscow Region FMS to make a genuine assessment of the risk to his life and personal security.

11. On 31 May 2016 the Chief of the Migration Service of the Ministry of the Interior upheld the decision of 11 April 2016, stating that the applicant's request had been duly examined by the the Moscow Region FMS and that their decision was lawful and well-reasoned.

12. On 13 January 2017 the applicant challenged the decision of 31 May 2016 before the Zamoskvoretskiy District Court of Moscow.

13. On 6 March 2017 the applicant was arrested and charged with administrative offence of violation of migration regulations.

14. On 13 March 2017 the Zamoskvoretskiy District Court examined the applicant's case in his and his lawyer's absence, having noted that, "[the applicant] did not appear at the hearing, having been informed of its date and location." On the same date the court found the decision of 31 May 2016 lawful and justified. The court considered that the applicant did not make a plausible case for believing that, upon return, he would run a real risk of treatment contrary to Article 3 of the Convention. It held that he had failed to substantiate his allegations of persecution in the DRC and that his personal circumstances could not justify granting him temporary asylum in Russia. In particular, the court held that,

> "... The applicant's statement that he organised a protest in the DRC and thus fears for his life does not serve as sufficient grounds for granting him temporary asylum status. The applicant left the DRC without any impediment ... He sought temporary asylum in Russia five months after his arrival. The Court notes that temporary asylum should not serve as an alternative to the standard ways of legalising one's stay in Russia ... As follows from paragraph 124 of the [Court's] judgment in *Shakurov v. Russia*, 55822/10, of 5 June 2012, '... [the] mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 ...' The applicant did not demonstrate that he was at a higher risk of persecution than the rest of the DRC population. Taking into account that the applicant did not submit any convincing arguments or facts regarding his persecution or ill-treatment in the country of which he is a national, there are no grounds for granting him temporary asylum in Russia ... The applicant's dossier indicates that he did not engage in either political or civic activities... [He] was not persecuted or threatened by the national authorities ..."

15. On 17 April 2017 the applicant lodged a new request for temporary asylum in the Russian Federation. The Court has not been informed about the outcome of those proceedings. In the correspondence of

19 November 2018 the applicant's representative noted that, on an unspecified date, the applicant lodged a new request for temporary asylum in the Russian Federation. However, the status or outcome of these proceedings remains unknown.

B. Proceedings for administrative removal (March-September 2017)

16. On 6 March 2017, the day of the applicant's arrest, the Chertanovskiy District Court of Moscow examined the applicant's case under the Code of Administrative Offences. The applicant attended the hearing and was assisted by an interpreter. During the hearing the applicant referred in passing to his fear of political persecution in the DRC and to pending proceedings for temporary asylum. He also stated that he had lost his passport in December 2016 and did not report the loss [to respective authorities]. The court found him guilty under Article 18.8 § 3.1 of the Code of Administrative Offences of the Russian Federation of breaching the rules governing the stay of foreign nationals in Russia, and ordered his administrative removal and payment of an administrative fine. The court ordered that the applicant was to be held at a centre for the temporary detention of aliens in Moscow until his removal, without specifying an exact date.

17. The applicant appealed, stating that he faced the risk of being subjected to treatment proscribed by Article 3 of the Convention if he was expelled to the DRC. In his appeal against the expulsion order before the Moscow City Court the applicant noted that he had applied for temporary asylum. The applicant did not attend the appeal hearing but he was represented by a lawyer who stated during the hearing that the applicant was not guilty of the administrative offence of which he had been charged.

18. On 12 April 2017 the Moscow City Court upheld the decision of 6 March 2017.

19. On 1 September 2017 the applicant filed a supervisory review complaint against the decision of 6 March 2017, but it was dismissed by the court.

20. On 9 February and 19 November 2018 the applicant's representative informed the Court that the applicant remained in the detention centre for foreigners in Sakharovo, the Moscow Region.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Refugee-status and temporary asylum proceedings

21. For a summary of the relevant general provisions of the Refugees Act of Russia concerning refugee-status and temporary asylum proceedings

(Law no. 4258-I of 19 February 1993), see *K.G. v. Russia* (Dec.), 31084/18, 2 October 2018, §§ 18-22.

B. The Code of Administrative Offences

22. Article 18.8 of the Code provides as follows:

> "1.1. A breach of the regulations on staying or residing in the Russian Federation committed by a foreign national or a stateless person who has no document confirming the right to reside or stay in the Russian Federation ... shall be punishable by an administrative fine of between 2,000 and 5,000 Russian roubles (RUB) and administrative removal from the Russian Federation.
>
> ...
>
> 3.1 The offences described in paragraph 1.1 ... above, if committed in the federal-level cities of Moscow and St Petersburg or in the Moscow or Leningrad Regions, shall be punishable by an administrative fine of between RUB 5,000 and 7,000 and administrative removal from the Russian Federation."

23. Article 3.10 § 5 and Article 27.19 § 3 of the Code allow the domestic courts to order the detention of a foreign national or stateless person with a view to his or her administrative removal.

C. The Code of Administrative Procedure

24. Chapter 28 of the Code governs the procedure for placing an alien in a special purpose facility pending his or her deportation, and for the extension of the term of such detention. Article 269 § 2 requires the courts deciding on the detention of an alien to set a "reasonable time-limit" for such detention and to justify its duration; moreover, the operative part of the decision should set "a fixed term of detention" in the special facility.

D. Case-law of the Constitutional Court

25. In decision no. 6-P dated 17 February 1998, the Constitutional Court held, in particular, as follows:

> "It is clear from Article 22 of the Constitution of the Russian Federation, taken in conjunction with Article 55 (paragraphs 2 and 3), that detention for an indefinite period cannot be regarded as a permissible limitation on the right to liberty and personal security, and is in fact a violation of that right. Therefore, the provisions ... concerning detention pending expulsion should not serve as a basis for detention for an indefinite period, even when the expulsion of a stateless person is delayed because no State is prepared to accept that person ... Otherwise, detention would go from being a measure necessary for ensuring the execution of an expulsion order to a ... punishment which is not provided for under Russian law, and which is incompatible with the provisions of the Constitution of the Russian Federation."

III. RELEVANT INTERNATIONAL AND NATIONAL MATERIAL ON THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

26. As regards the political situation in January 2015 in the DRC, the report of the Secretary-General of the United Nations, issued by the United Nations Security Council on 10 March 2015 (S/2015/172) stated the following:

> "2...The Government submitted to the Parliament a draft electoral law that conditioned the holding of the 2016 presidential and legislative elections on updated demographic data to be obtained through a population census. The last census was undertaken in 1984. The political opposition interpreted the clause as an attempt to delay the 2016 elections and allow the President, Joseph Kabila Kabange, to remain in power beyond his second and last term according to the Constitution. Opposition parties boycotted the vote on the draftlaw on 17 January. The National Assembly nevertheless passed the text. In protest, the political opposition called for demonstrations.
>
> 3. On 19 January, student protests and street demonstrations broke out in various neighbourhoods in Kinshasa and other cities, including Bukavu, Goma, Lubumbashi, Mbandaka and Mbuji-Mayi. Demonstrations continued during the following days, evolving into a larger protest movement, spearheaded by youths, against the controversial clause in the law.
>
> 4. In Kinshasa, police stations, town halls and Chinese businesses were looted and vehicles burned, and some administrative buildings were set on fire in Goma. The Government promptly deployed riot police and troops, including the Republican Guard, to respond to the protests. Disproportionate force was used in some instances and there were reports of alleged human rights violations committed by the national security forces. MONUSCO documented the killing of at least 20 civilians and the wounding of 64 others by the police and the Republican Guard from 19 to 23 January in Kinshasa and Goma...At least 480 individuals across the country, many from the political opposition, were arrested.
>
> ...
>
> 7. On 22 January, the Senate passed the bill after having removed the clause referring to the population census. The protests subsided nationwide following the announcement by the President of the National Assembly, Aubin Minaku, on 24January, that there was agreement on removing the contentious clause. The revised text of the electoral law was adopted by both houses of Parliament on 25 January and was promulgated by the President of the Democratic Republic of the Congo on 12 February ...".

27. As regards the current political situation in the DRC, the two most recent reports of the Secretary-General of the United Nations, issued by the United Nations Security Council and covering the major developments in the Democratic Republic of the Congo for the period from 4 January to 8 March 2019 (see S/2019/218, 7 March 2019) and from 2 October to 31 December 2018 (S/2019/6, 4 January 2019), respectively, state the following:

> "... The security situation in the Democratic Republic of the Congo remained relatively stable following the announcement of the results of the polls [following election on 30 December 2018 of President Félix Tshisekedi]. In the western part of the country, the security situation has remained relatively calm, notwithstanding an outbreak of violence in Kikwit, Kwilu Province [south-west], following the publication of the provisional results of the presidential election on 10 January. The security situation in Yumbi territory, Mai-Ndombe Province [west], has stabilized but has not improved significantly since the violent clashes of 17 and 18 December 2018, which resulted in the deaths of at least 535 people. Some Congolese armed groups and militias, particularly in the Kasai region [south-west], expressed readiness to lay down their weapons, and, in certain instances, surrendered. Congolese armed groups, however, while less active, continued to pose security concerns in Ituri [north-east], the Kasai region, Maniema [east] and North Kivu, South Kivu [both in the east] and Tanganyika Provinces [sout-east] ...".
>
> "...The security situation remained fragile in some parts of eastern Democratic Republic of the Congo, where armed groups continued to carry out destabilizing activities...".

Further, on 29 March 2019 the UN Security Council adopted Resolution S/Res/2463 (2019) concerning the DRC, in which it, *inter alia,* noted:

> "... the preliminary actions taken by President Tshisekedi to put an end to restrictions of the political space in the DRC, in particular arbitrary arrests and detention of members of the political opposition and of civil society, as well as restrictions of fundamental freedoms such as the freedom of opinion and expression, freedom of the press, and the right of peaceful assembly...".

It also condemned:

> "...the violence witnessed in Eastern DRC and the Kasaï region ... the violence committed in Yumbi territory on 16–18 December 2018, some of which the United Nations Joint Human Rights Office (UNJHRO) reported may constitute crimes against humanity...",

It reiterated its concern about the increase in reported human rights violations by State agents in 2018 and welcomed:

> "... in that regard the decision by President Tshisekedi to hold security forces and police accountable for violations of human rights, release political prisoners, and close irregular detention centres, and his commitments to ensure the Government of the DRC respects human rights and fundamental freedoms, as well as to investigate violations of human rights by State agents ...
>
> ...investigations by the Congolese authorities on any disproportionate use of force by security forces on peaceful protesters...".

28. The document entitled "Country Policy and Information Note", issued by the United Kingdom Home Office in January 2019, contains a review of the country guidance case of BM and Others (returnees-criminal and non-criminal) examined in 2015 by the United Kingdom Upper Tribunal (Immigration and Asylum Chamber) (hereinafter, "the Upper Tribunal"), and provides the following information concerning the

assessment of risk in respect of nationals of the DRC returning to their country of origin from the United Kingdom:

> "2.4.7. Since the promulgation of BM and Others in June 2015, the UK has returned over 50 Congolese unsuccessful asylum seekers (mostly by forced removal) to the DRC. Other European states, including Belgium, Estonia, France, Norway, and Sweden have also returned Congolese nationals to the DRC, including unsuccessful asylum seekers (see Returns statistics). There is limited information about the situation faced by returnees [upon] arrival in the DRC, although there continue to be a number of organisations that monitor the general human rights situation in the DRC. Some NGO and media sources have reported that unsuccessful asylum seekers have faced difficulties on return to the DRC, including detention and ill-treatment [...] However, information about the treatment of returnees is limited, anecdotal, and lacks specific detail [...]. It continues to be the case that the Home Office is not aware of independently verified evidence of ill-treatment on return solely because the person is an unsuccessful asylum seeker from the UK.
>
> 2.4.8. When taken as a whole, the evidence does not establish that there are very strong grounds supported by cogent evidence to depart from the case law of BM and Others. A person whose asylum claim has been carefully considered on its individual facts but found not to require protection because of their profile and activities is unlikely to be at risk of serious harm on return by virtue of the fact that they are an unsuccessful asylum seeker ...".

THE LAW

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

29. The applicant complained that his expulsion to the DRC, if carried out, would expose him to a real risk of death and ill-treatment in breach of Articles 2 and 3 of the Convention. The relevant provisions read as follows:

Article 2

> "1. Everyone's right to life shall be protected by law. ..."

Article 3

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

30. The Government contested that argument.

A. Admissibility

31. The Government claimed that the applicant had failed to exhaust domestic remedies in respect of his complaint under Articles 2 and 3 of the Convention. In particular, the applicant had not appealed against the

judgment of the Zamoskvoretskiy District Court of 13 March 2017 by which the refusal to grant him temporary asylum had been confirmed.

32. The applicant submitted that he had not been informed of the day and location of the hearing before the Zamoskvoretskiy District Court and that he had not been summoned to that hearing. He also contented that he had not had an opportunity to appeal against the judgment of 13 March 2017 because he had been in the detention centre at the relevant time.

33. The Court observes that the contents of the case-file reveals that the applicant was detained as from 6 March 2017 and that he nor his lawyer were present at the hearing before the Zamoskvoretskiy District Court that took place on 13 March 2017. According to the judgment, Zamoskvoretskiy District Court examined the applicant's case in his and his lawyer's absence, having noted that the applicant did not appear at the hearing although being informed of its date and location (see paragraph 14 above); the applicant denied having received this information (see paragraph 32 above) and the Government made no submissions concerning this matter.

34. The Court further notes that the content of the case-file does not reveal whether and if so, on which date, the applicant was served with a copy of the judgment of the Zamoskvoretskiy District Court against which he should have lodged a prompt appeal. The Government did not make any further observations concerning the applicant's submissions as outlined above nor did they submit documents demonstrating that the applicant and/or his lawyer had received a copy of that judgment.

35. In these circumstances, the Court finds that the Government have not demonstrated that the remedy of lodging an appeal against the judgment of the Zamoskvoretskiy District Court had, in practice, been made available to the applicant. In this particular situation it could therefore not be considered a remedy to be used. Accordingly, the Court dismisses the Government's objection of non-exhaustion.

36. The Court further finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the applicant's related complaint under Article 3 and will proceed on this basis (see *N.A. v. the United Kingdom*, no. 25904/07, § 95, 17 July 2008). The Court notes that the applicant's complaint under Article 3 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties submissions

(a) The applicant

37. The applicant submitted that in his request for temporary asylum he had indicated the exact date and location of the opposition protest in which he had taken part as a result of which his name had been put on the international wanted persons list. To substantiate his claim before the Court, the applicant adduced a copy of an order of arrest, dated 23 January 2015.

38. He further contended that during the hearing before the Chertanovskiy District Court of Moscow on 6 March 2017 he had claimed that, if he were to be returned to the DRC, he would be subjected to political persecution and ill-treatment there. The applicant claimed that neither the migration authorities nor the domestic courts had thoroughly assessed his fear of persecution and ill-treatment in the DRC.

(b) The Government

39. Referring to the official statistics from the Ministry of Internal Affairs showing that four out of ten nationals from the DRC had been granted temporary asylum in Russia in 2017, the Government noted that the migration authorities granted temporary asylum to foreigners when there were sufficient grounds to believe that they would be persecuted in the country of which they were nationals. As regards the applicant's claim, the Government did not accept that there were substantial grounds for believing that the he would be at risk of treatment contrary to Articles 2 and/or 3 if his expulsion to the DRC was enforced.

40. In this respect the Government drew the Court's attention to the fact that although the applicant had arrived in Russia on 20 October 2015 and his visa had expired on 29 November 2015, it was not until 10 March 2016 that he had applied for temporary asylum. They further pointed at the fact that the applicant had not applied for refugee status and had not made any attempts to legalise his stay in Russia directly after the term of validity of his visa had ended.

41. The Government furthermore noted that in spite of the fact that the applicant relied on his persecution by the DRC authorities as a ground for his request for temporary asylum, he had failed to present plausible arguments and facts to substantiate his allegations. The Government pointed out that during his interview the applicant had stated that he had not been searched for by law enforcement authorities and that he had never been criminally persecuted. In response to the copy of the document submitted by the applicant to Court, the Government noted that according to information provided by the Russia's National Central Bureau for the Interpol, the applicant's name was not on an international wanted persons list. Moreover,

due regard should be given to the fact that, when travelling to Russia nine months later, the applicant had left the DRC for Russia without any impediment. The Government finally noted that the applicant's statements did not indicate that his sisters had been raped and beaten as a consequence of his alleged persecution for his political activity.

42. As regards the proceedings concerning the applicant's administrative removal, the Government submitted that the applicant had been provided with an interpreter during the hearing before the Chertanovskiy District Court of Moscow on 6 March 2017 and that he had been notified of his procedural rights, including his right to file applications and to have legal representation. At the hearing the applicant had briefly stated that he wished to live in a country where he would not be politically persecuted, but he had not referred to a specific fear of death or ill-treatment in the event of his expulsion to the DRC.

2. The Court's assessment

(a) General principles

43. Expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such circumstances, this provision implies an obligation not to deport the person in question to that country.

44. The Court further reiterates that where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. As a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see *F.G. v. Sweden* [GC], no. 43611/11, §118, ECHR 2016). The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State concerned is adequate and sufficiently supported by domestic material as well as by material originating from other reliable and objective sources (ibid, § 117).

45. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, Reports of Judgments and Decisions 1996-V). A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see, for example, *Maslov v. Austria* [GC], no. 1638/03, §§ 87-95, ECHR 2008, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 215,

28 June 2011). The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, §§ 107 and 108, Series A no. 215; and *F.G. v. Sweden*, cited above, § 115).

46. It is for the applicant to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008, and *F.G. v. Sweden*, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see *Paposhvili v. Belgium* [GC], no. 41738/10, § 186, ECHR 2016, and *Trabelsi v. Belgium*, no. 140/10, § 130, ECHR 2014 (extracts)).

47. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see *Saadi*, cited above, §§ 129-32, and *F.G. v. Sweden*, cited above, § 120).

(b) Application of these principles to the present case

48. The issue before the Court is whether the applicant, upon return to his country of origin, would be exposed to a real risk of being tortured or subjected to inhuman or degrading treatment or punishment as prohibited by Article 3 of the Convention. Owing to the fact that the applicant in the present case has not yet been expelled, the material point in time for the assessment of the claimed Article 3 risk is that of the Court's consideration of the case (see paragraph 45 above).

49. In examining the case, the Court observes that it appears from various international reports that following the election in December 2018 of the new president in the DRC, the security situation in the western regions of DRC, including Kinshasa, remained relatively stable. The security situation in the north-eastern or eastern provinces of the country remained however particularly difficult (see paragraph 27 above).

50. The Court notes that the applicant lived in Kinshasa before he left his country of origin and that there is no reason to assume that he would be expelled to the eastern provinces of the DRC.

51. The Court further notes that the applicant has not argued that the general situation in the DRC is such as to entail that any removal to it of a Congolese national will necessarily be in breach of Article 3 of the Convention, nor can such a conclusion be drawn from the case material

before the Court. The Court therefore has to establish whether the applicant's personal situation is such that his return would be in breach of Article 3 of the Convention.

52. As regards the existence of a real and personal risk by virtue of the applicant's past activities in the DRC, the Court notes that the domestic administrative and judicial authorities, having assessed the applicant's claim, found that the applicant did not adduce evidence capable of demonstrating that there are substantial grounds for believing that, upon return to DRC, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention (see paragraphs 9 and 14 above). The Court sees no grounds to depart from this conclusion. In particular, the Court notes that it remains unexplained how the applicant could freely leave the country by plane on a valid visa while he allegedly was on an international wanted persons list (see paragraphs 14 and 41 above) and why he, although having arrived on 20 October 2015 in Russia and his visa having expired on 29 November 2015, waited until 10 March 2016 to lodge an application for temporary asylum.

53. The Court further observes that the applicant submitted to the Court an uncertified copy of an order issued on 23 January 2015 to corroborate his allegations. In this regard, and bearing in mind the above standard of proof (see paragraph 46 above), the Court notes that the content of the case-file reveals that the applicant did not submit this document to the domestic authorities during his asylum procedure. He also did not explain to the Court whether, and if so why, it would have been burdensome for him to obtain the original or a certified copy of the document issued on 23 January 2015, taking into account the fact that he had left the DRC months later, in October 2015. The Court moreover notes that the applicant did not reply to the Government's submission that, according to information provided by the Russia's National Central Bureau of the Interpol, the applicant is not being searched for.

54. The Court has found no concrete information in the contents of the applicant's case file indicating a negative interest of the authorities of the DRC in the applicant, either at the material time or currently. Nothing indicates that these authorities have ever taken actual steps aimed at finding out the applicant's whereabouts after he had left the DRC on a valid student visa.

55. Finally, the Court notes that there is no evidence before it that the applicant was involved in any DRC political opposition activities or group abroad and for this reason would have to fear ill-treatment upon his return to the DRC (see, for similar reasoning *Mawaka v. the Netherlands*, no. 29031/04, § 49, 1 June 2010).

56. In these circumstances, the Court cannot but conclude that the applicant failed to adduce evidence capable of demonstrating that there are substantial grounds for believing that he, if returned to his country of origin,

would face a real risk being subjected to treatment in breach of Article 3 of the Convention.

57. The foregoing considerations are sufficient to enable the Court to conclude that the expulsion of the applicant to the DRC as envisaged by the respondent Government would not be in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

58. The applicant also complained that his detention pending expulsion proceedings had been arbitrary and prolonged and that he had not had access to effective judicial review of his detention. He relied on Article 5 §§ 1 (f) and 4 of the Convention, which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful ...".

59. The Government submitted that there had been no violation on account of the applicant's detention pending expulsion. In particular, the time-limit for his detention had not been specified in the relevant court decision of 6 March 2017 because in regular circumstances it did not take a long time to enforce an expulsion order. The maximum period for enforcing such an order was two years from the date of the relevant expulsion order becoming final.

60. In respect of the applicant's complaint under Article 5 § 4, the Government submitted that he could lodge a supervisory appeal if new circumstances emerged making detention unnecessary or expulsion impossible.

A. Admissibility

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

B. Merits

62. The Court observes that the general principles regarding the deprivation of liberty pending expulsion and availability of a mechanism for review of the continued detention have been stated in a number of its previous judgments (see, among others, *Chahal v. the United Kingdom*, 15 November 1996, § 112, Reports of Judgments and Decisions 1996 V, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009).

63. In the judgments in the cases of *Azimov v. Russia* (no. 67474/11, 18 April 2013) and *Kim v. Russia* (no. 44260/13, 17 July 2014) the Court already found a violation in respect of issues similar to those in the present case.

64. Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion on the merits of these complaints. Having regard to its case-law on the subject, the Court considers that the applicant's detention pending expulsion has been unlawful and that he had no procedure allowing for review of their continued detention.

65. Accordingly, there has been a breach of Article 5 §§ 1 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant also complained that he had not had at his disposal effective domestic remedies in respect of his complaints under Articles 2 and 3. He relied on Article 13 of the Convention, which reads as follows:

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

67. The Government submitted that no separate issue arose under Article 13 of the Convention and that the relevant complaints could be examined under Article 3 of the Convention. They also stated that the most appropriate domestic remedy for the applicant against his forced return to

the DRC would be a request for refugee status or temporary asylum, the proceedings in relation to which (including appeal review by the court) would have a suspensive effect on his administrative expulsion, in accordance with the Refugees Act.

68. Having regard to the facts of the case, the submissions of the parties and its findings under Articles 2 and 3 of the Convention (see paragraphs 49-57 above), the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the admissibility and the merits of the complaint under Article 13 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

70. The applicant claimed that he should be compensated for the suffering which he had endured as a result of the violations found, and sought compensation in respect of non-pecuniary damage. He left the amount to the Court's discretion.

71. The Government submitted that should the Court find a violation of Article 5, the award should be made in compliance with the Court's established case-law.

72. The Court observes that it has found violation of Article 5 of the Convention in the present case. It accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. The Court therefore awards the applicant 5,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant.

B. Costs and expenses

73. The applicant also claimed 150,000 Russian roubles (RUB) or EUR 2,000 for costs and expenses incurred before the Court.

74. The Government submitted no comments concerning the applicant's claim for costs and expenses.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and bearing in mind that a violation has been found only in respect of Article 5 of the Convention, the Court considers it reasonable to award EUR 1,500 to the applicant's representative, Mr Maivand Abdul Gani, plus any tax that may be chargeable.

C. Default interest

76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

V. RULE 39 OF THE RULES OF COURT

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

78. The Court notes that the applicant is still formally liable to administrative removal pursuant to the final judgments of the Russian courts. Having regard to paragraph 77 above, the Court considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 4 above) must remain in force until the present judgment becomes final or until further notice.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Articles 3 and 5 §§ 1 (f) and 4 of the Convention admissible;

2. *Holds* that the forced return of the applicant to the Democratic Republic of the Congo would not give rise to a violation of Article 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 §§ 1 (f) and 4 of the Convention;

4. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention;

5. *Holds*

(a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), to the applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, directly to the applicant's representative, Mr Maivand Abdul Gani, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction;

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

Done in English, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President