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The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg CEDEX
France

7 February 2020

Re: T.K. and S.R. v. Russia (app.no. 28492/15 and 49975/15)

Dear Sir or Madam,

Please find enclosed the applicants' request for referral of the above cases to the Grand Chamber of the Court.

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Yours faithfully,

Nadezhda Ermolayeva,
the applicants' legal representative

Enc.

The applications nos. 28492/15 and 49975/15)

THE EUROPEAN COURT OF HUMAN RIGHTS

The case T.K. and S.R. v. Russia

The applicants' request for referral of the case to the Grand Chamber of the Court

7 February 2020, Moscow

In accordance with Article 43§1 of the Convention and Rule 73 of the Rules of the Court the applicants instructed me to file in the request for referral of their case to the Grand Chamber of the Court. The present request consists of three main parts:

A. The analysis of the Chamber's conclusions in the judgment of 19 November 2019 which tend to change the Court's established approach to the extradition cases
B. Diplomatic assurances and its value
C. The applicants' conclusions on the case

A. The Analysis of the Chamber's Conclusions Which Tend Depart from the the Court's Established Approach in the Extradition Cases

1. The Chamber Judgment of 19 November 2019 (hereinafter – the Judgment) is based on the following conclusions in relation to applicants' arguments under Article 3 of the Convention.
2. These conclusions can be divided into three main groups: a) referring to the general situation in Kyrgyzstan, b) referring to the individual situation of the applicants, c) referring to the diplomatic assurances of the receiving state.
3. Assessing general situation with human rights in Kyrgyzstan the Chamber acknowledged that there is a common accord of international, regional and national NGOs as well as UN related bodied about existing national routine practice of torture in Kyrgyz detention facilities (§82 of the Judgment). However, the Chamber noticed that there is a certain consensus that some positive steps to remedy the situation had been made since 2010. Similarly, the Chamber acknowledged that cases of torture are reported, however it was not considered to be a sign of existing risk for the applicants but rather the sign of certain steps made by Government to eliminate torture through revealing investigating that cases (§83 of the Judgment).
4. In this respect, the applicants should note that ones right not to be subject to torture is of absolute nature, and thus is protected by the Convention in the strictest possible manner. Any reduction of this standard (by, for example, acknowledging that certain amount of torture cases is acceptable in a country which expressed eligibility to its human rights international obligations) will undermine, in the applicants' opinion, the whole Conventional system with its high values.
5. Further, the Chamber found it appropriate to depart from the Court's established approach that ethnic Uzbeks constitute a vulnerable group which faces increased risk of torture if detained in Kyrgyzstan. In support of this approach the Chamber refers that reliable international sources keep silent about Uzbeks as a targeted group (§84-88 the Judgment).
6. Though, the applicants should underline that nothing in these reliable sources indicates that this statement is based on certain evidence. By contrast, the reliable human rights sources continue to indicate that cases of discrimination against the ethnical minorities are not rare and that victims of ethnic clashes of 2010 still suffer the denial of justice and persecution.

7. It does not follows directly from the Judgement (and that's actually the key point of the case) what kind of positive steps inside the accepting state should be taken into account in order to conclude that extradition to Kyrgyzstan does not any longer exposes a person of Uzbek nationality to high risk of ill-treatment. One may try to speculate and try to determine those factors which allows to judge about positive changes. It may be seen from the judgment that the Chamber attempted to see those changes in (a) silence of international sources about new cases of torture of members of vulnerable group and (b) creation of certain national mechanisms which allow an independent actor to come to conclusion that it is effective enough to overcome torture practices. However, nothing in the Judgment indicates that this proposal is correct or based on the Court's caselaw.
8. In the applicants' opinion these or may be some additional factors should be somehow stipulated by the Grand Chamber, since such indication would make the Court's caselaw foreseeable enough in determination of the criteria of estimation of changes of the human rights climate in a country which is not a Party to the Convention. Indeed, human rights situation in different regions tends to change in different directions, thus negative changes are usually quit vivid and easy to fix (they are usually the saddest and the ugliest consequences of armed conflicts and other disasters); on the contrary, positive changes in the country with long term negative human rights profile should be fixed with particular scrutiny. Lack of such scrutiny may result in false optimism about the destiny of persons who are forcefully returned there.
9. Assessing the individual risks for the applicants, the Chamber underlined that the charges against them in Kyrgyzstan constitute that of "common criminal nature" and are not anyhow connected with the applicants' ethnicity. However, the applicants should not agree with this assessment. The second applicant was charged with violent acts (including those of killing police officer of Kyrgyz origin) in course of ethnic clashes in June 2010 in Jalalabad. (See also §14 of partly dissenting opinion of Judge Keller). Yet the first applicant was indeed charged with economic crime, however according to him he left his country of origin shortly after the clashes, and then in September 2010 upon the request of his Kyrgyz colleague a criminal investigation into his previous business activities was opened against him. According to numerous reports of international non-governmental human rights organization as well as UN based bodies, deprivation of property of ethnic Uzbeks is also a method of discrimination used by Kyrgyz authorities (see also §11 of the dissenting opinion of Judge Elòsegui).
10. The Chamber also stressed that the national courts are in a better placed position in estimation of the applicant's evidence (§90 of the Judgment) and refers to the case of *F.G. v. Sweden* ([GC] no.43611/11, §§111-27, ECHR 2016). However, the Judgment in *F.G.* confirms the principles of *Saadi v. Italy* ([GC], app.no. 37201/06, ECHR 2008) which established that the applicant in expulsion or extradition case is expected to to adduce evidence capable of proving that there were substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3, and that where such evidence was adduced, it was for the Government to dispel any doubts raised by it (*Saadi*, cited above, § 129). *F.G.* further gives a certain rectification, providing the following. In case the applicant's plea is based mainly on general considerations, the obligations incumbent on the States under Articles 2 and 3 of the Convention in

expulsion cases entail that the authorities carry out an assessment of that risk of their own motion (see, for example, *Hirsi Jamaa and Others* [GC], app.no.27765/09, §§ 131-33, ECHR 2012; and *M.S.S. v. Belgium and Greece* [GC], app.no.30696/09, § 366, ECHR 2011). Whereas if the applicant's arguments are based on his/her individual circumstances, that is for the applicant to provide the authorities with evidence and proofs of his/her claims. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned (*F.G.* cited above, §120). However, as it follows from the Judgment of 19 November 2019 in the present case, the applicants' arguments about high risk of torture on the basis of their ethnicity were dismissed by the national authorities with the reference solely or in large extent to diplomatic assurances and possibility for Russian diplomates to visit the extradited persons (§20 and §31 of the Judgment). Hence, the authorities failed to make any sufficient research or estimation of the risk for the detained Uzbeks charged with offenses connected with ethnic clashes of 2010 (vulnerable group) to be subject to torture, but merely relied on the assurances.

11. In this connection, the applicants' also underline that the Chamber's approach to the standard of estimation of evidence by the national authorities tend to vary from one established earlier in *Saadi* and *F.G.*.
12. Summing it up, the Chamber Judgment is based on approach of acknowledging that though the torture cases are not eliminated in Kyrgyzstan and though the national authorities are still criticized by international human rights community because of their failure to comply with their international obligation and though there are no direct indications on significant approval of situation of ethnic Uzbeks, some positive steps in the country and Government's reference to the diplomatic assurances were enough to convince the Chamber that the Russian authorities conducted proper research and estimated duly the applicants' arguments and that the applicants' extradition to Kyrgyzstan would not constitute a violation of Article 3 of the Convention, since the applicants' arguments were considered by national courts.
13. It should be also underlined that two Judges of the Court expressed their dissenting opinions and disagreed with the opinion of the majority in the Chamber. Both Judge Keller and Judge Elòsegui expressed doubts about the sustainability of the conclusions to which the Chamber came in the Judgment.

B) Diplomatic assurances and its value

14. In the Judgment the Chamber underlines that it was enough to solve the case without providing deep analysis of the quality of diplomatic assurances, however the Chamber found it appropriate to scrutinize it. In the applicants' opinion, the Chamber has departed from the well established Court's caselaw.
15. First, the Chamber refers to the Court's standards in assessing the quality of assurances as established in *Othman (Abu Qatada) v. UK* ([GC] app.no. 8139/09, §189, ECHR 2012). According to the Court's approach, the following factors should be taken into account: (i) whether the terms of the assurances have been disclosed to the Court; (ii) whether the assurances are specific or are general and vague; (iii) who has given the assurances and whether that person can bind the receiving State; (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them; (v) whether the assurances concerns treatment which is legal or illegal in the receiving State; (vi) whether they have been given by a Contracting State; (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances; (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms; (x) whether the applicant has previously been ill-treated in the receiving State and (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.
16. The approach of the Grand Chamber in the case of *Othman* (§§197 – 204) shows that this factors can never be taken alone, but rather have cumulative effect. However, in the Judgment of 19 November 2019, the Chamber concludes "any of the above, or other factors taken alone or in combination, are in themselves required or sufficient for a conclusion on a quality or reliability of assurances. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time" (§101 of the Judgment). The Chamber refers to §148 of the Judgment in the case of *Saadi v. Italy* ([GC], app.no. 37201/06, ECHR 2008) which had been considered 4 years before the case of *Othman,* where the factors of assessment of the quality of assurances were formulated by the Court.
17. This trend to depart from the Court's approach used in the case of Othman is also clear if one looks at the Chamber conclusion about the reliability of the Kyrgyz assurances. Thought the Chamber accepts they are formulated in a general in formal manner (§103 of the Judgment), and there is no indications about their legal nature and binding force, no practical way to challenge compliance with the assurances in court of any international body, etc. Yet, the assurances satisfied the Chamber in terms of their quality (See §15 of partly dissenting opinion of Judge Keller).
18. Hence, the Judgment of 19 November 2019 tends to indicate that the Chamber departs from the well established caselaw in the question of estimation the quality of assurances in extradition cases. However, the question of changing of the Court's approach to a

certain issue (especially of major importance, such as quality of diplomatic assurances in extradition cases) should be decided by the Grand Chamber.

C. The Applicants' Conclusion

19. The applicants come to the conclusion that the Chamber's Judgment does not, first of all, establishes the criteria of the quality of changes of the human rights situation in relation to a vulnerable group in the receiving countries in extradition cases. In other words, the Chamber failed to determine the factors which should be taken into account in assessing whether the degree of the risk of torture to the members of vulnerable group has changed.
20. It should be underlined that similar position is expressed in Partly Dissenting Opinion of the Judge Keller. In particular, it is stated that the Chamber has failed to establish evidential standard that should be met in order "to justify a reassessment of the Court's findings in a well established line of cases concerning human rights situation in a State that is not a party to the Convention" (§2). Judge Keller also expressed doubts that the reassessment of the established approach of the Court can be made by Chamber, but not the Grand Chamber.
21. Next, the applicants maintain that the Chamber tends to depart from the general Court's approach to the assessment of the quality of diplomatic assurances given by a receiving country.
22. Both issues constitute a serious question, which indicates new tends in the Court's case law and are not anyhow touched in the cases currently pending before the Grand Chamber. In view of said above, the applicants suppose that the present case should be referred to the Grand Chamber for reconsideration.

7th February 2020

The applicants' legal representative Nadezhda Ermolayeva