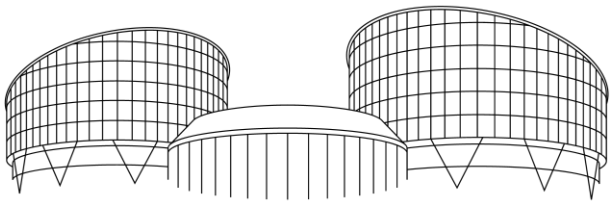

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KHAYDAROV v. RUSSIA

(Application no. 21055/09)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

04/10/2010

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

In the case of Khaydarov v. Russia**,**

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

Christos Rozakis, *President,*
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 29 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 21055/09) 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 Tajikistani national, Mr Mamurdzhon Rakhimdzhonovich Khaydarov ("the applicant"), on 22 April 2009.

2. The applicant was represented by Ms R. Magomedova and Ms E. Ryabinina, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. On 23 April 2009 the President of the First Section decided to apply Rules 39 and 41 of the Rules of Court, indicating to the Government that the applicant should not be extradited to Tajikistan until further notice and granting priority treatment to the application.

4. On 3 July 2009 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Dushanbe, Tajikistan. He is currently detained in a remand prison in Moscow.

A. Background of the case

1. Civil war in Tajikistan

6. In May 1992 a civil war erupted in Tajikistan when ethnic groups under-represented in the ruling elite rose up against the national government of President Nabiyev. Politically, the discontented groups were represented by liberal democratic reformists and Islamists, who fought together and later organised themselves under the banner of the United Tajik Opposition ("UTO"). By June 1997 fifty to one hundred thousand people had been killed. On 27 June 1997 a peace agreement was signed by President Rakhmonov and the UTO leader. However, in August 1997 fighting again erupted in several regions of Tajikistan, incited by an opposition group. Government forces retaliated and drove the armed faction of the opposition group to seek sanctuary in Uzbekistan.

2. The applicant's account of the events of August 1997

7. The applicant, an ethnic Uzbek, lived in the village of Tajikistan in the Shakhrinavskiy District of Tajikistan. The village was mainly populated by ethnic Uzbeks. In the late 1990s large-scale persecution of ethnic Uzbeks commenced in Tajikistan. There were several armed attacks on the applicant's village; some of his acquaintances were killed.

8. The local administration of the applicant's village decided to create a number of checkpoints on the way to the village to protect the inhabitants and provided those who manned those checkpoints with firearms. The applicant himself was not given any firearms.

9. In August 1997 the village was attacked once again; after that, several members of the local militia and the applicant fled to Uzbekistan.

3. Subsequent events

10. In February 1998 the applicant moved to Russia.

11. On several occasions the applicant travelled from Russia to Tajikistan. He obtained internal Tajik identity papers and a foreign passport in 2002 and 2004 respectively. His last visit to Tajikistan took place in September 2005.

12. On 6 February 2001 the Tajik Prosecutor General's Office instituted criminal proceedings against Mr M., a fellow villager of the applicant who had participated in the militia and fled to Uzbekistan in August 1997, charging him with banditry and organisation of an illegal armed group. The applicant was listed as one of the members of the group.

B. Criminal proceedings against the applicant

13. On 16 January 2006 the Tajik Prosecutor General's Office decided to bring charges against the applicant, stating that in August 1997 he had been a member of Mr M.'s illegal armed group and that such actions constituted an act of banditry punishable under Article 74 of the Tajik Criminal Code. It was also decided that the applicant should be put on a wanted list.

14. On 17 February 2006 the Tajik Prosecutor General's Office decided, in the absence of the applicant, to place him in custody.

15. On 15 April 2006 the applicant was put on an international wanted list.

16. On 19 July 2006 the investigation in the applicant's case was suspended as the applicant was at large.

17. On 13 March 2008 the Tajik Prosecutor General's Office severed the applicant's case from Mr M.'s criminal case. The decision read, in so far as relevant, as follows:

> "At the beginning of August 1997 [Mr M.], taking advantage of the unstable situation in Tajikistan, created an illegal armed group to attack legal entities and private individuals; the group was active until the end of August 1997.
>
> ...
>
> At the beginning of August 1997 Mr Khaydarov was a voluntary member of the illegal armed group and participated in armed hostilities.
>
> On 9 and 10 August 1997, after officers of law-enforcement agencies had entered the territory of the Shakhrinavskiy District, Mr M.'s armed group fled the district territory and left Tajikistan."

C. Extradition proceedings

18. On 18 April 2008 the Tajik Prosecutor General's Office sent a request for the applicant's extradition to the Russian Prosecutor General's Office, stating that in August 1997 the applicant had been a member of Mr M.'s illegal armed group.

19. On 24 April 2008 the Russian Prosecutor General's Office received a request by the Tajik Prosecutor General's Office to extradite the applicant.

20. On 13 June 2008 the Tajik Prosecutor General's Office sent the Russian Prosecutor General's Office additional documents stating that the applicant had participated in Mr M.'s group which had fought the government troops, and that he had borne arms and had manned the checkpoint in the village of Tajikistan.

21. On 20 November 2008 the Russian Prosecutor General's Office ordered the applicant's extradition to Tajikistan. The decision read, *inter alia*, as follows:

> "The actions of [Mr] M. Khaydarov are punishable under the Russian criminal law and correspond to Article 209 § 2 of the Russian Criminal Code (participation in a gang), which provides for a sanction in a form of imprisonment for more than one year.
>
> ... No [legal] impediments to [Mr] M. Khaydarov's extradition under treaties and Russian laws have been established."

22. On 3 December 2008 the applicant was notified of the extradition order of 20 November 2008.

23. The applicant and his counsel lodged appeals against the decision of 20 November 2008 on 4 and 5 December 2008 respectively. In his appeal the applicant alleged that he was being persecuted in Tajikistan for political reasons related to the civil war.

24. On 23 December 2008 the Moscow City Court, at the applicant's counsel's request, included in the case file reports by international NGOs on the political climate in Tajikistan and postponed the examination of the appeals because the applicant's appeal against the refusal to grant his asylum request had not yet been examined.

25. On 21 January 2009 the Moscow City Court again postponed the hearing pending examination of the appeal against the refusal to grant the applicant asylum and requested additional documents from the Russian Prosecutor General's Office concerning the charges brought against the applicant in Tajikistan.

26. On 4 February 2009 the Moscow City Court sent requests for information to the Russian and Tajik Ministries of Foreign Affairs concerning the applicant's allegations of a risk of ill-treatment, as well as to the Russian Prosecutor General's Office concerning the possibility of amnesty being granted to the applicant in Tajikistan, and postponed a hearing on the appeal against the extradition order pending the completion of the asylum proceedings.

27. On 17 February 2009 the Russian Prosecutor General's Office informed the City Court that the applicant could not benefit from acts of amnesty in Tajikistan.

28. On 26 February and 12 March 2009 the Moscow City Court again sent requests for information concerning the applicant's allegations of a risk of ill-treatment to the Russian and Tajik Ministries of Foreign Affairs.

29. On 27 February 2009 the Moscow City Court again postponed a hearing.

30. On 24 March 2009 the Russian Ministry of Foreign Affairs informed the Moscow City Court that it had no information concerning any political motives for the applicant's prosecution and noted that Tajikistan had ratified nearly every major international human-rights instrument, including the International Covenant on Civil and Political Rights (ICCPR) and the United Nations (UN) Convention against Torture.

31. On 1 April 2009 the Moscow City Court questioned Ms Ryabinina, a member of the Expert Council for the Russian Ombudsman, who stated that torture and ill-treatment were frequently practised in Tajikistan.

32. On the same day the Moscow City Court dismissed at first instance the appeals lodged by the applicant and his counsel against the extradition order of 20 November 2008. The court reasoned, in particular, that the applicant had voluntarily left Tajikistan in 1997 and had been able to freely enter the country since then, that the Tajik Prosecutor General's Office had guaranteed that the applicant had not been prosecuted for political or religious reasons, and that Tajikistan had ratified nearly every major international human-rights instrument. The applicant's allegation that he had been prosecuted in relation to the civil war remained unanswered.

33. On 6 April 2009 the applicant's counsel appealed against the Moscow City Court's judgment.

34. On 10 April 2009 the Tajik Prosecutor General's Office informed the Russian Prosecutor General's Office of the following:

> "The criminal proceedings against [Mr] Khaydarov are not inspired by any political motives and the Tajik Prosecutor General's Office guarantees that [Mr] Khaydarov will be prosecuted only in respect of the act he was charged with; he will be able to freely leave the territory of Tajikistan after completion of the court proceedings and having served any sentence; he will not be extradited to a third State without the Russian authorities' consent and will not be persecuted on political and religious grounds."

35. On 14 May 2009 the Supreme Court of Russia ("the Supreme Court") quashed the judgment of 1 April 2009 because the Moscow City Court had failed to thoroughly examine the applicant's counsel's claim that the crime that the applicant had been charged with was of a political nature. Moreover, the Supreme Court stated that the Russian Office of the United Nations High Commissioner for Refugees (UNHCR) had confirmed that the applicant's fears of political persecution had been well-founded. The case file was returned to the Moscow City Court for a fresh examination.

36. On 26 May 2009 the Tajik Prosecutor General's Office informed the Russian Prosecutor General's Office that Tajikistan had ratified the UN Convention against Torture.

37. On 3 June 2009 the Moscow City Court re-examined the appeals against the extradition order and upheld it. It reasoned that the applicant was a Tajikistani national, held no refugee status and, according to the Tajik Prosecutor General's Office, had not been prosecuted for political or religious reasons. The court also pointed out that the applicant had applied for temporary asylum only on 6 April 2009 and concluded that his application could not impede the examination of the appeals against the extradition order. It further referred to the guarantees of 10 April and 26 May 2009 provided by the Tajik Prosecutor General's Office that the applicant would not be persecuted on political and religious grounds and

dismissed the report by Ms Ryabinina as unsubstantiated, arguing that the assurances in question sufficed to exclude the risk of ill-treatment in the applicant's case. The applicant's allegations that the criminal proceedings against him had been linked to the events surrounding the civil war remained unanswered.

38. On 30 July 2009 the Supreme Court upheld the Moscow City Court's decision of 3 June 2009. It reasoned that Tajikistan had ratified the UN Convention against Torture and referred to the guarantees given by the Tajik Prosecutor General's Office. On the same date the extradition order became final.

D. Asylum proceedings

39. On 17 June 2008 the applicant applied to the Moscow Office of the Federal Migration Service ("the Moscow FMS") for asylum, claiming that the Tajik authorities had persecuted him on the ground of his ethnic origin.

40. On 6 October 2008 the asylum request was dismissed; on 1 November 2008 the applicant was notified accordingly.

41. On 28 January 2009 the Zamoskvoretskiy District Court of Moscow dismissed an appeal by the applicant against the decision by the Moscow FMS.

42. On 26 March 2009 the Moscow City Court upheld the judgment of 28 January 2009 on appeal.

43. On 6 May 2009 the UN High Commissioner for Refugees declared the applicant a person requiring international protection.

44. On 22 September 2009 the Moscow FMS rejected the applicant's request for temporary asylum and notified him accordingly on 5 October 2009.

45. The applicant appealed against the refusal of 22 September 2009 to the Federal Migration Service of Russia ("the Russian FMS").

46. On 13 November 2009 the Russian Office of the UNHCR sent the Russian FMS a report in support of the applicant's request for temporary asylum, stating that he ran a real risk of being ill-treated in Tajikistan. The report read, in particular, as follows:

> "Mr Khaydarov's allegations [of a risk of ill-treatment] are supported by numerous documents concerning the events of 1997-98 in Tajikistan. ... [E]thnic Uzbeks were subjected to oppression and persecution; in particular, there were reports of numerous killings of civilians before and during the armed conflict in August 1997, which led to a mass exodus of ethnic Uzbeks from northern areas of Tajikistan, in particular to Uzbekistan.
>
> Having examined Mr Khaydarov's application and having assessed his fears regarding his return to [Tajikistan], the UNHCR has established that Mr Khaydarov's application and his fears of being subjected to persecution, on the grounds of political convictions attributed to him, in the form of arrest, torture with a view to obtaining a

self-incriminating deposition, unlawful and unfair trial and lengthy imprisonment for acts that he had not committed are well-founded.

... There are strong reasons to believe that the criminal proceedings against the applicant instituted by the Tajik authorities amount to persecution on the grounds of political views attributed to the applicant, since [the Tajik authorities] associate the applicant with anti-governmental activities because he had been a member of militia groups suspected of involvement in the armed conflict of August 1997.

...

The UNHCR considers that there are serious concerns that Mr Khaydarov will be subjected to torture and other violations of basic human rights, which mean that there is an even greater risk of his being persecuted on the grounds of political views attributed to him. ...[Mr Khaydarov's] case corresponds to the definition of a 'refugee' within the meaning of the 1951 United Nations Convention Relating to the Status of Refugees and the Russian Refugees Act.

... Mr Khaydarov is charged with ... banditry. However, it is noteworthy that the criminal case in which Mr Khaydarov is charged was opened in 2001 and the preliminary investigation concerning Mr Khaydarov was suspended in 2006, which shows that during such a lengthy period of investigation no proof of his guilt had been found and that the requesting State has no such proof.

The Tajik authorities have not provided a single piece of factual evidence of Mr Khaydarov's criminal activity in his country of origin, and the documents provided by the Tajik counterparty as a basis for extradition are contradictory. ... [t]he UNHCR concludes that there is no reliable evidence of the fact that Mr Khaydarov committed criminal acts, such as banditry, while in Tajik territory."

E. The applicant's detention

47. On 17 April 2008 the applicant was arrested in Moscow as a person wanted by the Tajik authorities. Upon his arrest the applicant learned for the first time that there had been criminal proceedings against him. On the same date the Tajik Ministry of the Interior requested the Russian police to keep the applicant in custody pursuant to the Minsk Convention.

48. The applicant was then placed in remand prison IZ-77/4 in Moscow.

49. On 19 April 2008 the Taganskiy District Court of Moscow ordered the applicant's placement in custody pending extradition pursuant to Articles 97, 99 and 108 and Article 466 § 1 of the Russian Code of Criminal Procedure (CCP). The court stated that on 19 July 2006 the applicant had been put on a wanted list and that he had no permanent place of residence in Russia and concluded that, if not in custody, he could escape and impede his extradition to Tajikistan. The term of the detention was not specified.

50. On 18 June 2008 the Taganskiy District Court again ordered the applicant's placement in custody pursuant to Articles 108 and 466 of the CCP for an unspecified period of time. The court reasoned that less severe

preventive measures could not be applied because the applicant had been at large since 1996, was a Tajikistani national, had no registered place of residence in Russia and was charged with a crime that was punishable by imprisonment for more than two years.

51. On 6 October 2008 the applicant's counsel applied to the governor of remand prison IZ-77/4 for the applicant's release, claiming that the maximum detention period permitted by domestic law had expired. On 16 October 2008 the governor of the remand prison replied that the applicant had not appealed against the decision of 18 June 2008 authorising his detention and that the question of his release should be decided upon by the Russian Prosecutor General's Office.

52. On 1 December 2008 the applicant's counsel complained to the Babushkinskiy District Court of Moscow that the applicant's detention was unlawful.

53. On 10 December 2008 the Babushkinskiy District Court informed the applicant's counsel that it had no jurisdiction to examine the complaint.

54. On 23 January 2009 the applicant's counsel complained to the Tverskoy District Court of Moscow, under Article 125 of the CCP, that the Russian Prosecutor General's Office had unlawfully failed to apply for an extension of the term of the applicant's detention as required by Article 109 of the CCP. On 27 January 2009 the President of the Tverskoy District Court returned the complaint for elimination of discrepancies.

55. On 4 May 2009 the applicant's counsel lodged another complaint under Article 125 of the CCP with the Zamoskvoretskiy District Court of Moscow, alleging inaction on the part of the Russian Prosecutor General's Office.

56. On 7 May 2009 the Zamoskvoretskiy District Court refused to examine the applicant's complaint of 4 May 2009 for the reason that its subject matter did not fall within the ambit of Article 125 of the CCP.

57. On 14 May 2009 the Supreme Court ruled that the preventive measure applied to the applicant should remain unvaried until 4 June 2009.

58. On 3 June 2009 the Moscow City Court ruled that the preventive measure applied to the applicant should remain unvaried.

59. On 27 July 2009 the Moscow City Court quashed the decision of the Zamoskvoretskiy District Court of 7 May 2009 and remitted the matter to the first-instance court for a fresh examination.

60. On 4 September 2009 the Zamoskvoretskiy District Court again dismissed the applicant's complaint, arguing that Article 125 of the CCP was inapplicable since there had been no criminal proceedings pending against the applicant in Russia. It reasoned as follows:

> "The [applicant's] requests to declare unlawful the inaction of the Moscow prosecutor's office on account of its failure to perform its function of supervising compliance with the law in custodial institutions could not be examined under

> Article 125 of the CCP because the prosecutors' supervision of the custodial system is not related to the criminal proceedings against [Mr] Khaydarov.
>
> Acts and inaction of agents of the prosecutor's office can be challenged by way of another procedure which is not provided for in Article 125 of the CCP.
>
> The request for extension of the term of custodial detention is an exclusive right of the competent bodies and a court is not entitled to impel [those bodies] to bring such requests."

61. On 11 September 2009 the applicant's counsel appealed against the decision of 4 September 2009.

62. On 14 September 2009 the applicant's counsel complained to the Taganskiy District Court that the applicant's detention was unlawful. Referring to Article 5 § 4 of the Convention, she argued that Article 109 of the CCP had been breached in the applicant's case as his term of detention had not been extended and that there had been no judicial review of the lawfulness of the detention.

63. On 16 September 2009 a judge of the Taganskiy District Court sent the applicant's counsel a letter explaining that it was open to the applicant to appeal against the decision on choosing the preventive measure and that there were no other avenues of complaining of the alleged unlawfulness of detention.

64. On 5 October 2009 the applicant's counsel appealed against the refusal to examine her complaint. On 13 October 2009 the judge of the Taganskiy District Court sent her a letter explaining that the previous letter could not be appealed against.

65. On 26 October 2009 the Moscow City Court dismissed the appeal against the decision of 4 September 2009.

66. On 8 December 2009 the applicant's counsel requested the Russian Prosecutor General's Office to release the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure (CCP)

67. Chapter 13 of the CCP governs the application of preventive measures. Preventive measures may be applied to a suspect or a person charged with an offence where it is probable that the person in question might abscond, continue to be engaged in criminal activities, threaten witnesses or impede the investigation (Article 97). When deciding on the necessity to apply a preventive measure, it is necessary to take into account the gravity of the charges and the various personal details of the person concerned (Article 99). Placement in custody is a preventive measure applied on the basis of a court decision to a person suspected of or charged

with a crime punishable with at least two years' imprisonment where it is impossible to apply a more lenient preventive measure (Article 108 § 1). A request for placement in custody should be lodged by a prosecutor (or an investigator or inquirer with a prosecutor's prior approval) (Article 108 § 3). The request should be examined by a judge of a district court or a military court of a corresponding level (Article 108 § 4). A judge's decision on placement in custody may be challenged before an appeal court within three days (Article 108 § 11). The period of detention pending investigation of a crime cannot exceed two months (Article 109 § 1) but may be extended up to six months by a judge of a district court or a military court of a corresponding level further to a request lodged by a prosecutor (or an investigator or inquirer with a prosecutor's prior approval) (Article 109 § 2). Further extensions up to twelve months may be granted on an investigator's request approved by a prosecutor of the Russian Federation only if the person is charged with serious or particularly serious criminal offences (Article 109 § 3).

68. Chapter 16 of the CCP lays down the procedure by which acts or decisions of a court or public official involved in criminal proceedings may be challenged. Decisions taken by police or prosecution investigators or prosecutors not to initiate criminal proceedings, or to discontinue them, or any other decision or inaction capable of impinging upon the rights of "parties to criminal proceedings" or of "hindering an individual's access to court" may be subject to judicial review (Article 125).

69. Upon receipt of a request for extradition not accompanied by an arrest warrant issued by a foreign court, the Prosecutor General or his deputy is to decide on the preventive measure in respect of the person whose extradition is sought. The preventive measure is to be applied in accordance with the established procedure (Article 466 § 1).

B. Decisions of the Constitutional Court of Russia

1. Decision no. 101-O of 4 April 2006

70. Verifying the compatibility of Article 466 § 1 of the CCP with the Russian Constitution, the Constitutional Court reiterated its settled case-law to the effect that excessive or arbitrary detention, unlimited in time and without appropriate review, was incompatible with Article 22 of the Constitution and Article 14 § 3 of the International Covenant on Civil and Political Rights in all cases, including extradition proceedings.

71. In the Constitutional Court's view, the absence of specific regulation of detention matters in Article 466 § 1 did not create a legal lacuna incompatible with the Constitution. Article 8 § 1 of the 1993 Minsk Convention provided that, in executing a request for legal assistance, the requested party would apply its domestic law, that is, the procedure laid

down in the CCP. Such procedure comprised, in particular, Article 466 § 1 of the Code and the norms in its Chapter 13 ("Preventive measures"), which, by virtue of their general character and position in Part I of the Code ("General provisions"), applied to all stages and forms of criminal proceedings, including proceedings for the examination of extradition requests.

72. The Constitutional Court emphasised that the guarantees of the right to liberty and personal integrity set out in Article 22 and Chapter 2 of the Constitution were fully applicable to detention with a view to extradition. Accordingly, Article 466 of the CCP did not allow the authorities to apply a custodial measure without complying with the procedure established in the CCP or in excess of the time-limits fixed in the Code.

2. Decision no. 333-O-P of 1 March 2007

73. In this decision the Constitutional Court reiterated that Article 466 of the CCP did not imply that detention of a person on the basis of an extradition request did not have to comply with the terms and time-limits provided for in the legislation on criminal procedure.

3. Decision no. 158-O of 11 July 2006 on the Prosecutor General's request for clarification

74. The Prosecutor General asked the Constitutional Court for an official clarification of its decision no. 101-O of 4 April 2006 (see above), for the purpose, in particular, of elucidating the procedure for extending a person's detention with a view to extradition.

75. The Constitutional Court dismissed the request on the ground that it was not competent to indicate specific provisions of the criminal law governing the procedure and time-limits for holding a person in custody with a view to extradition. That matter was within the competence of the courts of general jurisdiction.

4. Decision no. 333-O of 1 March 2007

76. The Constitutional Court reiterated its settled case-law to the effect that the scope of the constitutional right to liberty and personal inviolability was the same for foreign nationals and stateless persons as for Russian nationals. A foreign national or stateless person may not be detained in Russia for more than forty-eight hours without a judicial decision. That constitutional requirement served as a guarantee against excessively long detention beyond forty-eight hours, and also against arbitrary detention as such, in that it required a court to examine whether the arrest was lawful and justified.

77. The Constitutional Court held that Article 466 § 1 of the Code of Criminal Procedure, read in conjunction with the Minsk Convention, could

not be construed as permitting the detention of an individual for more than forty-eight hours, on the basis of a request for his or her extradition, without a decision by a Russian court. A custodial measure could be applied only in accordance with the procedure established in the Russian Code of Criminal Procedure and within the time-limits fixed in the Code.

III. INTERNATIONAL INSTRUMENTS AND OTHER DOCUMENTS

A. Council of Europe

78. Recommendation No. R (98) 13 of the Council of Europe Committee of Ministers to Member States on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights reads as follows:

> "...
>
> Without prejudice to the exercise of any right of rejected asylum seekers to appeal against a negative decision on their asylum request, as recommended, among others, in Council of Europe Recommendation No. R (81) 16 of the Committee of Ministers...
>
> 1. An effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment.
>
> 2. In applying paragraph 1 of this recommendation, a remedy before a national authority is considered effective when: ...
>
> 2.2. that authority has competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief; ...
>
> 2.4. the execution of the expulsion order is suspended until a decision under 2.2 is taken."

79. The Council of Europe Commissioner for Human Rights issued a Recommendation (CommDH(2001)19) on 19 September 2001 concerning the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders, part of which reads as follows:

> "11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged."

80. For other relevant documents, see the Court's judgment in the case of *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 36-38, ECHR 2007-V.

B. The 1993 CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (the Minsk Convention)

81. When performing actions requested under the Minsk Convention, to which Russia and Tajikistan are parties, a requested official body applies its country's domestic laws (Article 8 § 1).

82. Upon receipt of a request for extradition, the requested country should immediately take measures to search for and arrest the person whose extradition is sought, except in cases where no extradition is possible (Article 60).

83. The person whose extradition is sought may be arrested before receipt of a request for extradition if there is a related petition. The petition must contain a reference to a detention order and indicate that a request for extradition will follow (Article 61 § 1). If the person is arrested or placed in detention before receipt of the extradition request, the requesting country must be informed immediately (Article 61 § 3).

84. A person detained pending extradition pursuant to Article 61 § 1 of the Minsk Convention must be released if the requesting country fails to submit an official request for extradition with all requisite supporting documents within forty days from the date of placement in custody (Article 62 § 1).

C. Reports on Tajikistan

85. Conclusions and Recommendations: Tajikistan, issued by the UN Committee against Torture on 7 December 2006 (CAT/C/TJK/CO/1), refer to the following areas of concern regarding the human-rights situation in the country:

> "The definition of torture provided in domestic law ... is not fully in conformity with the definition in article 1 of the Convention, particularly regarding purposes of torture and its applicability to all public officials and others acting in an official capacity.
>
> ...
>
> There are numerous allegations concerning the widespread routine use of torture and ill-treatment by law enforcement and investigative personnel, particularly to extract confessions to be used in criminal proceedings. Further, there is an absence of preventive measures to ensure effective protection of all members of society from torture and ill treatment.

...

The Committee is also concerned at:

(a) The lack of a legal obligation to register detainees immediately upon loss of liberty, including before their formal arrest and arraignment on charges, the absence of adequate records regarding the arrest and detention of persons, and the lack of regular independent medical examinations;

(b) Numerous and continuing reports of hampered access to legal counsel, independent medical expertise and contacts with relatives in the period immediately following arrest, due to current legislation and actual practice allowing a delay before registration of an arrest and conditioning access on the permission or request of officials;

(c) Reports that unlawful restrictions of access to lawyers, doctors and family by State agents are not investigated or perpetrators duly punished;

(d) The lack of fundamental guarantees to ensure judicial supervision of detentions, as the Procuracy is also empowered to exercise such oversight;

(e) The extensive resort to pretrial detention that may last up to 15 months; and

(f) The high number of deaths in custody.

...

There are continuing and reliable allegations concerning the frequent use of interrogation methods that are prohibited by the Convention by both law enforcement officials and investigative bodies.

...

There are reports that there is no systematic review of all places of detention, by national or international monitors, and that regular and unannounced access to such places is not permitted."

86. Minority Rights Group International in its document "Tajikistan: Overview", updated in January 2008, describes the situation of the Uzbek minority in Tajikistan as follows:

"The situation in Tajikistan is similar in many respects to that of its neighbours. ... Since independence, Tajiks have attempted to assert their dominance by linguistic and other preferences that tend to discriminate against and exclude minorities, often leading to resentment or even an exodus. While they were close to a quarter of the population at the time of independence, many Uzbeks fled during the period of the civil war. They remain the largest minority at over 15 percent of the population according to a 2000 census, and are concentrated in areas usually associated with opposition to the government. This has led to a general distrust of Uzbeks, and in turn discriminatory treatment towards them in many institutions of the state. Once again, oppressive measures have been presented as necessary in the name of the fight against 'terror' and 'separatism'. The degree of under-representation of minorities in public life

is startling: only two members of Parliament are Uzbeks, despite this minority's very substantial numbers.

... Despite constitutional provisions that initially appear to guarantee the use of minority languages, and despite the large percentage of minorities in the country, in particular Uzbeks, minorities are largely excluded from employment in public service."

87. The World Report Chapter: Tajikistan by Human Rights Watch, released in January 2009, describes the human-rights situation in the country as follows:

"Tajikistan's definition of torture does not comply fully with the UN Committee Against Torture's recommendations to the country in December 2006. In a positive move, in March 2008 the Criminal Procedure Code was amended to make evidence obtained under torture inadmissible in court proceedings.

Experts agree that in most cases there is impunity for rampant torture in Tajikistan. In one of the few cases that reached the courts, two policemen in Khatlon province were convicted in August 2008 for ill-treating minors; one of the two received a four-year prison sentence, and the other a suspended sentence.

NGOs and local media reported at least three deaths in custody in 2008, including the death from cancer of the ex-deputy chair of the Party of Islamic Revival Shamsiddin Shamsiddinov. The party alleged his arrest in 2003 was politically motivated and claimed that his life could have been saved had he been allowed to undergo surgery.

In an April 1, 2008 decision (*Rakhmatov et al. v. Tajikistan*) the UN Human Rights Committee found that Tajikistan violated the rights, including freedom from torture, of five applicants, two of them minors when they were arrested. Tajikistan failed to cooperate with the committee's consideration of the complaint. Similar violations were established in an October 30, 2008 decision (*Khuseynov and Butaev v. Tajikistan*)."

88. The 2009 US Department of State Country Report on Human Rights Practices, released on 11 March 2010, provides the following information in relation to Tajikistan:

"The government's human rights record remained poor, and corruption continued to hamper democratic and social reform. The following human rights problems were reported: ... torture and abuse of detainees and other persons by security forces; impunity of security forces; denial of right to fair trial; harsh and life-threatening prison conditions; prohibition of international monitor access to prisons; ...

The law prohibits [cruel, inhumane or degrading treatment or punishment], but some security officials used beatings or other forms of coercion to extract confessions during interrogations, although the practice was not systematic. Officials did not grant sufficient access to information to allow human rights organizations to investigate claims of torture.

...

The Ministry of Justice (MOJ) continued to deny access to prisons or detention facilities to representatives of the international community and civil society seeking to investigate claims of harsh treatment or conditions. Some foreign diplomatic missions and NGOs were given access to implement assistance programs or carry out consular functions, but their representatives were limited to administrative or medical sections, and MOJ personnel accompanied them. The government did not sign an agreement with the International Committee of the Red Cross (ICRC) to allow free and unhindered access to prisons and detention centres, and the ICRC's international monitoring staff has not returned to the country since 2007.

Detainees and inmates described harsh and life-threatening prison conditions, including extreme overcrowding and unsanitary conditions. Disease and hunger were serious problems, but outside observers were unable to assess accurately the extent of the problems because authorities did not allow access to prisons. Organizations such as the UN Human Rights Council reported that infection rates of tuberculosis and HIV were significant and that the quality of medical treatment was poor.

...

Victims of police abuse may submit a formal complaint in writing to the officer's superior or the Office of the Ombudsman. Most victims chose to remain silent rather than risking retaliation by the authorities.

...

Trials are public, except in cases involving national security. There is a presumption of innocence by law, but in practice defendants were presumed guilty. ... In national security cases, a panel consisting of a presiding judge and two 'people's assessors' determines the guilt or innocence of the accused. Qualifications of the assessors and how those qualifications are determined are not known, but their role is passive, and the presiding judge dominates the proceedings.

...

Authorities claimed that there were no political prisoners and that they did not make any politically motivated arrests. Opposition parties and local observers claimed the government selectively prosecuted political opponents. There was no reliable estimate of the number of political prisoners, but former opposition leaders claimed there were several hundred such prisoners held in the country, including former fighters of the UTO."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

89. The applicant alleged that, if extradited to Tajikistan, he would be subjected to ill-treatment in breach of Article 3 of the Convention. He also

claimed that the Russian authorities had failed to assess the risks of ill-treatment that he would run in the requesting country. Article 3 of the Convention reads as follows:

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

A. The parties' submissions

90. The Government contested the applicant's arguments.

91. The Tajik Prosecutor General's Office had given diplomatic assurances to the effect that the applicant would be prosecuted only in relation to the crimes mentioned in the extradition request, that he would be able to leave Tajikistan freely after standing trial and serving a sentence and that he would not be expelled, transferred or extradited to a third State without the Russian authorities' consent. According to the Tajik Criminal Code, its task was to protect human rights; and a sentence applied to a criminal could not pursue the aim of causing him or her physical suffering or humiliating the person in question.

92. The Russian Ministry of Foreign Affairs had informed the Russian Prosecutor General's Office that there had been no reason not to extradite the applicant because Tajikistan, a UN member, had undertaken to comply with the Universal Declaration of Human Rights, and a Tajik ombudsman's office had been created. Tajikistan had ratified the ICCPR of 1966, the Refugee Convention of 1989, the Convention against Torture of 1984 and other treaties.

93. The applicant's allegations of risks of ill-treatment in Tajikistan had not been substantiated. Accordingly, his extradition would not amount to treatment proscribed by Article 3 of the Convention.

94. The applicant maintained his claims.

B. The Court's assessment

1. Admissibility

95. The Court notes that the complaint under Article 3 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds and must therefore be declared admissible.

2. Merits

(a) General principles

96. The Court reiterates at the outset that in order to fall within the scope of Article 3 ill-treatment must attain a minimum level of severity. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *T. v. the United Kingdom* [GC], no. 24724/94, § 68, 16 December 1999). Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX).

97. The Court further reiterates that extradition 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 in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 of the Convention in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise (see *Soering v. the United Kingdom*, 7 July 1989, § 91, Series A no. 161).

98. In determining whether it has been shown that the applicant runs a real risk, if extradited, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, 29 April 1997, § 37, *Reports of Judgments and Decisions* 1997-III). Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition (see *Cruz Varas and Others v. Sweden*, 20 March 1991, §§ 75-76, Series A no. 201, and *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 107, Series A no. 215). However, if the applicant has not been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see

Chahal v. the United Kingdom, 15 November 1996, §§ 85-86, *Reports* 1996-V).

99. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*). It is in principle for the applicant to adduce evidence capable of proving that there are 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 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *Ryabikin v. Russia*, no. 8320/04, § 112, 19 June 2008).

100. As regards the general situation in a particular country, the Court considers that it can attach certain importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100, *Müslim v. Turkey*, no. 53566/99, § 67, 26 April 2005, *Said v. the Netherlands*, no. 2345/02, § 54, ECHR 2005-VI, and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). At the same time, 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 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001). Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 73, ECHR 2005-I).

(b) Application of the above principles to the present case

101. In line with the case-law cited above, it is necessary to examine whether the foreseeable consequences of the applicant's extradition to Tajikistan are such as to bring Article 3 of the Convention into play. Since he has not yet been extradited, owing to the indication by the Court of an interim measure under Rule 39 of the Rules of Court, the material date for the assessment of that risk is that of the Court's consideration of the case.

102. In the applicant's submission, his fears of possible ill-treatment in Tajikistan are justified by two factors. First, referring to a number of reports, the applicant argues that the general human-rights situation in the receiving country is deplorable. Secondly, he claims that he would personally run an even greater risk of ill-treatment since the criminal proceedings against him were of a political nature and because of his ethnic Uzbek origin.

103. The Court will accordingly first consider whether the general political climate in Tajikistan could give reasons to assume that the applicant would be subjected to ill-treatment in the receiving country. It notes that, in the Government's submission, Tajikistan respects basic human rights. However, the Court reiterates that in cases concerning aliens facing expulsion or extradition it is entitled to compare materials made available by the Government with materials from other reliable and objective sources (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, ECHR 2007-I, and *Saadi v. Italy* [GC], no. 37201/06, § 131, ECHR 2008-...).

104. The Court points out in this connection that the evidence from a number of objective sources undoubtedly illustrates that the overall human-rights situation in Tajikistan gives rise to serious concerns. For instance, the Committee against Torture pointed out that the Tajik law regarding prohibition of torture was not fully in conformity with the text of the Convention against Torture, which in itself might raise suspicions as to the degree of protection accorded to those alleging ill-treatment. The Committee also emphasised that detainees were often kept in unrecorded detention without access to a lawyer or medical assistance and that interrogation methods prohibited by the Convention against Torture were frequently used (see paragraph 85 above). Human Rights Watch observed that granting impunity to State officials for acts of rampant torture was a common practice (see paragraph 87 above). The US Department of State also reported frequent use of torture by security officials and pointed out that the Tajik authorities denied independent observers, including employees of the International Committee for the Red Cross, unhindered access to detention facilities (see paragraph 88 above).

105. The Court is not persuaded by the Government's argument that the mere fact of ratification by Tajikistan of major human-rights instruments excludes the possibility that the applicant would run a risk of ill-treatment in the requesting country. The existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see *Saadi*, cited above, § 147 *in fine*). Given that the Government failed to convincingly show that the human-rights situation in Tajikistan had drastically improved when compared with the situation described in the aforementioned reports by reputable organisations, the Court is ready to accept that ill-treatment of detainees is an enduring problem in Tajikistan.

106. Nonetheless, the Court points out that the above-mentioned findings attest to the general situation in the country of destination and should be supported by specific allegations and require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73). In the

same context, the Court should examine whether the authorities assessed the risks of ill-treatment prior to taking the decision on extradition (see *Ryabikin*, cited above, § 117).

107. The applicant argued that the risk of his being subjected to ill-treatment in Tajikistan was exacerbated by his ethnic Uzbek origin. The Court points out in this connection that instances of discrimination against Uzbeks in Tajikistan have been reported (see paragraph 86 above). Furthermore, the applicant brought to the Russian authorities' attention the fact that the charges against him concerned events that had taken place in the aftermath of the civil war. The Court observes in this connection that, according to the US Department of State, several hundred political prisoners, including former opponents of the governing party who fought in the civil war, are being held in Tajikistan (see paragraph 88 above).

108. The Court also observes that the Russian Office of the UNHCR, having studied the applicant's case, concluded that the criminal charges of banditry had amounted to disguised persecution "on the grounds of political views attributed to the applicant, since [the Tajik authorities] associate the applicant with anti-governmental activities because he had been a member of militia groups suspected of involvement in the armed conflict of August 1997" (see paragraph 46 above). In such circumstances the Court considers that the applicant's personal situation would be more likely to increase the risk to him of harm in Tajikistan (see, *mutatis mutandis*, *Chahal*, cited above, § 106).

109. The Government's reference to the fact that the applicant did not apply for asylum immediately after his arrival in Russia does not necessarily refute his allegations of risks of ill-treatment since the protection afforded by Article 3 of the Convention is in any event broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention Relating to the Status of Refugees (see, *mutatis mutandis*, *Saadi*, cited above, § 138). Moreover, it is noteworthy that the Russian Office of the UNHCR acknowledged that, in its opinion, the applicant qualified as a "refugee" within the meaning of the 1951 Convention (see paragraph 46 above).

110. In view of the above, the Court considers that substantial grounds have been shown for believing that the applicant would face a real risk of treatment proscribed by Article 3 of the Convention if extradited to Tajikistan.

111. The Court further notes that the Government relied on assurances from the Tajik Prosecutor General's Office to the effect that the applicant would not be subjected to ill-treatment in Tajikistan (see paragraphs 34 and 36 above). However, the Court observes that the Tajik Prosecutor General's Office's letters of 10 April and 26 May 2009, which the Government described as diplomatic assurances, contained no reference whatsoever to the protection of the applicant from treatment proscribed by Article 3 of the Convention. The mere statement that Tajikistan had ratified the Convention

against Torture could not be considered a warranty against the risk of being subjected to torture that the applicant might face in Tajikistan. In any event, diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see *Saadi*, cited above, §§ 147-48).

112. Lastly, the Court will examine the applicant's allegation that the Russian authorities did not conduct a serious investigation into possible ill-treatment in the requesting country. The Government did not dispute that the applicant had brought to the domestic authorities' attention the fact that he had been persecuted in Tajikistan on ethnic and political grounds. Moreover, the Supreme Court quashed the decision of 1 April 2009 for the reason that the Moscow City Court had failed to analyse the defence's argument concerning political persecution (see paragraph 35 above).

113. Nonetheless, when re-examining the appeals against the extradition order, the City Court merely stated that Ms Ryabinina's report had been unsubstantiated (see paragraph 37 above). The Supreme Court, in its turn, limited its analysis of the risk of the applicant's being subjected to ill-treatment to a reference to the assurances by the Tajik Prosecutor General's Office (see paragraph 38 above). The Court is struck by the fact that both the City Court and the Supreme Court claimed that the letters from the Tajik Prosecutor General's Office of 10 April and 26 May 2009 had provided assurances that the applicant would not be ill-treated in Tajikistan, whereas it is clear from those documents that no such assurances were given. It concludes therefore that the domestic courts failed to study carefully the documents produced in the applicant's extradition case. It is also noteworthy that the domestic courts made no attempt to examine the fact that the charges against the applicant concerned events that had occurred in the context of the aftermath of the civil war and that the Tajik authorities might have brought them with a view to retaliating against their former political opponents.

114. In such circumstances the Court is unable to conclude that the Russian authorities duly addressed the applicant's concerns with regard to Article 3 in the domestic extradition proceedings.

115. The Court finds therefore that implementation of the extradition order against the applicant would give rise to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

116. The applicant complained under Article 5 § 1 (f) of the Convention that his ongoing detention pending extradition had been “unlawful”. He also complained under Article 5 § 4 of the Convention that he could not

challenge in the Russian courts the lawfulness of his detention pending extradition.

117. Article 5 of the Convention reads, in so far as relevant, 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."

A. The parties' submissions

1. The Government

118. The Government contested the applicant's arguments. They claimed that the applicant's detention pending extradition had been authorised by the decision of 18 June 2008 and that the decision in question had been taken after a court hearing held in the presence of the applicant and his counsel. The applicant had been advised of the avenues of appeal against the decision to place him in custody. In sum, the applicant's detention had been "lawful" within the meaning of Article 5 § 1 of the Convention.

119. The Government further referred to the decision by the Russian Constitutional Court of 1 March 2007 (see paragraphs 76 and 77 above) stating that the applicant's detention had been governed by Article 466 § 1 of the CCP read in conjunction with Chapter 13 of the CCP and that those legal provisions had been sufficiently clear.

120. The length of the applicant's detention could be explained by the complexity of the check undertaken by the Russian Prosecutor General's Office as regards the applicant's nationality. The detention after 3 December 2008, when the applicant had been served with the extradition order, had been justified by the fact that he had appealed against it, as well as by the application of Rule 39 of the Rules of Court.

121. The applicant had had an opportunity to complain about the alleged unlawfulness of his detention using the procedure referred to in the decision by the Russian Constitutional Court of 1 March 2007, that is, under Articles 97 to 101 and 108 to 110 of the CCP and Chapter 54 of the CCP.

The applicant had repeatedly complained that his detention had been unlawful, in particular, to the Babushkinskiy, Tverskoy and Zamoskvoretskiy District Courts of Moscow and to the governor of the remand prison.

122. The Government concluded that the applicant's rights under Article 5 of the Convention had not been violated.

2. The applicant

123. The applicant asserted that the term of his detention had exceeded the maximum term permitted by Article 109 of the CCP and that it had never been extended in breach of domestic law since the decision of 18 June 2008 could not be regarded as a decision on prolongation of the term of custodial detention. The applicant also claimed that the term of his detention had been unforeseeable, in breach of the quality-of-law requirement, because the Russian prosecutors had not applied to a court for extension of the term of his detention and the domestic courts had found that the prosecutors should not have done so in the absence of domestic criminal proceedings against him. He further stated that no extradition proceedings against him had been pending after the application of Rule 39 of the Rules of Court and that accordingly his detention had ceased to be justifiable under Article 5 § 1 (f) of the Convention.

124. The applicant also maintained his complaint under Article 5 § 4 of the Convention.

B. The Court's assessment

1. Admissibility

125. The Court notes that the complaints under Article 5 §§ 1 and 4 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It considers that they are not inadmissible on any other grounds and must therefore be declared admissible.

2. Merits

(a) Article 5 § 1 of the Convention

126. The Court reiterates at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty (see *Aksoy v. Turkey*, 18 December 1996, § 76, *Reports* 1996-VI). The text of Article 5 makes it clear that the guarantees it contains apply to “everyone” (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 162, ECHR 2009-...). Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list

of permissible grounds on which persons may be deprived of their liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (ibid., § 163).

127. It is common ground between the parties that the applicant was detained as a person "against whom action is being taken with a view to ... extradition" and that his detention fell under Article 5 § 1 (f). The parties disagreed, however, as to whether the detention was "lawful" within the meaning of Article 5 § 1 of the Convention.

128. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports* 1998-VI, and *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII).

129. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with (see *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III, *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX, and *Ladent v. Poland*, no. 11036/03, § 47, ECHR 2008-...).

130. Turning to the circumstances of the present case, the Court observes that the request for the applicant's extradition was accompanied by an arrest warrant issued by a Tajik prosecutor rather than by a decision of a Tajik court. The applicant's initial placement in custody was ordered, on 19 April 2008, by a Russian court in accordance with Articles 97, 99 and 108 and Article 466 § 1 of the CCP (see paragraph 49 above).

131. However, an issue arises as to whether the judicial authorisation of the applicant's detention given by the Taganskiy District Court was sufficient to hold the applicant in custody for any period of time – no matter how long – until the decision on the extradition request had been made, or whether the detention was to be reviewed at regular intervals (see *Nasrulloyev v. Russia*, no. 656/06, § 73, 11 October 2007).

132. In the Government's submission, the term of the applicant's custodial detention was governed by Article 109 of the CCP, which permits up to twelve months' detention in cases concerning serious crimes. The Court notes at the same time that, in order to be considered "lawful" within the meaning of Article 109 § 2 of the CCP, custodial detention exceeding two months necessitates further judicial authorisation (see paragraph 67 above).

133. According to the Government, the applicant's placement in custody was authorised by the Taganskiy District Court, pursuant to Article 108 of the CCP, on 19 April 2008 and then again on 18 June 2008 (see paragraphs 49 and 50 above). The Court is concerned with the fact that the same district court chose the same preventive measure in respect of the applicant for the second time one month and twenty-nine days after its first decision, although the applicant had remained in custody throughout that period. Nonetheless, it is ready to assume for the sake of argument that on 18 June 2008 the Taganskiy District Court erroneously referred to Article 108 of the CCP governing the initial placement in custody, and not extension of the term of detention, and in fact extended the term of the applicant's detention before it had exceeded two months as required by Article 109 § 2 of the CCP.

134. Should that be the case, the Court points out that no further decision on the extension of the term of the applicant's detention was taken until 14 May 2009, when the Supreme Court ruled that the applicant should remain in custody until 4 June 2009 (see paragraph 57 above). It follows that it took the domestic courts ten months and twenty-five days to reconsider the issue of the applicant's detention pending extradition.

135. In such circumstances the Court is bound to conclude that after 17 October 2008, that is, six months after the date of his placement in custody, the applicant was detained in breach of the provisions of Article 109 § 2 of the CCP. It thus finds that the applicant's detention pending extradition cannot be considered "lawful" for the purposes of Article 5 § 1 of the Convention. In these circumstances, the Court does not need to consider separately the applicant's additional arguments concerning the quality of domestic law and the length of his detention.

136. There has therefore been a violation of Article 5 § 1 of the Convention.

(b) Article 5 § 4 of the Convention

137. The Court reiterates that the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see *Talat Tepe v. Turkey*, no. 31247/96, § 72, 21 December 2004).

138. The Court observes that it is not disputed between the parties that the applicant spent more than two years in detention pending extradition. It

considers that new issues affecting the lawfulness of the detention might have arisen during that period and that, accordingly, by virtue of Article 5 § 4, he was entitled to apply to a "court" with jurisdiction to decide "speedily" whether or not his deprivation of liberty had become "unlawful" in the light of new factors which emerged subsequently to the decision on his initial placement in custody (see *Ismoilov and Others v. Russia*, no. 2947/06, § 146, ECHR 2008-...).

139. The Court emphasises that it has already found on numerous occasions that the provisions of Articles 108 and 109 of the CCP did not allow those detained with a view to extradition to initiate proceedings for examination of the lawfulness of the detention in the absence of a request by a prosecutor for an extension of the custodial measure (see *Nasrulloyev*, cited above, § 88, *Ismoilov and Others*, cited above, § 151, and *Muminov v. Russia*, no. 42502/06, § 114, 11 December 2008). Furthermore, in the present case the applicant's counsel's attempt to complain about the prosecutors' failure to request such an extension proved to be futile as the Zamoskvoretskiy District Court expressly stated on two occasions that Article 125 of the CCP was inapplicable in the applicant's case (see paragraphs 56 and 60 above).

140. In these circumstances, the Court is not satisfied that the provisions of domestic law secured the applicant's right to take proceedings by which the lawfulness of his detention would be examined by a court.

141. It follows that throughout the term of the applicant's detention pending extradition he did not have at his disposal any procedure for a judicial review of its lawfulness.

142. There has therefore been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

143. The applicant complained that the wording of the extradition order had violated his right to be presumed innocent, in breach of Article 6 § 2 of the Convention, which reads as follows:

> " Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. The parties' submissions

144. The Government claimed that the extradition order merely contained a classification of the offence with which the applicant had been charged under the Russian law and not a finding as regards his guilt.

145. The applicant submitted that the Russian Prosecutor General's Office in its order of 20 November 2008 had stated that he had been guilty, in breach of the presumption-of-innocence principle; he suggested that the statement in question might influence the Tajik courts. Therefore, his right to be presumed innocent had been violated.

B. The Court's assessment

146. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are, or have been in existence, statements attributing criminal or other reprehensible conduct are relevant rather to considerations of protection against defamation and adequate access to court to determine civil rights and raising potential issues under Articles 8 and 6 of the Convention (see *Zollmann v. the United Kingdom* (dec.), no. 62902/00, 20 November 2003).

147. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308). It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62) but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, § 41, and *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II).

148. The Court has already found that Article 6 § 2 of the Convention is applicable where extradition proceedings are a direct consequence, and the concomitant, of the criminal investigation pending against an individual in the receiving State (see *Ismoilov and Others*, cited above, § 164) and sees no reason to depart from this approach in the present case.

149. The Court further reiterates that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law (see *Garycki v. Poland*, no. 14348/02, § 66, 6 February 2007). A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found

guilty of a particular criminal offence (see *Böhmer v. Germany*, no. 37568/97, §§ 54 and 56, 3 October 2002, and *Nešťák v. Slovakia*, no. 65559/01, §§ 88 and 89, 27 February 2007). Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Daktaras v. Lithuania*, no. 42095/98, § 43, ECHR 2000-X, and *A.L. v. Germany*, no. 72758/01, § 31, 28 April 2005).

150. Turning to the circumstances of the present case, the Court points out that the extradition order of 20 November 2008 stated that "[t]he actions of [Mr] M. Khaydarov are punishable under the Russian criminal law and correspond to Article 209 § 2 of the Russian Criminal Code" (see paragraph 21 above). In the Court's view, the sentence in question refers first and foremost to the classification of the acts with which the applicant was charged in Tajikistan under Russian law. Although the wording employed by the Russian Prosecutor General's Office was rather unfortunate since there was no clear indication of the fact that the applicant had been merely suspected of having committed "actions punishable under the Russian criminal law", the Court considers that the Russian Prosecutor General's Office was referring not to the question whether the applicant's guilt had been established by the evidence – which was clearly not for the determination of the prosecutor issuing an extradition order – but to the question whether there were legal grounds for the applicant's extradition (see, *mutatis mutandis*, *Daktaras*, cited above, § 44).

151. In such circumstances the Court cannot conclude that the wording of the extradition order amounted to a declaration of the applicant's guilt in breach of the principle of the presumption of innocence (see, by contrast, *Ismoilov and Others*, cited above, § 168).

152. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

153. The applicant contended that he had had no effective remedies in respect of his complaint under Article 3 of the Convention, in breach of 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."

154. The Government contested the applicant's arguments and claimed that he had had effective domestic remedies as regards his grievances.

155. The applicant maintained his complaint.

156. The Court observes that the complaint made by the applicant under this head has already been examined in the context of Article 3 of the Convention. Having regard to its above findings (see paragraph 114 above), the Court considers that, whilst the complaint under Article 13 taken in conjunction with Article 3 is admissible, there is no need to carry out a separate examination of this complaint on its merits (see, *mutatis mutandis*, *Shaipova and Others v. Russia*, no. 10796/04, § 124, 6 November 2008, and *Makaratzis v. Greece* [GC], no. 50385/99, §§ 84-86, ECHR 2004-XI).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. 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

158. The applicant claimed 15,000 euros (EUR) in respect of the non-pecuniary damage caused by his unlawful detention and the fact that he ran the risk of being ill-treated if extradited.

159. The Government submitted that the amount claimed was unreasonable and suggested that a finding of a violation of the Convention would in itself constitute sufficient just satisfaction.

160. The Court notes that it has found a combination of violations in the present case and accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. The Court therefore finds it appropriate to award the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

161. The applicant claimed 55,000 Russian roubles (RUB, equivalent to EUR 1,240) for his representation by Ms Magomedova at national level. He submitted two invoices confirming that the sum in question had been paid. He further claimed, referring to his lawyers' timesheets, EUR 3,800 for his representation by Ms Magomedova before the Court, as well as EUR 1,600 for his representation by Mr Ryabinina. The timesheets did not indicate the lawyers' hourly rates. The applicant further claimed compensation for postal and administrative fees in the amount of 7% of the legal fees claimed, that is, EUR 464.

162. The Government submitted that the applicant had substantiated with appropriate evidence his claims in the amount of RUB 55,000 but had failed to show that the remaining costs had actually been incurred.

163. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court dismisses the claim for costs and expenses in the Strasbourg proceedings as unsubstantiated and considers it reasonable to award the sum of EUR 1,240 for the domestic proceedings.

C. Default interest

164. The Court considers it appropriate that the default interest 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 under Articles 3, 5 and 13 admissible and the remainder of the application inadmissible;

2. *Holds* that, if the order to extradite the applicant to Tajikistan were to be enforced, there would be a violation of Article 3 of the Convention;

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

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

5. *Holds* that no separate issues arise under Article 13 of the Convention in respect of the alleged violation of Article 3 of the Convention;

6. *Holds*

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

(i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage; and

(ii) EUR 1,240 (one thousand two hundred and forty euros) 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;

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

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President