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Defending the rights of persons detained pending extradition in the light of ECHR judgments

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Over the last two-and-a-half years the ECtHR has handed down a series of precedent judgments in extradition cases against Russia and Ukraine.[1] These judgments should dramatically change law enforcement practice as the ECHR, as a legal instrument guaranteeing the protection of human rights, requires that its norms be interpreted and applied so that the guarantees are practical and effective.[2]

People being detained pending extradition should have the right to regular judicial supervision of the periods they are held in custodial detention. The refusal to hear an appeal by a person held in custody pending extradition has been found to violate Art. 5(4) ECHR.[3] It appears that the existing procedure for considering an appeal by a person held in custody pending extradition under Art. 125 of the Code of Criminal Procedure of the Russian Federation (CCP)[4] is not an effective means of legal defence within the meaning of Art. 5(4) ECHR, because, even where a court finds a prosecutor's action or failure to act in relation to detention unlawful, it cannot immediately release the detainee; and the release procedure, which remains within the discretion of the prosecutor, is delayed for an indefinitely long period of time, sometimes many months.

person who has been taken into custody pending receipt of a request for extradition must be released if the request for their extradition does not arrive within 40 days of the date of their being taken into custody. Under Art. 109 CCP the period of detention in custody for those held pending extradition may not exceed two months. The initial two-month period of detention may only be extended in exceptional circumstances, and in strict compliance with the rules of Art. 109 CCP. However, the norms of Arts. 108 and 109 CCP in extradition cases are often contravened by the Office of the Prosecutor General of the Russian Federation, which takes many months, or even years, to make an extradition decision without the relevant period of detention being judicially extended. This practice was declared illegal in, among others, Constitutional Court Decision No. 101-O of 4 April 2006 in the case of Mr Nasrulloev.[6] The Constitutional Court stated that, *"Art. 466 of the CCP does not permit the authorities to apply a measure of restraint in the form of detention in custody without observing the procedure laid down in the Code of Criminal Procedure, or in excess of the periods stipulated in the Code"*.

In cases of detention in custody pending extradition[7] the ECtHR has found the rules of Russian law governing these procedures to be incoherent, mutually exclusive and not subject to adequate guarantees against arbitrariness, because

by the ECHR.

Following the ECtHR's judgments, on 29 October 2009, the Plenum of the Supreme Court of the Russian Federation confirmed that Art. 109 of the CCP should be applied to cases concerning extradition and indicated that, when extending a period of detention, courts must abide by the provisions of Art. 109 of the CCP. However, the Plenum did not alter the procedure used by the prosecutor for deciding on measures in instances where there is a court decision from another country that is not confirmed by a decision of a Russian court. In the case of *Dzuraev v Russia* (No. 38124/07) 17/12/09 the ECtHR ruled that, in the absence of a decision from a Russian court, the procedure for deciding on preventative measures in the form of detention in custody constituted a violation of Art. 5(1)(f) ECHR.

People may only be legally detained in custody pending extradition for the purpose of extradition itself and only where extradition may realistically be carried out. ECtHR practice in this context establishes that deprivation of freedom is justified only while the question of deportation is under consideration. If this procedure is not carried out with the requisite care, the detention ceases to be permissible under Art. 5(1)(f) ECHR and is only possible when the deportation can be effected (*Kolompar v Belgium* (No. 11613/85) 24/9/92; *Soldatenko v Ukraine* (No. 2440/07) 23/10/08; *Rya-*

It is clear that the period of detention of a person who is to be extradited may not exceed the limit set by national legislation and any extension must take place strictly in accordance with the manner prescribed by the Russian Law on Criminal Procedure (Chapter 13 of the CCP: Measures of Restraint). Under Art. 62 of the Minsk Convention,[5] a there was no periodic judicial supervision of the periods of detention in custody set out in domestic law and law enforcement practice in this area. In these cases the ECtHR found that the provisions in Russian law governing extradition procedures were both unclear and unforeseeable in their application, and did not meet the 'quality of law' required *bikin v Russia* (No. 8320/04) 19/6/08).

Since the period of detention in custody pending extradition is actually determined by the time taken by the Office of the Prosecutor General to decide on extradition, the Office's actions must be transparent and accessible to judicial

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supervision. Otherwise, where the Office fails to act and the process of taking a decision on extradition drags out for an indefinite length of time, the person awaiting extradition continues to be held unlawfully and for an unjustifiably long time. This amounts to a violation of Art. 5(1)(f) ECHR as freedom may not be lost for a longer period than absolutely necessary and it must be possible to promptly restore this where its loss has not been justified.

Extradition is not permissible if there are substantial grounds for believing that the extradited person faces a real risk of torture or inhuman treatment or punishment in the country they are to be extradited to (*Chahal v UK* (No. 22414/93) 15/11/96). This is an absolute rule, and does not depend in any way on the conduct of the applicant, any negative characteristics they may possess, any risk to the receiving country or anything else. There are no exceptions to Art. 3 ECHR and, under Art. 15, no departure from it is permitted in times of war or other emergency situation. In its decisions on extradition cases the ECtHR has repeatedly emphasised that it is well aware of the considerable difficulties faced by states at the present time in protecting their populations from terrorist violence. Nevertheless, even in these circumstances Art. 3 ECHR prohibits torture or inhuman or degrading treatment or punishment in absolute terms, regardless of the conduct of the person being extradited. In these circumstances the activities of the person in question, however undesirable or dangerous, cannot call into question the absolute prohibition on torture (*Saadi v Italy* (No. 37201/06) 28/2/08; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08).

In analysing the general situation in each specific country, the ECtHR attaches great importance to the information contained in reports from independent sources such as international human rights organisations like Amnesty International and Human Rights Watch, and also from government sources, including the US State Department (*Chahal v UK*; *Muslim v Turkey* (No. 53566/99) 26/4/05 para. 67; *Said v Netherlands* (No. 2345/02) 5/7/05 para. 54).

In its decisions against Russia concerning extradition to Uzbekistan, in the cases of *Ismoilov & Others* and *Muminov v Russia* (No. 42502/06) 11/12/08. the ECtHR found that: "*no concrete evidence has been produced of any fundamental improvement in the protection against torture in Uzbekistan in recent years. Although the Uzbek government adopted certain measures designed to combat the practice of torture [...] there is no evidence that those measures produced any positive results. The Court is therefore persuaded that ill-treatment of detainees is a pervasive and enduring problem in Uzbekistan*".[8]

The ECtHR came to similar conclusions in cases involving extradition to Turkmenistan (*Ryabikin* and *Soldatenko*). In these decisions the ECtHR held that evidence from a number of objective sources pointed to extremely bad conditions of custody and also to the fact that cruel treatment and torture were continuing to arouse concern among all observers of the situation in Turkmenistan. It also noted that accurate information about the human rights situation in Turkmenistan, and especially about places of detention, is scarce and difficult to verify because of the exceptionally restrictive character of the present political regime, described as *"one of the world's most repressive and closed countries"*.[9]

The ECtHR also found a violation of Art. 3 ECHR concerning extradition to Kazakhstan in the case of *Kaboulov v Ukraine* (No. 41015/04), 19/11/09 para. 111, indicating that: "*there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law-enforcement authorities to obtain confessions. All the above reports equally noted very poor prison conditions, including overcrowding, poor nutrition and untreated diseases. It is also reported that allegations of torture and ill-treatment are not investigated by the competent Kazakh authorities*".

Accordingly, there are strong grounds for arguing against deportation of an applicant in a number of instances (for example, to Uzbekistan, **Kazakstan or Turk**menistan) because this may violate Art. 3 ECHR. It is, however, important to note that each case must be considered on its individual facts and the risk presented to the individual applicant, but where there is a strong argument against extradition for the reasons outlined above domestic practitioners may also wish to consider the argument that detention in custody for a lengthy period for the purpose of extradition is also clearly unjustified.

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1 *Garabayev v Russia* (No. 38411/02) 7/6/07; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Kaboulov v Ukraine* (No. 41015/04), 19/11/09; *Koktysh v Ukraine* (No. 43707/07) 10/12/09; *Kreydich v Ukraine* (No. 48495/07) 10/12/09; and *Dzhuraev v Russia* (No. 38124/07) 17/12/09.

2 See *inter alia Artico v Italy* (No. 6694/74) 13/5/80 para. 33.

3 *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Garabayev v Russia* (No. 38411/02) 7/6/07.

4 As required by paragraph 19 of Decision No. 1 of 10 February 2009 of the Plenum of the Supreme Court of the Russian Federation: How the Courts are to Deal with Complaints Relating to Art. 125 of the Code of Criminal Procedure of the Russian Federation.

5 The Minsk Convention on Legal Assistance in Civil, Family and Criminal Cases, Minsk, 22 January 1993 (amended on 28 March 1997).

6 See also Decision No. 333-O-P of 1 March 2007 of the Constitutional Court on the complaint by the US Citizen Menachem Saidenfeld concerning a violation of Art. 1(3) and Art. 466(1) in relation to his rights under the Constitution of the Russian Federation.

7 *Nasrulloyev v Russia* (No. 656/09) 11/10/07; *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08; *Ryabikin v Russia* (No. 8320/04) 19/6/08; *Muminov v Russia* (No. 42502/06) 11/12/08.

8 *Ismoilov & Others v Russia* (No. 2947/06) 24/4/08, para. 121.

9 *Ryabikin v Russia* (No. 8320/04) 19/6/08, para. 98.