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

FIRST SECTION

**CASE OF GARABAYEV v. RUSSIA**

*(Application no. 38411/02)*

JUDGMENT

STRASBOURG

7 June 2007

*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 Garabayev v. Russia,**

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 15 May 2007,

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

# PROCEDURE

1. The case originated in an application (no. 38411/02) 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 Russian national, Murad Redzhepovich Garabayev ("the applicant"), on 28 October 2002.

2. The applicant, who had been granted legal aid, was represented by Ms Stavitskaya, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by their Agent, Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that he had been extradited to Turkmenistan in violation of Article 3 and that he had no effective remedies under Article 13. He also contended that his detention in Russia had been illegal and in breach of procedural guarantees of Article 5 of the Convention.

4. By a decision of 8 September 2005, the Court declared the application partly admissible.

5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

# THE FACTS

## THE CIRCUMSTANCES OF THE CASE

6. The applicant is a citizen of Russia and Turkmenistan. He was born in 1977 and currently resides in Moscow.

### A. The facts

7. The facts of the case, as submitted by the parties, may be summarised as follows.

8. The applicant was employed as an accountant in the Central Bank of Turkmenistan. On 4 March 2002 the applicant was registered at the Russian Consulate in Turkmenistan as a Russian citizen residing in Ashkhabad, and on 17 March 2002 he was issued a Russian passport (no. 51 N 0956182). In August 2002 the applicant resigned and, with his wife and son, born in 1999, moved to Moscow to apply for a PhD course.

#### *1. Proceedings related to the applicant's extradition to Turkmenistan*

9. On 27 September 2002 the Prosecutor General of Turkmenistan sent a request to the Prosecutor General of the Russian Federation to detain and extradite the applicant on criminal charges. The request was made on the basis of the CIS Convention on legal assistance and legal relations in civil, family and criminal cases (the 1993 Minsk Convention). In Turkmenistan the applicant was charged with large-scale embezzlement of state property, committed through abuse of power. In particular, the request stated that in the period between 25 July and 3 September 2002 the applicant had transferred financial assets to the value of 40 million US dollars from the correspondent account of the Central Bank of Turkmenistan in the Deutsche Bank AG (Frankfurt-am-Main, Germany) to the Russkiy Depozitarny Bank (Moscow), Latekobank and Pareksbank (Riga, Latvia) and to HSBC (Syangan, China). The assets had later been withdrawn from the accounts and not returned to Turkmenistan. Criminal proceedings were instituted against the applicant in Turkmenistan. On 25 September 2002 a warrant for his arrest had been issued by a prosecutor and he had been put on the wanted list.

10. On 27 September 2002 the applicant was arrested in Moscow pursuant to an order of the Prosecutor General of Turkmenistan and placed in the temporary detention ward of the Moscow City Department of the Interior (*изолятор временного содержания ГУВД г. Москвы*).

11. On 11 October 2002 the applicant's lawyer, Ms Stavitskaya, submitted a complaint to the Prosecutor General's Office (PGO). She argued

that the applicant should not be extradited to Turkmenistan because he was a Russian national. She referred to the relevant provisions of the Russian Constitution, the Citizenship Act, the Code of Criminal Procedure (CCP) and the 1993 Minsk Convention, none of which allowed extradition of a Russian national to another jurisdiction. The complaint referred to human-rights reports on the situation in Turkmenistan, which gave rise to a well-established fear that torture and other forms of inhuman or degrading treatment would be used against the applicant. She also stated that, as the applicant could not be legally extradited, on account of his Russian nationality, his detention for that purpose was unlawful.

12. On 11 October 2002 the Human Rights Centre Memorial ("Memorial"), a Russian NGO, contacted the Prosecutor General about the applicant's detention and possible extradition to Turkmenistan. It referred to the applicant's Russian nationality. It further referred to the situation in Turkmenistan and, in particular, to the absence of fair-trial guarantees and the lack of impartiality and independence of the judiciary. It referred to the facts that in Turkmenistan arrest warrants were signed personally by the President of Turkmenistan and were not subject to any review, that the sentences given in all politically important cases were pre-determined and that the use of torture was widespread. On 12 and 17 October Memorial issued press releases concerning the applicant's case. It stated that the applicant was being persecuted in Turkmenistan in connection with a politically motivated case against the former deputy head of the Central Bank of Turkmenistan, who had been accused by the President of financing the opposition and embezzling state funds, and who had fled Turkmenistan in 2001. Memorial gave details of the persecution of the employees of the Central Bank and their relatives, including the arrest of the applicant's mother, sister and uncle and confiscation of their property.

13. On 15 October 2002 Mr Sergey Kovalev, a member of the State Duma, sent a letter to the head of the International Department of the PGO concerning the applicant's case. He reminded the official of the applicant's Russian nationality and referred to the risk of torture and to the lack of fair-trial guarantees if the applicant were to be extradited to Turkmenistan.

14. On 18 October 2002 the applicant was transferred to a pre-trial detention centre (*учреждение ИЗ 77/3*).

15. On 18 October 2002 the chief assistant to the Prosecutor General issued an order for the extradition of the applicant to Turkmenistan. This order was approved by the Prosecutor General on 22 October 2002. The applicant and his lawyers were not informed of the order at the time and did not receive a copy of it.

16. On 24 October 2002 the applicant was extradited to Turkmenistan. The applicant submitted that, early in the morning, he was taken by the officers of the PGO to Domodedovo Airport and brought to the premises of Turkmen Airlines. There he was briefly shown a copy of the decision of the

Prosecutor General to extradite him. The officers of the Turkmen law-enforcement bodies brought him to the plane through the border control, where he was not required to show a passport. The applicant demanded a meeting with his lawyer, but this was refused.

17. The Government referred, in their memorials, to the information obtained from the PGO, according to which the applicant had been escorted to the plane by the officers of the Ministry of Justice. The applicant had not applied to the escort with a request for a meeting with his lawyer, and in any event the escort was not authorised to deal with detainees' complaints. The Government confirmed that the applicant had seen the decision to extradite him on 24 October 2002.

18. On 18 and 24 October 2002 the applicant's lawyer submitted complaints to the Moscow City Court. She challenged the lawfulness of the applicant's detention in view of his Russian nationality and the lack of grounds for his extradition. In her second complaint she also referred to the decision of the Prosecutor General to extradite the applicant and stated that the applicant had neither been officially informed of the decision nor received a copy of it.

19. On 28 October 2002 a judge of the Moscow City Court replied to the applicant's lawyer's complaint of 18 October in a letter stating that the complaint concerning the lawfulness of the applicant's detention should have been submitted to a competent district court. He further said that the complaint did not raise the issue of lawfulness of the decision to extradite, but that in any case a review should take place in the presence of the person who was to be extradited. Since the applicant had been already extradited to Turkmenistan on 24 October 2002, he could not take part in the proceedings. On 5 November the same judge replied to the lawyer's complaint of 24 October stating that the complaint about the unlawfulness of the decision to extradite could not be reviewed in the applicant's absence. The applicant's lawyer appealed to the Supreme Court.

20. On 11 November 2002 the PGO replied to the applicant's lawyer stating that the decision to extradite had been taken pursuant to the request of the Prosecutor General of Turkmenistan in relation to a criminal charge and was in conformity with international law.

21. On 14 November 2002 the European Court of Human Rights requested information from the Government, under Rule 49 § 2 (a) of the Rules of Court, concerning the applicant's detention and extradition to Turkmenistan, and asked whether his claims that he might be subjected to treatment contrary to Article 3 of the Convention had been reviewed by a competent national authority.

22. On 5 December 2002 the Moscow City Court reviewed the lawyer's complaint of 24 October. It found that the decision to extradite the applicant had been unlawful in view of his Russian nationality, proof of which - a copy of his Russian passport - was contained in the case file. The City Court

further found that the decision had not been officially served on the applicant or his lawyer, as a result of which he had been deprived of the possibility to challenge it under the national law. The applicant's detention was also found to be unlawful. No appeal was lodged against this decision, which became final on 16 December 2002.

*2. Proceedings related to the applicant's Russian nationality*

23. On 8 December 2002 the First Deputy to the Prosecutor General applied to the Presnenskiy District Court of Moscow seeking to establish that the applicant had fraudulently obtained Russian nationality. The application was directed against the Ministry of Foreign Affairs, the Russian Consulate in Ashkhabad and the applicant himself. The prosecutor submitted that the applicant had obtained Russian nationality as the spouse of a Russian national, pursuant to the relevant provisions of the Citizenship Act, and had submitted to the Russian Consulate a copy of the marriage certificate of 15 September 1998. However, the marriage had allegedly been dissolved by a district court in Ashkhabad, Turkmenistan, on 7 June 2001 and that ruling that had become final on 19 June 2001.

24. On 27 December 2002 the Presnenskiy District Court found that the applicant had submitted fraudulent information to the Russian Consulate. The court refused to nullify the applicant's Russian nationality, since a decision of this nature could only be taken by the President of the Russian Federation. Neither the applicant, nor his wife nor his lawyer was informed of the proceedings or present at the hearing.

25. Having learnt of the proceedings, the applicant's lawyer appealed against the decision to the Moscow City Court on 16 January 2003. She challenged the authenticity of the Ashkhabad district court's ruling, which had been accepted as the basis of the decision. She submitted a statement from the applicant's wife in which she categorically denied the divorce. Reference was also made to the fact that the applicant, his wife and his lawyer had not been informed of the proceedings and had taken no part in them.

26. On 27 January 2003 the Russian Embassy in Turkmenistan, acting also on behalf of the Ministry of Foreign Affairs, submitted a request to the Moscow City Court to reinstate the ten-day time-limit for appealing against the decision of 27 December 2002, because the decision had been delivered to them on 18 January 2003. On 30 January 2003 the Presnenskiy District Court reinstated the term. In its appeal the Embassy submitted that the decision of the court was based on a wrong interpretation of Turkmen family law and that the court decision on divorce was not final. They further stated that the applicant had been deprived of the opportunity to participate in the court hearing. At the relevant time he had been detained in Ashkhabad and the Russian Consulate had been denied access to him, in

violation of the relevant international treaties. They referred to Articles 6 and 13 of the European Convention on Human Rights.

27. On 16 May 2003 the Moscow City Court quashed the decision of 27 December 2002 because measures had not been taken to guarantee the applicant's participation in the proceedings. The case was remitted to the Presnenskiy District Court.

28. On 17 September 2003, on an application by the PGO, the Presnenskiy District Court terminated the proceedings concerning the allegedly fraudulent acquisition of Russian nationality, due to a change in circumstances. The decision became operative on 27 September 2003.

*3. Proceedings following the applicant's extradition*

29. The applicant submitted an account of his detention in Turkmenistan in a letter of 28 February 2003. He stated that once he arrived in Ashkhabad he was brought to the office of the Prosecutor General and questioned for four hours. He was refused water and cigarettes and threatened with torture and reprisals against his family. During the questioning he was hit on the head and back, the effects of which lasted for several months. The applicant denied the charges brought against him.

30. He was then taken to the pre-trial detention centre of the Ministry of National Security. He described the conditions as follows: three people were detained in a cell measuring about ten square metres, they were each given a plate of food twice a day, there was no toilet in the cell and they were taken out to the toilet twice a day, there was no radio or TV in the cell and they received no news from the outside. The applicant was taken outside for 15-20 minutes' exercise during the first 20 days, and for two months he was not allowed any exercise. The applicant submitted that during his stay in detention he was constantly in fear that he or his close relatives would be subjected to torture, which is wide-spread in Turkmenistan.

31. He was questioned twice without a lawyer. He attempted to instruct a lawyer through his relatives, but was told that he was not entitled to one. His relatives found out that he was detained in the pre-trial detention centre, and informed him that his mother had been sentenced to seven years in prison, and his uncle for a longer term. His sister's and parents-in-law's identity documents had been taken away from them.

32. At the end of November and beginning of December 2002 the officers of the law-enforcement bodies of Turkmenistan visited the applicant in the detention centre and informed him that proceedings had been instituted in the Presnenskiy District Court in Moscow. He was shown a summons to attend the court and told to sign it. The applicant managed to write on it that he was in detention and could not attend. The officers became angry at this and hit the applicant.

33. On 25 January 2003 the applicant was presented with the charges and the case file. The charges ran to four or five pages in Turkmen and the

case file consisted of two folders, mostly in Turkmen. The applicant submits that he does not know Turkmen well enough, and asked for an interpreter or a translation of the documents. His request was refused. By that time he had a lawyer, who told him that there were no documents in the file which could prove his guilt. It also appears that on a later date the applicant was charged with swindling committed jointly with his sister.

34. In the meantime the Russian Consulate in Ashkhabad contacted the Ministry of Foreign Affairs of Turkmenistan on several occasions in order to arrange for a consular meeting with the applicant. Requests were sent on 5 and 11 December 2002 and on 10 and 24 January 2003. On 24 December 2002 the Ministry of Foreign Affairs of Turkmenistan replied that no meeting was possible because the applicant was a citizen of Turkmenistan.

35. On 1 February 2003 the applicant was taken to Ashkhabad Airport and returned to Moscow, accompanied by an official from the Russian Consulate.

36. After the applicant was returned to Moscow, he learnt that his mother had been tried again and sentenced to 14 years' imprisonment and that similar sentences had been imposed on his sister and his uncle.

*4. Criminal charges against the applicant in Russia*

37. While the applicant was in Turkmenistan, an investigator of the PGO started criminal proceedings on 24 January 2003 against a group of persons on the basis of information received from the Prosecutor General of Turkmenistan. The background to the proceedings concerned the unauthorised transfer of 20 million US dollars from the account of the Central Bank of Turkmenistan in Deutsche Bank AG (Frankfurt-am-Main, Germany) to accounts in a private bank in Moscow. The applicant was not listed among the suspects.

38. On 29 January 2003 the applicant was charged with swindling on a large scale, committed by an organised group. The charge stated that in August 2002 the applicant, along with several private bank managers, including a certain L., had transferred 20 million US dollars from the account of the Central Bank of Turkmenistan in Deutsche Bank AG (Frankfurt-am-Main, Germany) to accounts in a private bank in Moscow. They had then misappropriated 19.3 million US dollars.

39. Also on 29 January 2003 the applicant was put on the international wanted list.

40. On 30 January 2003 the Basmanny District Court of Moscow issued an arrest warrant in respect of the applicant on request of the PGO. The warrant stated that the applicant had been charged with a serious crime but had fled from justice abroad and that his name had been placed on the international wanted list. At the hearing the applicant was represented by a court-appointed lawyer, who did not object to the applicant's arrest.

41. On 30 January 2003 the First Deputy to the Prosecutor General of the Russian Federation contacted the Prosecutor General of Turkmenistan, seeking the applicant's extradition in relation to criminal charges and an arrest warrant issued against him in Russia. The letter stated that the applicant was a Russian national and that there was information from which one could conclude that he was now in Turkmenistan. It did not refer to the applicant's previous extradition to Turkmenistan.

42. On 31 January 2003 the First Deputy to the Prosecutor General of Turkmenistan authorised the applicant's "temporary extradition" to Russia on the grounds of the criminal proceedings brought against him.

43. On 1 February 2003 the applicant was returned to Moscow. On his arrival he was arrested and placed in the Lefortovo pre-trial detention centre of the Federal Security Service (FSB). On the same day he was presented with the charges of swindling.

44. On 6 February 2003 the applicant's lawyer, Ms Stavitskaya, met with the applicant in the detention centre. During the meeting she learnt of the court decision of 30 January ordering the applicant's arrest. On 11 February she lodged an appeal with the Moscow City Court against that decision. She submitted that the applicant had not been properly represented, that he had not fled from justice but had been extradited to Turkmenistan by the PGO, that he had been detained in Turkmenistan and that the investigators could not have been unaware of this. She also referred to the decision of the Moscow City Court of 5 December 2002 according to which the applicant's extradition and detention were unlawful.

45. On 19 March 2003 the Moscow City Court dismissed the appeal. The representative of the PGO submitted that the investigator and the Deputy Prosecutor General who had authorised the proceedings had not been aware of the applicant's whereabouts and that an international search warrant had been issued against him. The district court had had regard to his personal situation, the seriousness of the charges, and the fact that the applicant could interfere with the investigation, put pressure on witnesses and hide or destroy evidence of the crimes.

46. On 19 March 2003 the applicant was again charged with large-scale swindling committed by a group of persons and with forgery of official documents.

47. On 28 March 2003 the Basmanny District Court extended the applicant's detention. The court repeated its findings that the applicant had fled from justice abroad. It had regard to the seriousness of the charges and the risk that he might interfere with the investigation. His detention was authorised until 29 May 2003. On 23 April 2003 the Moscow City Court confirmed this decision on appeal.

48. On 2 April 2003, following a letter from the applicant stating that the threat of his extradition persisted, the European Court of Human Rights

requested the Russian Government, under Rule 39 of the Rules of Court, not to extradite the applicant to Turkmenistan until further notice.

49. On 24 and 27 April 2003 the charges of swindling, money-laundering and forgery of documents were again laid against the applicant.

50. On 12 May 2003 a judge of the Moscow City Court, on a complaint by the applicant, submitted an application for supervisory review to the Presidium of the Moscow City Court, seeking a review of the decisions of 30 January 2003 and 19 March 2003. The application stated that the applicant had been extradited to Turkmenistan pursuant to a decision of the Prosecutor General and that the reasons given for issuing an international search warrant and authorising his detention *in absentia* had therefore been invalid.

51. On 16 May 2003 the Basmanny District Court again extended the applicant's detention.

52. At some point in the summer of 2003 the investigation was completed and the Zamoskvoretskiy District Court set the case down for hearing on 4 September, and then on 3 October 2003.

53. On 9 March 2004 the Zamoskvoretskiy District Court of Moscow found the applicant guilty of using a forged document and sentenced him to a fine of 5,000 roubles (RUR). The court acquitted the applicant of the charges of embezzlement, while the prosecutor withdrew the charges of money-laundering. The applicant was released from detention on the same day. By the same decision the applicant's only co-accused, L., the manager of a private bank in Moscow, was convicted of money-laundering committed by a group and sentenced to four years' imprisonment.

54. On 19 March 2004, following a letter from the Russian Government giving assurances that the applicant would not be extradited to Turkmenistan in view of his now undisputed Russian nationality, the European Court discontinued the preliminary measure indicated under Rule 39 § 1 of the Rules of Court.

55. On 9 June 2004 the Moscow City Court reviewed and upheld the sentence of 9 March 2004.

## B. Relevant domestic law

### *1. The Code of Criminal Procedure (CCP)*

56. Articles 108 and 109 of the Code of Criminal Procedure (CCP) of 2002 contain provisions relating to pre-trial detention. They provide that detention can be imposed by a judge, on a reasoned request by the prosecutor, or an investigator upon the prosecutor's sanction, if no other measure of restraint can be applied. The presence of the accused person in the court room is obligatory, unless he has been put on the international wanted list. The decision of the court to order detention can be appealed to a

higher court within three days. The appeal must be considered within three days of the date of receipt. Article 109 sets out the following terms of pre-trial detention: the term of detention cannot exceed two months. If the investigation continues, it can be extended to six months by the court on an application by the prosecutor. After that it can be extended to 12 months on an application by the prosecutor of the region. In exceptional circumstances, on an application by the Prosecutor General or his deputy, pre-trial detention can be extended to a maximum of 18 months.

57. Article 125 of the CCP provides for judicial review of decisions of investigators that might infringe the constitutional rights of participants in the proceedings or prevent a person's access to court.

58. Chapter 54 of the CCP regulates extradition on criminal charges. Articles 462-463 state that a decision to extradite a person upon a request from another country is taken by the Prosecutor General or his deputy. Such a decision is subject to appeal to a regional court within 10 days from the date of notification of the decision to the person concerned. The complaint is reviewed at a public hearing in the presence of the person in question, his representative and the prosecutor. The decision of the regional court can be appealed to the Supreme Court.

59. Article 464 provides that extradition cannot take place if the person whose extradition is sought is a Russian national or if he has refugee status.

60. Article 466 contains provisions relating to detention of a person whose extradition is sought. Detention can be authorised by the Prosecutor General or his deputy on receipt of an extradition request. If a foreign court has authorised the person's arrest, the decision of the prosecutor does not need to be confirmed by a Russian court. The period of detention cannot exceed the normal periods of detention pending investigation laid down by the Code of Criminal Procedure for similar crimes.

### *2. The 1993 Minsk Convention*

61. Article 57 of the CIS Convention on legal assistance and legal relations in civil, family and criminal cases (the 1993 Minsk Convention), to which both Russia and Turkmenistan are parties, provides that extradition shall not take place if the person whose extradition is sought has the nationality of the requested Contracting Party.

62. Its other relevant provisions are as follows:

**Article 61. Arrest or detention before the receipt of a request for extradition**

"1. The person whose extradition is sought may also be arrested before receipt of a request for extradition, if there is a related petition (*ходатайство*). The petition shall contain a reference to a detention order ... and shall indicate that a request for extradition will follow. A petition for arrest ... may be sent by post, wire, telex or fax.

2. The person may also be detained without the petition referred to in point 1 above if there are legal grounds to suspect that he has committed, in the territory of the other Contracting Party, an offence entailing extradition.

3. In case of [the person's] arrest or detention before receipt of the request for extradition, the other Contracting Party shall be informed immediately."

**Article 61-1. Search for a person before receipt of the request for extradition**

"1. The Contracting Parties shall ... search for the person before receipt of the request for extradition if there are reasons to believe that this person may be in the territory of the requested Contracting Party ....

2. A request for the search ... shall contain ... a request for the person's arrest and a promise to submit a request for his extradition.

3. A request for the search shall be accompanied by a certified copy of ... the detention order ....

4. The requesting Contracting Party shall be immediately informed about the person's arrest or about other results of the search."

**Article 62. Release of the person arrested or detained**

"1. A person arrested pursuant to Article 61 § 1 and Article 61-1 shall be released ... if no request for extradition is received by the requested Contracting Party within 40 days of the arrest.

2. A person arrested pursuant to Article 61 § 2 shall be released if no petition issued pursuant to Article 61 § 1 arrives within the time established by the law concerning arrest."

*3. Other relevant legal provisions*

63. Article 61 of the Constitution states that a citizen of the Russian Federation may not be deported from Russia or extradited to another State.

64. Article 62 §§ 1 and 2 of the Constitution permit a citizen of the Russian Federation to have the citizenship of a foreign State (dual citizenship) in accordance with the federal law or an international agreement of the Russian Federation. The possession of foreign citizenship by a citizen of the Russian Federation shall not derogate from his rights and freedoms and shall not relieve him of the obligations stipulated by Russian citizenship, unless otherwise provided for by federal law or an international agreement of the Russian Federation.

65. Section 4(4) of the Citizenship Act provides that a citizen of the Russian Federation shall not be exiled from the Russian Federation or handed over to a foreign State.

66. Article 5 of the 1993 Agreement between Russia and Turkmenistan on Regulation of Double Citizenship provides that a person having double

citizenship of the Contracting Parties enjoys all rights and freedoms and bears all responsibilities of a citizen of the State where he or she resides.

# THE LAW

## I. THE GOVERNMENT'S PRELIMINARY OBJECTION AS TO EXHAUSTION OF DOMESTIC REMEDIES

67. In their submissions following the Court's decision as to admissibility of the application, the Government stated that the applicant had not challenged before a court the lawfulness of his detention prior to extradition and that the final domestic decisions on the extradition and on the criminal charge against him had been taken after the submission of his complaint to the European Court.

68. The Court reiterates that, under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). However, in their observations on the admissibility of the application the Government did not raise this point. Moreover, the Court cannot discern any exceptional circumstances that could have dispensed the Government from the obligation to raise their preliminary objection before the adoption of the Chamber's admissibility decision of 8 September 2005 (see *Prokopovich v. Russia*, no. 58255/00, § 29, 18 November 2004).

69. Consequently, the Government are estopped at this stage of the proceedings from raising the preliminary objection of failure to use the domestic remedy (see, *mutatis mutandis*, *Bracci v. Italy*, no. 36822/02, §§ 35-37, 13 October 2005). It follows that the Government's preliminary objection must be dismissed.

## II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

70. The applicant submitted that by extraditing him to Turkmenistan Russia had violated Article 3 of the Convention, which provides:

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

*1. Submissions of the parties*

71. The applicant insisted that his extradition to Turkmenistan was incompatible with Article 3. He stated that the authorities had failed to take into account information which indicated that there existed a real risk of torture and politically motivated persecution. He had been shown the extradition order only on 24 October 2002, that is, on the day of transfer to Turkmenistan, and had had no opportunity to contact his lawyer or to challenge it. This risk of ill-treatment had materialised in Turkmenistan, where he had been beaten and detained in inhuman conditions.

72. The Government referred to the information from the PGO, according to which there had been no reason to expect treatment contrary to Article 3 in Turkmenistan. While in detention pending extradition the applicant had not alleged that he was in danger of such treatment and had submitted such complaints only after the extradition. The Government also noted that the applicant's extradition had been found unlawful by a domestic court on 5 December 2002.

*2. General principles*

73. It is the settled case-law of the Court 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 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. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 89-91; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107; and *H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, p. 758, § 37).

74. In determining whether it has been shown that the applicant runs a real risk, if expelled, 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*. The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources. 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 expulsion (see *Vilvarajah and Others v. the United Kingdom*, cited above, p. 36, § 107).

75. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. 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 and its physical or mental effects (see *Vilvarajah and Others*, cited above, p. 36, § 107). Treatment will be considered to be "inhuman" within the meaning of Article 3 because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). Furthermore, in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, p. 13, § 22). When assessing conditions of detention, account has to be taken of their cumulative effects as well as the applicant's specific allegations (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The duration of detention is also a relevant factor.

76. In assessing the evidence on which to base the decision whether there has been a violation of Article 3, 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. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

*3. The Court's assessment*

77. In line with its case-law cited above, the Court needs to establish whether there existed a real risk of ill-treatment in case of extradition to Turkmenistan and whether this risk was assessed prior to taking the decision on extradition, with reference to the facts which were known or ought to have been known at the time of the extradition (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67-69, ECHR 2005-I).

78. The Government denied, in their memorials, that before extradition information about a possible risk of ill-treatment had been available. At the same time they did not dispute that immediately after the applicant's arrest

several letters by the applicant, his lawyers and various public figures had been addressed to the Prosecutor General, expressing fears of torture and personal persecution of the applicant for political motives and seeking to prevent extradition on these grounds (see paragraphs 11-13 above). They also referred to the general situation in Turkmenistan. The competent authorities were thus made sufficiently aware of a risk of ill-treatment in case of the applicant's return to Turkmenistan. The Court therefore finds that at the date of the applicant's extradition to Turkmenistan there existed substantial grounds for believing that he faced a real risk of treatment proscribed by Article 3.

79. The Court will next examine whether prior to extradition this information received proper assessment. The Court does not discern any evidence in the present case to support a positive answer to this question. For example, no assurances of the applicant's safety from treatment contrary to Article 3 were sought, and no medical reports or visits by independent observers were requested or obtained (see *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 76-77). The reply of 11 November 2002 from the PGO to the applicant's lawyer referred only to the criminal proceedings that had served as formal ground for extradition and did not address any of the concerns relevant to Article 3.

80. Furthermore, it is not in dispute between the parties that the applicant was informed of the decision to extradite him only on the day of his transfer to Turkmenistan and that he was not allowed to challenge it or to contact his lawyer. The decision of the domestic court which found the extradition unlawful after it had occurred also failed to take into account the submissions under Article 3, and did not contain any reference to steps that could remedy the applicant's situation in this respect. In such circumstances, the Court can only conclude that no proper assessment was given by the competent authorities to the real risk of ill-treatment. The extradition was thus carried out without giving a proper assessment to that threat.

81. However, in the present case the applicant was not only extradited to Turkmenistan, but returned to Russia three months later. He produced an account of the events which had occurred while he was there. The Court is thus able to look beyond the moment of extradition and to assess the situation in view of these later developments (see *Mamatkulov,* cited above, § 69).

82. According to this evidence, the applicant spent most of his three-months detention in a cell measuring ten square metres shared with two other inmates and received food twice a day. He had been allowed very little exercise for the first 20 days of his detention, and no exercise in the remaining period. He was denied consular visits from the staff of the Russian Consulate, who could have provided some independent information about the conditions of his detention and his situation during that period. He was in constant fear for his life, anxious about the uncertainty of his own

fate and that of his relatives. He was also hit by investigators on several occasions (see paragraphs 29- 36 above). The applicant's submissions in this part were not contested by the respondent Government and serve to strengthen the Court's above conclusions about a violation of Article 3 by the authorities' failure to give a proper consideration to the well-grounded fears raised by the applicant.

83. In view of the above, the Court concludes that there has been a violation of Article 3 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

84. The applicant challenged the lawfulness and procedural guarantees of his detention, referring to the following relevant provisions of Article 5:

> "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: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;...
>
> (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. ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 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. ...."

### *1. Concerning the lawfulness of detention between 27 September and 24 October 2002*

85. The applicant complained that his detention in Russia between 27 September and 24 October 2002 had been unlawful within the meaning of Article 5 § 1 (f) and the domestic legislation and not authorised by a court. He stressed that at the time of his arrest he had been holding Russian nationality and could not be extradited to Turkmenistan, his detention for that purpose had therefore been unlawful from the outset. The applicant also disagreed that the decision of 5 December 2002 had restored his rights under Article 5 § 1 (f), because it had not led to his release and he had

remained in detention in Turkmenistan for another two months. The reason for his return from Turkmenistan had not been the quashing of the decision to extradite, but fresh criminal proceedings instituted in Russia as a result of which his detention had continued, albeit on new grounds.

86. The Government relied on two legal approaches which they had obtained from the PGO and from the Supreme Court of Russia. The PGO stated that the applicant's detention prior to extradition had been based on the provisions of the Minsk Convention of 1993 and the relevant Russian legislation. The Supreme Court agreed with the applicant that from 27 September until 24 October 2002 he had been detained unlawfully. However, the decision of the Moscow City Court of 5 December 2002 had corrected the violation by declaring the extradition and the detention unlawful so the applicant's rights had thus been restored.

87. The Court reiterates that the provisions of Article 5 § 1 (f) require the detention to be "in accordance with a procedure prescribed by law" and the arrest or detention to be "lawful". This requires any decision taken by the domestic courts within the sphere of Article 5 to conform to the procedural and substantive requirements laid down by a pre-existing law. The Convention here refers essentially to national law, but it also requires that any deprivation of liberty be in conformity with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118).

88. In the present case the applicant was detained in Russia pursuant to a detention order issued by a prosecutor in Turkmenistan. His detention was not confirmed by a Russian court, contrary to the provisions of Section 466 of the CCP, which requires such authorisation unless the detention in the country seeking extradition has been ordered by a court. Therefore the applicant's detention pending extradition was not in accordance with a "procedure prescribed by law" as required by Article 5 § 1.

89. Furthermore, the decision of 5 December 2002 found the applicant's extradition unlawful in view of his Russian nationality. Domestic legislation excludes, in non-ambiguous terms, the extradition of Russian nationals. The information about the applicant's nationality had already been available to the competent authorities at the time of the applicant's arrest because the applicant and his lawyer had raised the issue and his Russian passport had been in his extradition file. On that basis the Moscow City Court declared the applicant's detention for the purpose of extradition unlawful from the outset. The Court considers that the procedural flaw in the order authorising the applicant's detention was so fundamental as to render it arbitrary and *ex facie* invalid (see *Khudoyorov v. Russia*, no. 6847/02, § 165, ECHR 2005 (extracts)). This conclusion is further strengthened by the absence of judicial review of the lawfulness of the applicant's detention until his extradition had taken place.

90. As to the Government's argument that the applicant's situation was remedied by the decision of 5 December 2002, the Court notes that, apart from reaching the conclusion that the detention had been unlawful, the domestic authorities did not order or take steps to ensure the applicant's release or otherwise remedy the violation of his right to liberty and security.

91. To sum up, the Court finds that the applicant's detention during the period in question was unlawful and arbitrary, in violation of Article 5 § 1 (f).

*2. Concerning the availability of judicial review of the detention prior to extradition*

92. The Government argued that the applicant had had ample opportunities to challenge the lawfulness of his detention but had failed to use them. The applicant's lawyer had challenged the lawfulness of detention before the Prosecutor General on 11 October 2002 and before the Moscow City Court on 18 October 2002. The PGO had replied to the applicant's lawyer on 11 November 2002. The Moscow City Court had refused to consider the complaint because it should have been submitted to a competent district court. The applicant himself had not made any complaints. He had been informed of the decision to extradite him on 24 October 2002 and had not requested to contact a lawyer. The Russian legislation did not provide for notification of the lawyer of the person whose extradition was under way.

93. The applicant argued that Chapter 54 of the CCP, which regulated questions of extradition, did not contain a mechanism for challenging the lawfulness of detention pending extradition. His detention pending extradition had never been reviewed by a court, despite his complaints. The review which had occurred after the extradition could not be considered effective because the question of detention had been resolved only in the context of the review of the extradition procedure. He had thus been unable to obtain judicial review of his detention prior to extradition, in violation of Article 5 § 4.

94. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 76). The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see *Čonka v. Belgium,* no. 51564/99, § 46 and 55, ECHR 2002-I).

95. It should be noted that in the judgment of *Bordovskiy v. Russia* (no. 49491/99, § 66-67, 8 February 2005) the Court found that judicial review of detention pending extradition was in principle available in Russia under the provisions of the previous Code of Criminal Procedure. However, since the new CCP was applied in the present case, the Court does not find the conclusions in *Bordovskiy* directly applicable in this case.

96. The applicant was detained in Russia pursuant to an arrest warrant issued by the Prosecutor General of Turkmenistan. As the Court has found above, the applicant's detention was not authorised by a Russian court, in violation of the relevant domestic provisions. The Moscow City Court refused to consider the complaints concerning the unlawfulness of detention for lack of jurisdiction, but did not indicate which district court would be competent to review them. It nevertheless addressed the issue of detention in the context of the extradition proceedings, but only after the applicant's extradition had taken place. Thus, the lawfulness of the applicant's detention during the period in question was not examined by any court, despite his appeals to that effect.

97. The Court finds that even if the remedy required by Article 5 § 4 was available in the national law, as the Government have asserted, the applicant was unable to benefit from it. The Court's above findings regarding the arbitrariness of the detention are also of direct relevance here, since a court would have been much better placed to uncover the fundamental flaw in the detention order and order the applicant's release.

98. There has therefore been a violation of Article 5 § 4 of the Convention on account of the absence of judicial review of the applicant's detention pending extradition.

*3. Concerning the justification of detention after 30 January 2003*

99. The applicant argued that the guarantees of Article 5 § 3 were not observed during his detention on criminal charges in Russia after 1 February 2003. The inclusion of his name on the international wanted list by the Russian PGO was unlawful because he had been extradited by the same office to Turkmenistan in October 2002 and had not absconded from justice. The Basmanny District Court, when ordering his detention *in absentia* on 30 January 2003, had failed to investigate the circumstances of the case. The subsequent judicial review of his detention had failed to take into account the defective reasoning of the detention order.

100. The Government denied any irregularities in the order of 30 January 2003 and its further extensions. They pointed out that at the time when the Basmanny District Court ordered the applicant's detention it had not been aware that the applicant was in Turkmenistan, but only that he had been charged with a criminal offence in Russia and put on the international wanted list. During subsequent reviews this information was brought to the courts' attention, but that did not affect the conclusion regarding the

lawfulness of the court's initial decision. The decision of 30 January 2003 had been reviewed on appeal by the Moscow City Court on 19 March 2003 and found lawful, as were the following extensions of detention pending trial. The applicant had been represented by a lawyer throughout the proceedings.

101. The Court notes that, apart from the peculiarities of the present case, the mere possibility of a court issuing an arrest warrant *in absentia* in a situation where a person flees from justice, especially when he or she is placed on the international wanted list, does not conflict with the provisions of the Convention. However, once the applicant was returned from Turkmenistan on 1 February 2003 and arrested in Russia, he should have been promptly brought before a judge within the meaning of Article 5 § 3. He was not brought before a judge until 19 March 2003, that is, one month and 19 days later. This delay cannot be deemed to be compatible with the strict requirements of Article 5 § 3.

102. There has, accordingly, been a violation of Article 5 § 3 on the account of a failure to be brought promptly before a judge. In the light of this finding, the Court is not required to examine further aspects of this complaint.

## IV. ALLEGED VIOLATION OF ARTICLE 13

103. The applicant alleged that he had had no effective remedies against the above violations. He referred to Article 13, which provides:

> "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."

104. The Government contended that the applicant had had access to the domestic courts and had thus been able to raise his complaints before the competent domestic authorities.

105. The Court reiterates that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Čonka v. Belgium*, cited above, § 79).

106. The applicant was informed of the decision to extradite him on the day of the transfer. He was not allowed to contact his lawyer or to lodge a complaint, in breach of the relevant provisions of the domestic legislation. As found above, the compatibility of the scheduled removal with Article 3

was not examined by the relevant authorities before it had occurred. In such circumstances the Court considers that the applicant was not provided with an effective remedy as regards the complaint concerning the risk of treatment in breach of Article 3 if he was to be sent to Turkmenistan. The review of 5 December 2002 could not be regarded as an effective remedy, since it occurred after the applicant's removal had taken place.

107. Accordingly, the Court concludes that there has been a violation of Article 13 in connection with Article 3 of the Convention.

108. As regards the applicant's complaints under Article 5 of the Convention, in the light of the Court's established case-law stating that the more specific guarantees of Article 5, being a *lex specialis* in relation to Article 13, absorb its requirements (see *Dimitrov v. Bulgaria* (dec.), no. 55861/00, 9 May 2006) and in view of its above findings of violations of Article 5 of the Convention, the Court considers that no separate issue arises in respect of Article 13 in connection with Article 5 of the Convention in the circumstances of the present case.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. 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

110. The applicant did not submit any claim in respect of pecuniary damage.

111. The applicant claimed 81,000 euros (EUR) in respect of non-pecuniary damage he had sustained during the whole detention period. He also claimed EUR 50,000 in respect of non-pecuniary damage sustained as a result of the fear and suffering caused by his extradition to Turkmenistan in breach of Article 3.

112. The Government replied that the applicant had failed to apply to the domestic courts for compensation for pecuniary or non-pecuniary damage following his acquittal. They also found the amount claimed to be exaggerated and not supported by relevant evidence. They stressed that the authorities had taken successful steps to reverse the applicant's extradition.

113. The Court reiterates, firstly, that an applicant cannot be required to exhaust domestic remedies to obtain compensation for pecuniary loss since this would prolong the procedure before the Court in a manner incompatible with the effective protection of human rights (see *Papamichalopoulos and*

*Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, § 40, and *Gridin v. Russia*, no. 4171/04, § 20, 1 June 2006). Nor is there a requirement that an applicant furnish any proof of the non-pecuniary damage he or she has sustained.

114. The Court notes that it has found a combination of grievous violations in the present case. The applicant's detention pending extradition was not lawful and he was unable to obtain judicial review of it. There was a breach of the obligation to bring the applicant promptly before a judge in the context of his detention on criminal charges in Russia. The applicant was extradited to Turkmenistan despite justifiable fear of treatment in breach of Article 3. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation.

115. Making its assessment on an equitable basis, the Court awards the applicant EUR 20,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

### B. Costs and expenses

116. The applicant sought reimbursement of legal costs in the amount of 27,100 Russian roubles (RUR), which is equivalent to EUR 790. He submitted an invoice from the Moscow Bar Association which confirmed that between October 2002 and April 2004 the applicant had paid the said amount to Ms Stavitskaya.

117. The Government questioned the reasonableness of this amount.

118. The Court notes that the applicant was represented by Ms Stavitskaya in the domestic proceedings and in the proceedings before the Strasbourg Court. He has actually incurred the expenses of this representation, as confirmed by the invoice of the Bar Association. The amount does not seem to be unreasonable. In these circumstances the Court awards the applicant the amount claimed, less the EUR 685 received by way of legal aid from the Council of Europe, together with any value-added tax that may be chargeable.

### C. Default interest

119. 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. *Dismisses* the Government's preliminary objections concerning non-exhaustion of domestic remedies;

2. *Holds* that there has been a violation of Article 3 on account of the applicant's extradition to Turkmenistan;

3. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention in respect of the applicant's detention prior to extradition;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the availability of judicial review of detention pending extradition;

5. *Holds* that there has been a violation of Article 5 § 3 of the Convention in respect of the failure to bring the applicant promptly before a judge after his return from Turkmenistan;

6. *Holds* that there has been a violation of Article 13 in connection with Article 3 of the Convention;

7. *Holds* that there is no need to examine the alleged violation of Article 13 in connection with Article 5 of the Convention;

8. *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, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) 20,000 (twenty thousand euros) in respect of non-pecuniary damage;

(ii) EUR 105 (one hundred and five euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(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.

Done in English, and notified in writing on 7 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President