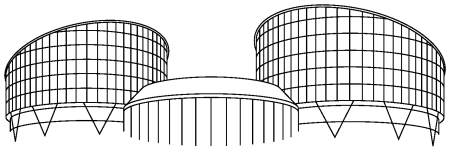

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF DZHURAYEV AND SHALKOVA v. RUSSIA

(Application no. 1056/15)

JUDGMENT

STRASBOURG

25 October 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dzhurayev and Shalkova v. Russia,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 October 2016,

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

PROCEDURE

1. The case originated in an application (no. 1056/15) 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 Tajik national, Mr Tuychi Akbarovich Dzhurayev, and a Russian national, Ms Yekaterina Sergeyevna Shalkova ("the applicants"), on 15 December 2014.

2. The applicants were represented by Mr B.I. Ponosov, a lawyer practising in Ocher. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights.

3. The applicants alleged, in particular, that the authorities' decision to exclude the first applicant from Russia violated their rights under Articles 8 and 13 of the Convention.

4. On 7 October 2015 the complaints concerning Articles 8 and 13 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1966 and 1985 respectively. They live in Perm, Russia. The facts of the case, as submitted by the parties, may be summarised as follows.

The circumstances of the case

1. Background information

6. In 1995 the first applicant moved to Russia from Tajikistan. In 1998 he was sentenced by the Dzerzhinsky District Court in Perm to eight years of imprisonment for drug trafficking. In 2011 that conviction was expunged.

7. At some point after his arrival in Russia, the first applicant entered into a relationship with the second applicant. In 2006 the couple had a son and in 2009 they officially registered their marriage. There were two other children in the applicants' family from the second applicant's previous marriage.

8. The documents submitted indicate that the first applicant lived in Russia on regularly extended temporary residence permits and was allowed to work. He was also involved with the Union of Tajiks in Russia (*Союз Таджиков России*), a public organisation promoting cultural ties between Tajikistan and Russia.

2. The exclusion order against the first applicant

9. On 13 May 2013 the first applicant left Russia to go to Tajikistan. On 21 May 2013 on his way back to Russia, at Yekaterinburg Koltsovo airport, he was informed that he was not allowed to re-enter the country. The written notice given to him stated that he was the subject of an exclusion order and of a re-entry ban on the basis of section 27 § 1 of the Entry Procedure Act, that is to say "for the purposes of ensuring the defensive capacity or security of the State, or protecting public order or health". No indication of the length of the ban's duration, the authority responsible or any other information was given.

3. The applicants' attempts to establish which executive authority had issued the exclusion order

10. After the first applicant had been refused admission to Russia, on various dates between May and November 2013 the second applicant sent requests to a number of executive authorities, including the Federal Security Service of the Russian Federation (*Федеральная служба безопасности*

(*ФСБ*)) (hereinafter "the FSS") and its department in the Perm Region (*Федеральная служба безопасности по Пермскому краю*) (hereinafter "the Regional FSS"), the Federal Border Service (*Пограничная служба*), the Russian Ministry of the Interior (*Министерство внутренних дел Российской Федерации*) (*МВД*)), the Ministry of Foreign Affairs (*Министерство иностранных дел Российской Федерации* (*МИД*)), the Russian Drug Enforcement Agency (*Федеральная служба Российской Федерации по контролю за оборотом наркотиков* (*ФСКН*)), and the Russian Federal Migration Service (*Управлении Федеральной миграционной службы* (*ФМС*)) (hereinafter "the FMS") and its Perm Region department (hereinafter "the Perm Region FMS") asking whether it had been they who had taken the decision for the first applicant to be excluded from Russia. In their replies the agencies either denied having provided the basis for the re-entry ban or refused to provide information. The applicants furnished the Court with copies of their information requests to the above agencies and their replies.

11. In the absence of information concerning the basis for the exclusion and the executive authority responsible therefor, in December 2013 the applicants lodged a complaint with the Leninskiy District Court of Perm against the Perm Region FMS, alleging that it had taken the decision to exclude the first applicant for reasons unknown and stating that the first applicant's inability to enter Russia had disrupted their family life. By a decision of 20 February 2014 the Leninskiy District Court rejected the complaint, stating that the subject of the complaint should have been not the Perm Region FMS, but the Regional FSS.

4. Appeal against the exclusion order in the domestic courts

(a) Proceedings in the Perm Regional Court

12. At the end of February 2014 the applicants lodged a complaint against the Regional FSS with the Dzerzhinsky District Court of Perm and requested that the exclusion order be quashed and the re-entry ban lifted. The Dzerzhinsky District Court forwarded the complaint to the Perm Regional Court (hereinafter "the Regional Court"), as under domestic regulations regional courts were to examine cases involving State secrets.

13. On 16 May 2014 the Regional Court examined the complaint in camera. Prior to that examination the second applicant and the applicants' counsel gave undertakings of confidentiality concerning the information examined in camera hearing. The Regional FSS provided the court with the case file concerning the first applicant. The file, which seemed to comprise about two hundred and forty pages, was reviewed by the judge within the space of a few minutes. Neither the second applicant nor the applicants' counsel was allowed to see the file's contents.

14. The Regional FSS was represented at the hearing by its counsel. Another FSS officer, an operational search officer who had participated in operational measures against the first applicant, was called as a witness. According to the executive agency, the exclusion order and the re-entry ban had been imposed on the first applicant on the basis of a report drafted by the Regional FSS dated 7 September 2012 according to which the first applicant was a member of an extremist group and had incited ethnic tensions. The Regional FSS refused to specify which actions of the first applicant had served as the basis for the ban. When the applicants' counsel tried to question the FSS operational officer concerning the factual basis for the report of 7 September 2012, the latter refused (with the judge's approval) to answer. According to the second applicant, neither she nor her counsel was allowed access to any of the documents that had served as the basis for the exclusion order.

15. On 16 May 2014 the Regional Court upheld the first applicant's exclusion and the re-entry ban, stating, *inter alia*, that according to the witness statement of the FSS operational search officer "the [first] applicant had been involved in activities threatening State security. This has been confirmed by the secret operational documents presented, which have been reviewed by the court and returned to the representative of the FSS". The court further stated that the decision to exclude the first applicant had been issued in accordance with the procedure prescribed by law and its reasoning had referred to the information submitted by the Regional FSS; therefore, it had been lawful. As to whether the imposition of the re-entry ban amounted to an interference with the right to family life, the court stated that interests of the society prevailed over the private interests of the [first] applicant. The court further stated that given the fact that the entry ban was valid at least until the end of 2014, the second applicant and her son could visit the first applicant in the summer of 2014 during the school holidays.

(b) Appeal to the Supreme Court of the Russian Federation

16. The applicants lodged an appeal against the decision of 16 May 2014 with the Supreme Court of the Russian Federation (hereinafter "the Supreme Court") stating, *inter alia*, that (i) neither they nor their representative – despite having given an undertaking of confidentiality – had been told anything about the content of the information that had served as the basis for the exclusion and (ii) the court had taken into account the operational information furnished by the Regional FSS even though that evidence had not been formally submitted and should therefore not have been considered. The applicants further stated that the information furnished by the FSS did not give details of the nature of the first applicant's activity that had allegedly posed a risk to the national security. Finally, the applicants stated that the ban had disrupted their family life and that the Regional Court had failed to balance the interests at stake.

17. On 23 July 2014 the Supreme Court upheld the decision of 16 May 2014, stating in general terms that the Regional Court had duly examined the legal basis for the exclusion, and that its decision had been lawful and had balanced public and private interests.

18. As can be seen from the documents submitted it is unclear until what date the first applicant's re-entry ban shall remain in force.

5. Subsequent developments

19. According to the Government, on 10 January 2015 the first applicant re-entered Russia. On 20 March 2015 the Perm Region FMS granted him a temporary residence permit, valid until 20 March 2018. The first applicant currently resides in Russia.

20. On 13 January 2015 the Regional FSS lodged a claim for reimbursement of transportation and lodging expenses related to the examination of the appeal against the first applicant's exclusion order on 23 July 2014 by the Supreme Court in Moscow. The Regional Court examined the claim in camera and ruled that the first applicant was to reimburse the amount of 19,404 Russian roubles (RUB) (about 300 euros (EUR)), as claimed. On 4 April 2015 the applicants paid the above amount.

21. As regards the Court's request in respect of the information and documents that had served as the basis for the first applicant's exclusion, the Government did not furnish any documents.

II. RELEVANT DOMESTIC LAW

22. For the relevant domestic law and practice see *Liu v. Russia (no. 2)*, no. 29157/09, §§ 45-52, 26 July 2011.

III. RELEVANT COUNCIL OF EUROPE MATERIAL

23. For the relevant Council of Europe material see *Gablishvili v. Russia*, no. 39428/12, § 37, 26 June 2014.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicants complained that the first applicant's exclusion order had been based on undisclosed information and had violated their right to respect for family life. They relied on Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

A. The parties' submissions

1. The Government

25. The Government submitted that the evidence proving the threat posed by the first applicant to national security had been duly examined by the domestic courts. The classified evidence furnished by the FSS to the Regional Court had been reviewed without it being included in the case file. The information furnished by the executive had enabled the court to conclude that the first applicant's exclusion had been substantiated and that the order had been issued within the scope of the FSS's powers. The examination of the appeal had been held in camera in the presence of the second applicant and the applicants' representative, who had failed to exercise their right to submit evidence. Having examined the information submitted by the Regional FSS and considered the applicants' family situation, the court had found that the public interest prevailed over the private interests of the applicants.

26. The Government further pointed out that the second applicant was unemployed and that therefore she and the applicants' son were able to visit the first applicant in Tajikistan for the entire duration of the summer school holidays in 2014. In any event, the applicants' son was able to move permanently to Tajikistan as he was of a sufficiently young age as to be able to adapt; Russian was commonly spoken in Tajikistan and both the second applicant and the applicants' son would therefore be able to adapt to life in that country.

2. The applicants

27. The applicants stated that they did not question the FSS's authority to issue exclusion orders. They stressed, however, that there had been no factual basis for such a decision to be taken in respect of the first applicant. They submitted that the Regional FSS had not furnished any evidence of a threat posed by the first applicant to national security and that the domestic courts had not given them a chance to refute the allegations. The examination of their appeal against the exclusion order had been carried out in camera; despite the fact that they had given undertakings of confidentiality, the domestic courts had failed to disclose to them any evidence against the first applicant. In particular, in reply to the

representative's request that the FSS officer cite a single concrete fact indicating the first applicant's threat to State security, the latter refused (with the judge's approval) to provide such information. The FSS case file submitted to the Regional Court had been examined by the judge for only five minutes and neither the second applicant nor the representative had been allowed to see any of its contents. In addition, after the imposition of the exclusion order against the first applicant, the FSS had denied any involvement in the matter; this had prevented the applicants from lodging an appeal in a timely manner against the exclusion order with the domestic courts.

28. The applicants further argued that the first applicant's exclusion from Russia had disrupted their family life.

B. Admissibility

29. The Court notes that the 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.

C. Merits

30. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 104, 3 October 2014). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 of the Convention, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the aims sought to be achieved (see, among other authorities, *Slivenko v. Latvia* [GC], no. 48321/99, § 99, ECHR 2003-X).

31. Turning to the application at hand, the Court notes that prior to his exclusion in May 2013 the applicant had resided in Russia since 1995. For a number of years he was in relationship with the second applicant, with whom he had a son in 2006 and whom he officially married in 2009. Both the second applicant and the applicants' son are Russian citizens who have lived in Russia all their lives. The information given to the first applicant at the border crossing in May 2013 did not indicate the length of his exclusion from the country and, consequently, the impossibility of his residing with

the second applicant and their son. In the light of these factors, the Court considers that the exclusion ordered against the first applicant constituted an interference with the applicants' right to respect for their family life (compare *Liu (no. 2)*, cited above, § 78, with further references).

32. The Court is prepared to accept that the first applicant's exclusion between May 2013 and January 2015 – that is for more than nineteen months – pursued the legitimate aims of protecting national security and preventing disorder and crime. It remains to be ascertained whether the interference was proportionate to the legitimate aims pursued – in particular whether the domestic authorities struck a fair balance between the relevant interests (namely the prevention of disorder and crime and the protection of national security) on the one hand, and the applicants' right to respect for their family life on the other.

1. Establishment of the threat posed by the first applicant to national security

33. The Court observes that the content of the information supplied by the FSS which served as the basis for the exclusion order has not been revealed to it. Further, the domestic judgments contained no indication as to why the first applicant was considered a danger to national security. Moreover, those judgements neither mentioned any facts on the basis of which that finding had been reached nor provided even a generalised description of the acts imputable to the applicant. In their submissions to the Court, the Government neither gave a general outline of the possible basis for the security services' allegations against the first applicant (see, by contrast, *Liu (no. 2)*, cited above, § 75, and *Amie and Others v. Bulgaria*, no. 58149/08, §§12-13 and 98, 12 February 2013) nor furnished the supporting documents requested by the Court (see paragraph 21 above).

34. The Court takes note of the Government's argument that the FSS information describing the allegations against the first applicant had been examined by the domestic courts, which had found that it provided sufficient justification for his exclusion on national security grounds.

35. Mindful of its subsidiary role and the wide margin of appreciation open to the States in matters of national security, the Court accepts that it is for each Government, as the guardian of their people's safety, to make their own assessment on the basis of the facts known to them. Significant weight must, therefore, attach to the judgment of the domestic authorities, and especially of the national courts, who are better placed to assess the evidence relating to the existence of a national security threat.

36. The principle of subsidiarity, however, does not mean renouncing all supervision of the result obtained from using domestic remedies; otherwise the rights guaranteed by the Convention would be devoid of any substance. Whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural

safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation. Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 of the Convention (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I, and *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports of Judgments and Decisions* 1996-IV).

37. Therefore, the Court must examine whether the domestic proceedings were attended by sufficient procedural guarantees. It reiterates in this connection that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 123-24, 20 June 2002).

38. The Court observes that the exclusion order was imposed without informing the applicants of the identity of the authority responsible or the length of its duration (see paragraphs 9 and 10 above). In addition, the FSS denied any involvement in the matter; only through court proceedings was the second applicant able to establish the FSS's responsibility for the imposition of the measure (see paragraph 11 above). Furthermore, the domestic judgments upholding the exclusion order made no mention of the factual grounds on which that decision was taken. From the documents submitted it transpires that the domestic courts confined the scope of their examination to ascertaining that the FSS had acted within its administrative competence in issuing the exclusion order without carrying out an independent review of whether the conclusion that the first applicant constituted a danger to national security had a reasonable basis in fact. The courts rested their rulings solely on uncorroborated information provided by the FSS and did not examine any other pieces of evidence to confirm or refute the allegations against the first applicant. The courts thus failed to examine a critical aspect of the case, namely whether the state authority was able to demonstrate the existence of specific facts serving as a basis for its assessment that the first applicant presented a national security risk. These elements lead the Court to conclude that the national courts confined themselves to a purely formal examination of the decision concerning the first applicant's exclusion from Russia (see, for similar reasoning, *Nolan*

and K. v. Russia, no. 2512/04, §§ 71 and 72, 12 February 2009, and *Liu (no. 2)*, cited above, § 89).

39. Furthermore, it appears that the Regional Court did not accede to the request of the applicants' representatives that the FSS present evidence in relation to the facts alleged against the first applicant and serving as a basis for their assertion that he represented a national security risk (see paragraph 14 above). Since the domestic proceedings were classified in their entirety, the Court has no information on the exact nature of the materials placed before that court (see, for a similar situation, *Liu (no. 2)*, cited above, § 90). The confidential materials were not disclosed to the second applicant and the applicants' representative, despite their undertaking not to disclose such information (see paragraph 13 above). Moreover, the applicants were not informed of any details of the national security case against the first applicant other than that he was a member of an extremist group and had incited ethnic tensions (see paragraph 14 above). The allegations against him were of a general nature, making it impossible to challenge the executive's assertions by providing exonerating evidence, such as an alibi or an alternative explanation for his actions (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 220-24, ECHR 2009).

40. Given that the domestic proceedings were not attended by sufficient procedural guarantees, the Court is unable to accept the conclusion of the national courts that it had been established that the first applicant was a danger to national security.

2. Assessment of the strength of the applicants' family ties

41. Balanced against the public interest in protecting national security and preventing disorder and crime was the applicants' right to respect for their family life.

42. The Court notes that the applicants have been married since 2009 and have a son and that the first applicant lived in Russia for a number of years with his family until his exclusion in May 2013. The Court attaches considerable weight to the solidity of the first applicant's family ties in Russia. Further, the duration of the first applicant's exclusion from Russia was unknown to the applicants for a year. It was clarified only by the Regional Court's decision on their appeal against the exclusion order – the wording of that decision mentioned that the first applicant had been excluded until the end of 2014 (see paragraphs 9 and 15 above). Considering that the first applicant was unable to enter Russia until January 2015 the disruption to the applicants' family life should not be underestimated.

43. The national courts did not give any consideration to the above factors during the examination of the applicants' appeal against the exclusion. Accordingly, the domestic proceedings did not provide an opportunity for a tribunal to examine whether this measure was

proportionate under Article 8 § 2 of the Convention to the legitimate aims pursued. The first applicant was prohibited from entering Russia for more than nineteen months without the possibility of having the proportionality of the measure determined by a tribunal and was therefore deprived of the adequate procedural safeguards required by Article 8 of the Convention (see, *mutatis mutandis*, *De Souza Ribeiro v. France* [GC], no. 22689/07, § 83, ECHR 2012).

3. Conclusion

44. It follows from the above that the decision to exclude the first applicant from Russia was not attended by adequate procedural safeguards and was not "necessary in a democratic society". Taking into account the fact that on the one hand, the threat to national security was not convincingly established, and that on the other hand, his family ties to Russia were very strong, the Court finds that the first applicant's exclusion from Russia was not proportionate to the legitimate aims pursued.

45. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

46. The applicants complained that the judicial review proceedings did not afford them the opportunity to refute accusations against the first applicant. They 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."

47. The Court notes that in the present case the complaint under Article 13 of the Convention largely overlaps with the procedural aspects of Article 8 of the Convention. Given that the complaint under Article 13 of the Convention relates to the same issues as those examined under Article 8 of the Convention, it should be declared admissible. However, having regard to its conclusion above under Article 8 of the Convention, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention (see *Liu (no. 2)*, cited above, § 100).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicants did not claim pecuniary damage. As for non-pecuniary damage, they claimed 5,000 euros (EUR) each.

50. The Government stated that considering that the first applicant had been able to re-enter Russia in January 2015 and had been granted a temporary residence permit valid until 2018, the applicants' claim should be rejected.

51. The Court finds it appropriate to award the applicants EUR 5,000 each, as requested.

B. Costs and expenses

52. The first applicant also claimed 19,986 Russian roubles (RUB) (about EUR 300) as expenses incurred before the domestic courts as the result of the examination of the appeal against the exclusion order (see paragraph 20 above).

53. The Government objected, stating that the amount claimed was "an integral part of any proceedings before a [domestic] court and was recovered from the defeated party and therefore should not be recovered from the Government".

54. 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, the Court considers it reasonable to award the sum of EUR 300, covering costs under all heads.

C. Default interest

55. 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 Articles 8 and 13 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants, 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 each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 300 (three hundred euros), plus any tax that may be chargeable to the applicants, 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;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Luis López Guerra
Deputy Registrar	President