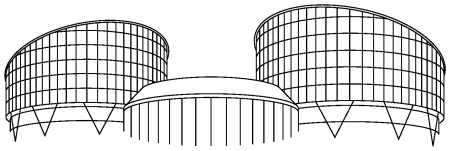

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MSKHILADZE v. RUSSIA

(Application no. 47741/16)

JUDGMENT

STRASBOURG

13 February 2018

This judgment is final but it may be subject to editorial revision.

In the case of Mskhiladze v. Russia,

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

Helen Keller, *President,*
Pere Pastor Vilanova,
Alena Poláčková, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 23 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 47741/16) 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 stateless person, Mr Noe Georgiyevich Mskhiladze ("the applicant"), on 5 August 2016.

2. The applicant was represented by Ms Olga Pavlovna Tseytlina, a lawyer practising in Saint Petersburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that post, Mr M. Galperin.

3. On 6 December 2016 the complaints concerning the conditions of the applicant's detention, the legality of his detention and its review were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972.

A. Administrative-offence proceedings against the applicant

6. The applicant arrived in Russia in 1988. He was subsequently convicted of criminal offences on several occasions. He was released on 3 December 2014 after serving his most recent prison sentence.

7. On 2 December 2014 the Russian Ministry of Justice issued an exclusion order, declaring the applicant's presence in Russia undesirable and prohibiting his return to Russia until 2020. Further to the exclusion order, on 4 March 2015 the migration authorities issued a deportation order in respect of the applicant and he was later arrested. On 6 March 2015 a judge authorised his further detention until 10 March 2015, with a view to enforcing the deportation order. His detention was then extended until 30 August 2015.

8. On 7 May 2015 the Georgian authorities informed the Russian migration authority that the applicant was not a Georgian national and that they would not assist in his return to Georgia. The applicant was released on 30 August 2015 following the expiry of the latest detention order.

9. On 14 December 2015 the applicant was accused of an offence under Article 18.8 § 3 of the Code of Administrative Offences (CAO) on account of his presence in Russia without the necessary documents. On 15 December 2015 the Kirovskiy District Court of Saint Petersburg convicted the applicant and ordered his administrative removal from Russia (without specifying the destination country). The judge noted that the applicant was a stateless person but held that he had to comply with a statutory obligation to leave Russia, having no valid legal basis for being there. Lastly, the judge ordered that the applicant be placed in a detention centre for foreigners, with a view to enforcing his administrative removal.

10. The judgment was amenable to appeal within ten days of receipt by the defendant.

11. On 25 December 2015 the applicant appealed, arguing, *inter alia*, that the penalty of administrative removal could not be enforced in the absence of Georgian or any other nationality and that it was therefore unjustified to place him in detention and keep him there.

12. On 26 January 2016 the Saint Petersburg City Court upheld the judgment of 15 December 2015. The appeal court considered that the applicant could still be removed to the country from which he had arrived in Russia if there was a readmission agreement with that country; that he could be held in detention for a maximum of two years, which was the statutory period for the enforceability of a penalty; and that the CAO had not required the trial judge to set any time-limit when ordering his placement in a detention centre for foreigners.

13. On 24 March 2016 the Georgian authorities again informed the Russian migration authority that they would not assist in providing

documents for the applicant's return to Georgia as he was not a Georgian national and there were no other legal grounds for such assistance.

14. The applicant sought a review of the decisions of 15 December 2015 and 26 January 2016. On 24 June 2016 the deputy President of the City Court upheld them on review under Article 30.12 of the CAO.

15. On 22 July 2016 the District Court dismissed an application from the applicant to terminate the proceedings to enforce the judgment of 15 December 2015. The court held that there was no statutory basis in the CAO or other legislation for granting such an application. On 8 November 2016 the City Court upheld that decision.

16. In the meantime, on 1 August 2016, referring to Article 5 § 4 of the Convention, the applicant lodged an application for release and again sought termination of the enforcement proceedings. By a letter of 2 August 2016 a judge of the District Court returned his application without examination.

17. The applicant lodged an individual complaint with the Russian Constitutional Court (see paragraph 29 below).

18. On 5 June 2017 the applicant's lawyer lodged an application with the Kirovskiy District Court of Saint Petersburg in order to obtain the applicant's release, referring to the above-mentioned constitutional ruling. On 22 June 2017 the District Court ordered his release.

B. Conditions of detention in the detention centre for foreign nationals

1. The applicant's account

19. From 15 December 2015 to 5 August 2016 (when the application was lodged with the Court) and then further until 22 June 2017 the applicant was kept in the Centre for the Temporary Confinement of Foreign Nationals (*Центр временного содержания иностранных граждан*) in Krasnoye Selo. From the start date to mid-February 2016 he was kept in cell no. 404 and from mid-February to 3 August 2016 he was in cell no. 403. According to the applicant, each cell measured eighteen square metres and accommodated four people. The cells were equipped with bedside boards and beds but there were no chairs, tables or other furniture. On 3 August 2016 the applicant was transferred to cell no. 304, measuring eight square metres, where he was kept alone. From late September 2016 to 17 January 2017 he shared cell no. 706, measuring ten square metres, with another detainee. From 17 to 22 January he was in cell no. 405 and from 22 January to 22 June 2017 he was kept in cell no. 406 with three other detainees.

20. During the period of his confinement up to 3 August 2016 the applicant was locked in his cell most of the time, being taken to a courtyard (measuring some fifteen square metres) every second day for ten to fifteen minutes. He was taken there every third day from early 2017. The yard had

no equipment for sport or leisure activities, no benches and no shelter from the rain or snow.

21. The toilets in the cells were separated from the main area by a fixed partition. There was no proper, ceramic toilet bowl, just a "hole" with a flusher set on a small base so the toilet had to be used in a squatting position. According to the applicant, the partition was not high enough and the toilet area remained visible. There were also unpleasant odours.

22. Shower facilities were accessible for ten minutes every fourth day in 2016 and once every seven to ten days from early 2017. There were no facilities for washing or drying clothes and no toilet paper, toothpaste, soap or the like was provided. Bedding was changed once a month. Subsequently, the applicant also stated that the cells became infested with bugs, cockroaches and mice, although it was not clear to what period of time he referred to. He submitted a photograph showing two captured mice in containers.

23. Food was brought to the cells but was cold, particularly in winter, and of mediocre quality. In the absence of tables, detainees had to eat on their beds. There was no supply of drinking water and no facilities for boiling water or cooking food. It was not possible to purchase food.

24. He had been allowed to leave cells 304 and 706 and move within the corridor and shower area but had been prohibited from entering other cells.

25. No radio, television, newspapers or the like were provided in the detention centre. The applicant and his co-detainees were apparently allowed to have a television set during his most recent period of detention.

26. The applicant has submitted several photographs of the cells, a statement written by his cellmate after March 2017, a statement from a detainee written in 2015 and a recent news report about the detention centre.

27. In November 2016 the detention facility was visited by members of a public oversight committee. They noted that the toilets (consisting of a "hole") in the cells on the fourth floor were separated from the main area by a low partition or curtain and that it was not possible to switch the lights on or off from inside the cells. They also noted that the detention centre had no courtyard for detainees.

2. The Government's account

28. According to the Government, as of February 2017 the applicant was being held in cell no. 403, which measured 27.4 square metres (not eighteen as submitted by the applicant). The cell was equipped with a toilet, a sink with hot and cold water, beds and a table. The main lights were switched off at night. The detention centre had a library and detainees could borrow books. Food was prepared and delivered by an external catering company. Hot food was brought in special containers.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. In Ruling no. 14-P of 23 May 2017 the Russian Constitutional Court specified that the scope of the matter before it did not include the legality of imposing the penalty of administrative removal on a stateless person, the related decision to confine that person to a special detention facility, the legality of continued detention without specifying a time-limit or any legal consequences arising from the decision to discontinue such detention. Instead, the Constitutional Court focused on the constitutional requirement to have available an effective remedy against an unlawful, unjustified or disproportionate deprivation of liberty. Under Russian law there were two types of penalty of administrative removal: the controlled-departure procedure and the mandatory-removal procedure. The latter could be accompanied by a decision by the trial judge to issue an order with a view to enforcing the penalty; that decision was enforceable immediately. The use of such detention had to be in compliance with the requirements of proportionality; be based on good reasons; and correspond to the requirement of the reasonableness of legal regulations and practical application. The Constitutional Court also pointed out that such detention was not automatic but remained at the discretion of the judge who had to find that it was necessary for ensuring the enforcement of the penalty of removal, having due regard to all the pertinent circumstances. The Constitutional Court then noted that it was indeed the case that under Russian law a trial judge was not required to put a time-limit on a detention order and that it was not excluded that such detention could continue after the expiry of the two-year period for enforcement of the penalty. A judge could not legally discontinue enforcement of a penalty where no country was ready to accept a defendant. The absence of judicial review of detention contributed to the uncertainty which was present in the applicable legislative framework. The Constitutional Court required the federal legislature to amend the CAO without delay by making provision for effective judicial review.

III. OTHER RELEVANT MATERIAL

30. In May 2016 the Russian authorities submitted a communication to the Council of Europe Committee of Ministers (Action Plan, DH-DD(2015)527) relating to the execution of the Court's judgment in *Kim v. Russia* (no. 44260/13, §§ 41-57 and 68-74, 17 July 2014). As regards general measures, the Russian authorities submitted that they were considering the necessity of legislative reform, setting a time-limit for detention in centres for aliens pending removal. As regards the violations of Article 5 §§ 1 and 4 of the Convention found in *Kim* (cited above), the Russian authorities indicated in Action Plan, DH-DD(2017)425 that the

judgment had been translated, published and disseminated to the competent authorities and that an assessment by them of the need for legislative reform was to take place by December 2015. Following that assessment, a report was submitted to the President of the Russian Federation in August 2016, including proposals for legislative amendments. As a result, by an Order of 26 October 2016 the Government instructed the Ministry of the Interior to prepare a draft law "On Amendments to the Code of Administrative Offences" concerning detention with a view to expulsion and deportation as well as appeals. The draft is due to be finalised by December 2017.

31. On 26 May 2016 the Human Rights Centre "Memorial" and the Anti-Discrimination Centre "Memorial", both NGOs, submitted a communication (DH-DD(2016)864) concerning the general measures in the *Kim* case. They stated that, in general, the authorities were continuing the practice of the arbitrary detention of stateless individuals awaiting removal from the Russian Federation, without making available a procedure for judicial review of the lawfulness of such a measure. They noted, however, that a positive step had been taken by the courts in the city of Ivanovo by setting a time-limit for detention pending removal in some cases.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The applicant complained under Article 3 of the Convention about the conditions of his detention in Krasnoye Selo. Article 3 reads as follows:

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

A. Admissibility

33. The Court observes at the outset that the applicant complained about the conditions of his detention from 15 December 2015 to 5 August 2016, the date when he lodged his application with the Court, as well as about the conditions of his continued detention after that date. Having regard to the available information, the parties' submissions and the scope of the present case, the Court considers it appropriate to examine the complaint as concerning the period from 15 December 2015 to 22 June 2017 (see, for the approach, albeit in the context of a continuous situation under Article 5 § 3 of the Convention, *Novokreshchin v. Russia* (Committee), no. 40573/08, §§ 11-18, 27 November 2014, and *Kalinin v. Russia* (Committee), no. 54749/12, §§ 3 and 15, 19 February 2015). Both parties have been expressly afforded an opportunity to make submissions in respect of the

entire period. Indeed, in their observations in February 2017, as well as in their further observations, the Government commented on the contemporaneous conditions of the applicant's detention in cell no. 406, in which the applicant had been kept from January 2017 until his release in June 2017. It appears that the material conditions remained essentially the same during this final period of time.

34. The Court notes that this complaint 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

35. The Court notes that the Government's submissions only concern the applicant's conditions of detention which were contemporaneous with the Government's submission of their observations to the Court in February 2017. After examining the applicant's detailed submissions, the other available material, and in the absence of any submissions from the Government, the Court considers it appropriate to rely on the applicant's account of the material conditions of his detention as regards the period from 15 December 2015 to 21 January 2017.

36. The Court observes that the applicant did not allege that he had been kept at the relevant time in severely overcrowded conditions resulting, for instance, in him not having an individual sleeping place and having to take it in turns to sleep (see, by contrast, *Kim v. Russia*, no. 44260/13, §§ 18-19 and 41-57, 17 July 2014 concerning the same detention facility in 2013, and *Georgia v. Russia (I)* [GC], no. 13255/07, § 199, ECHR 2014 (extracts)). It follows from the applicant's own submissions that detainees had 4-4.5 square metres of floor space each (including space occupied by furniture but not the cell toilet area) when he was detained with three other people in the cells located on the fourth floor of the detention centre.

37. In the Court's view, the above consideration is not by itself sufficient to conclude that there has been a violation of Article 3 of the Convention (compare *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 163-67 and 170-77, ECHR 2016 (extracts)).

38. As regards the other aspects (see paragraphs 20-25 above), it is first noted that the toilet was separated from the main area by a partition and, usually, a curtain. The available material, including photographs submitted by the applicant, does not disclose whether that arrangement raised any particular problem of privacy. The applicant has also not specified in what manner the presence of bars on the windows posed a problem; no particular consequences arose from that measure relating to the entry of natural light or air into the cell. The allegation concerning mice was first raised in the applicant's observations in reply to the Government's submissions. It has

not been argued that that was a pervasive problem at the material time or that the authorities did nothing to deal with it.

39. In so far as they have been substantiated and established in the present case, the remaining aspects of the material conditions of confinement up to 21 January 2017 (relating to the light in the cell during the night, food, hygiene and sanitary arrangements, or activities in the detention centre), were not shown to have reached the minimum threshold of severity and thus did not amount to "inhuman" or "degrading" treatment within the meaning of Article 3 of the Convention. Lastly, nothing suggests that the applicant had any health issues that would require attention and could be pertinent in assessing the material conditions of confinement.

40. As regards the conditions of the applicant's detention from 22 January to 22 June 2017, the Court discerns no significant factual elements to give a different assessment.

41. There has accordingly been no violation of Article 3 of the Convention as regards the conditions of the applicant's detention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

42. Referring to the Court's findings under Articles 5 and 46 of the Convention in *Kim* (cited above, §§ 41-57 and 68-74), the applicant complained that his detention had been and remained, as of August 2016, unlawful and arbitrary since it should have been clear to the authorities that his removal was impracticable.

43. Article 5 § 1 of the Convention reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

44. The applicant submitted that it had been clear, and had remained so all along, that no State was willing to accept him and that he was a stateless person with no right of entry anywhere. As early as 2015 the Russian authorities had been told that the applicant had no right to enter or reside in Georgia. However, they had not attempted to negotiate with the Georgian authorities after that clarification.

45. The Government argued that it had been possible to detain the applicant for two years, which was the period for enforcing the final penalty of administrative removal.

46. The Court notes that this complaint 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.

47. It is not disputed that the applicant's detention in a centre for foreigners amounted to a "deprivation of liberty" and that it fell within the ambit of subparagraph (f) of Article 5 § 1 of the Convention. The Court also notes that the applicant did not complain about his arrest and detention before or during the trial on 15 December 2015. Nor did he complain about his detention during the appeal proceedings, which ended with the decision of 26 January 2016.

48. There is no dispute about the fact that at all stages of the administrative-offence proceedings, the Russian authorities, including the courts and the bailiff service, were aware that the applicant was a stateless person. The impracticability of his removal to Georgia should have become obvious to them no later than 24 March 2016, when the Georgian authorities reiterated their earlier statement that the applicant was not a Georgian national and that there were no other legal grounds for assistance to the Russian authorities, *inter alia*, by way of providing documents for his entry into Georgia. The Court has not been provided with sufficient information concerning any other plausible options for enforcing the penalty of removal (in terms of arrangements for his removal, such as reliance on a readmission procedure or agreement, or in terms of a country of destination), apart from removal to Georgia. There is also no indication of the Russian authorities taking any steps towards the implementation of any such alternative solutions.

49. Having regard to the Court's findings in similar cases concerning the same legal framework (see *S.K. v. Russia*, no. 52722/15, §§ 110-17, 14 February 2017, with further references), and with particular regard to the context of the applicant's situation as a stateless person, the Court concludes that there have been violations of Article 5 § 1 of the Convention as regards the applicant's detention, counting at least from late March 2016 to his release on 22 June 2017.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

50. The applicant complained under Article 5 § 4 of the Convention about the legal possibility to "take proceedings" to have the legality of and his continued detention reviewed by a court or have other pertinent aspects examined. He also complained about the delay in the examination of his appeal against the judgment of 15 December 2015 (in so far as it concerned his placement in a detention centre for foreigners).

51. Article 5 § 4 reads as follows:

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

52. The Government acknowledged that Article 5 § 4 had been violated on account of the length of the appeal proceedings "in respect of the court decisions dated 15 December 2015 and 26 January 2016".

53. The applicant maintained his complaint concerning the length of the appeal proceedings against the judgment of 15 December 2015 in so far as it concerned the detention matter. He also maintained his complaint concerning the lack of a possibility to take proceedings for a review of his continued detention after January 2016. As an example, he referred to his case against the bailiff service, in particular the fact that it had taken some three months to obtain an appeal decision (see paragraph 15 above).

B. The Court's assessment

54. As regards the first complaint, the Court notes that the relevant appeal decision was issued on 26 January 2016 while the related complaint about the length of the appeal proceedings in so far as it concerned the detention matter was first raised before the Court on 5 August 2016. There is no reason to consider that the applicant or his lawyer were not immediately aware of that decision or that it is relevant to take into account, for the purpose of applying the six-month rule, the decision dated 24 June 2016 taken in the review procedure under Article 30.12 of the CAO (see also *Smadikov v. Russia* (dec.), no. 10810/15, 31 January 2017). Accordingly, this complaint has been lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

55. As regards the complaint about the absence of a review procedure in respect of the continued detention, the Court notes that this complaint 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.

56. The Court has taken note of the findings in the ruling dated 23 May 2017 by the Constitutional Court in the applicant's case. However, in terms of Article 5 §§ 1 and 4 of the Convention, those findings have no direct bearing in respect of the assessments of the facts and procedure, which mostly predated that ruling. As to subsequent events, the Court observes that on 22 June 2017 a district court examined an application for release, lodged on 5 June 2017, and allowed it, with reference to the constitutional ruling.

57. Having regard to the Court's findings in similar cases (see *S.K. v. Russia*, cited above, §§ 104-09, with further references), the Court concludes that there has been a violation of Article 5 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed compensation in respect of non-pecuniary damage, leaving the amount to the Court's discretion. He specified that as a stateless person he would be unable to open a bank account and thus requested that the Court authorise payment of any just satisfaction award into his representative's bank account.

60. The Government made no specific comment.

61. The Court awards the applicant 7,500 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable. Should it facilitate payment of that sum, the Court considers it appropriate that the amount awarded to him by way of just satisfaction should be held in trust for him by his representative, Ms O. Tseytlina (compare *Khamidkariyev v. Russia*, no. 42332/14, § 171, 26 January 2017).

B. Costs and expenses

62. Ms Tseytlina also claimed on behalf of the applicant EUR 1,100 for the costs and expenses incurred at the domestic level and EUR 850 for the representative's fees incurred before the Court. She asked to have the award transferred to the bank account of the Anti-Discrimination Centre "Memorial" (ADC Memorial), a non-governmental organisation in Belgium.

63. The Government made no specific comment.

64. 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. The Court observes that the legal services agreements concluded for proceedings at the domestic level and before the Court were signed by ADC Memorial and the applicant's representative, Ms Tseytlina. Being one of the *de facto* beneficiaries of those agreements, the applicant did not effect any payment and there is nothing to suggest that he incurred

any pecuniary obligation under them. Furthermore, at least a part of the related expenses arguably incurred by ADC Memorial has not been shown to be related to the applicant and the violations of the Convention against him as found by the Court in the present case. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 1,000 under all heads, to be paid to the Anti-Discrimination Centre Memorial (ADC Memorial) non-governmental organisation in Belgium.

C. Default interest

65. 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.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the conditions of detention from 15 December 2015 to 22 June 2017, and the lawfulness, arbitrariness and review of detention from 26 January 2016 to 22 June 2017 admissible;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 3 of the Convention;

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

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a possibility to take proceedings for review of the continued detention;

6. *Holds*
   (a) that the respondent State is to pay, within three months the following amounts, at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the applicant; if appropriate, that sum is to be held by Ms O. Tseytlina in trust for the applicant;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be

paid to the Anti-Discrimination Centre "Memorial" (ADC Memorial) non-governmental organisation in Belgium;

(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;

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

Done in English, and notified in writing on 13 February 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Helen Keller
President