CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

**CASE OF NASRULLOYEV v. RUSSIA**

*(Application no. 656/06)*

JUDGMENT

STRASBOURG

11 October 2007

**FINAL**

*11/01/2008*

*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 Nasrulloyev 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,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges,*
and Mr A. WAMPACH, *Deputy Section Registrar,*

Having deliberated in private on 20 September 2007,

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

## PROCEDURE

1. The case originated in an application (no. 656/06) 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 national of Tajikistan, Mr Khabibullo Nasrulloyev ("the applicant"), on 6 December 2005.

2. The applicant, who had been granted legal aid, was represented before the Court by Ms A. Stavitskaya and Ms K. Moskalenko, lawyers practising in Moscow. The Russian Government ("the Government") were initially represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by their new Representative, Mrs V. Milinchuk.

3. On 23 November 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility. Further to the applicant's request, the Court granted priority to the application (Rule 41 of the Rules of Court).

4. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government's objection, the Court dismissed it.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in the Moscow Region.

### A. Historical background

6. The applicant was the chairman of the Tajik Consumers' Union ("Tajikpotrebsoyuz").

7. In May 1992 the Tajik opposition, comprising a coalition of Islamic groups and Islamic fundamentalists, seized power from the Tajik Supreme Soviet, which led to civil war. In November 1992 the Supreme Soviet elected Mr Rakhmonov as its chairman and head of State. Mr Rakhmonov was supported by armed forces of the People's Front. The applicant was the leader of the People's Front in the Hissar region of Tajikistan.

8. In 1994 Mr Rakhmonov was declared winner in the Presidential election. The applicant supported the opposition candidate, Mr Abdulajanov.

9. On 27 June 1997 Mr Rakhmonov signed a "peace and accord" agreement with the representative of the United Tajik Opposition. On 1 August 1997 the Majlisi Oli (Parliament) of Tajikistan passed the Amnesty Act which provided for discontinuation of criminal proceedings against the participants in the political and military conflict after 1992. Pending criminal cases, in which convictions had not been yet handed down, were to be discontinued, and no new cases were to be opened.

10. On 3 November 1998 a force led by Mr Khudoyberdiev and Mr Abdulajanov launched an offensive in Leninabad province. The Government began a counter-offensive, joined by the United Tajik Opposition's forces. By 10 November 1998 the Government had retaken control of the province after intense fighting. The applicant declared that he had not taken part in the offensive; he had been ill and had stayed in Tashkent.

11. On an unspecified date the applicant's youngest son was convicted for participation in the offensive and sentenced to seventeen years' imprisonment. A search warrant was issued against the applicant who had fled to Russia together with his family.

### B. The applicant's arrest and detention with a view to extradition

12. On 30 June 2003 an investigator in charge of particularly serious cases in the Tajikistan Prosecutor General's Office charged the applicant

with criminal offences allegedly committed between November 1992 and February 1997. The charges included kidnapping, manslaughter, participation in an anti-Government organisation, participation in an armed group with a view to attacking Government institutions, subversive activities, high treason and conspiracy to seize State power.

13. By a separate decision of the same date, the investigator held that the applicant should be taken into custody and that his name should be put on the list of fugitives from justice. The decision was approved by the acting Prosecutor General of Tajikistan.

14. On 13 August 2003 the applicant was arrested in Moscow. On the same day the Tajikistan Prosecutor General's Office sent a request for the applicant's extradition to its Russian counterpart which was received on 18 August 2003.

15. On 21 August 2003 the Nagatinskiy District Court of Moscow ordered the applicant's detention on the basis of Articles 97, 99 and 108 of the Code of Criminal Procedure, finding as follows:

> "Having heard the parties to the proceedings, the court finds the [prosecution's] request justified because the criminal-procedure laws governing application of measures of restraint have been complied with and the case file contains sufficient grounds showing that no measure of restraint other than deprivation of liberty may be applied to the accused. Mr Nasrulloyev is charged with serious and particularly serious crimes carrying a penalty of no less than two years' imprisonment. His name is on the international list of fugitives from justice. Furthermore, the court considers that, since Mr Nasrulloyev is a foreign national and has no permanent place of residence within Russian territory, he may abscond from investigation and prosecution or otherwise hinder the criminal proceedings."

The District Court did not set a time-limit for detention.

16. On 28 October 2003 the applicant and his counsel asked the Prosecutor General to refuse the request for his extradition. He submitted that he was being prosecuted in Tajikistan on political grounds, that he risked a death sentence if found guilty as charged, and the guarantee against inhuman treatment and the right to a fair trial would not be respected in Tajikistan. He indicated that he had applied for political asylum in Russia.

17. On 6 February 2004 counsel for the applicant asked the director of the remand centre to release the applicant. In her submission, as there had been no arrest warrant issued by a Tajikistani court, the provisions of the Russian Code of Criminal Procedure on pre-trial detention were to be applied. Article 109 set the maximum detention period at two months. As the detention period had not been extended following the expiry of that period on 21 October 2003, the applicant's subsequent detention was unlawful. In these circumstances, the director of the remand centre had a statutory duty to release anyone detained unlawfully.

18. On 17 February 2004 the director of the remand centre replied to her that the applicant was still detained under the District Court's decision of 21 August 2003 and that his release would only be possible if there was a

new judicial decision or a decision by the Prosecutor General refusing his extradition.

19. On 26 February 2004 counsel asked the Prosecutor General to release the applicant, submitting that his detention had been unlawful under domestic terms and that, in any event, the European Convention on Extradition limited the period of provisional arrest to forty days (Article 16 § 4). No reply was received.

20. In December 2004 Tajik counsel for the applicant asked the Sino District Court of Dushanbe to review the lawfulness of the applicant's detention because the maximum term of detention under the Tajikistani Code of Criminal Procedure was fifteen months. On 13 December 2004 the District Court refused to consider the complaint, claiming that it should be examined by the court having territorial jurisdiction for the detention centre.

21. On 20 December 2004 counsel lodged complaints with the Prosecutor General's Office, and the Nagatinskiy and Babushkinskiy District Courts of Moscow, seeking the applicant's release on the ground that the maximum term of detention under the Tajikistani Code of Criminal Procedure had expired.

22. On 31 December 2004 the Nagatinskiy District Court returned the complaint, indicating that it had no territorial jurisdiction. It also pointed out that the measure of restraint had been applied under the Russian Code of Criminal Procedure and that counsel's references to the Tajikistani Code of Criminal Procedure were therefore irrelevant.

23. On 17 January 2005 a deputy head of the International Cooperation Department of the Prosecutor General's Office told counsel to petition the "competent authorities" of Tajikistan in order to have the measure of restraint varied.

24. On 18 January 2005 counsel applied, with the same request, to the Tajikistan Prosecutor General's Office. By letter of 15 February 2005, the head of the department for investigation of particularly serious crimes informed her that the Tajikistani Code of Criminal Procedure was not applicable because the applicant was not in Tajikistan and because his detention had never been extended in Tajikistan. Accordingly, the complaint would only be considered after the applicant had been extradited.

25. On 13 February 2005 the maximum eighteen-month detention period laid down in Article 109 of the Russian Code of Criminal Procedure expired.

26. On 18 February 2005 the director of the remand centre told counsel that within the meaning of the Russian Code of Criminal Procedure the applicant was neither a "suspect" nor a "defendant", whereas the provision concerning the statutory duty to release anyone detained unlawfully only mentioned "suspects" and "defendants". He further reminded counsel that there had so far been no judicial decision on the applicant's release or a refusal by the prosecutor to extradite him.

27. Counsel for the applicant unsuccessfully sought judicial review of the applicant's detention in the Moscow City Court, and the Babushkinskiy and Tverskoy District Courts of Moscow. She relied on Article 110 of the Code of Criminal Procedure.

28. On 21 April 2005 the Tverskoy District Court disallowed the counsel's complaint about the Prosecutor General's Office's failure to release the applicant, finding as follows:

> "The measure of restraint was imposed on Mr Nasrulloyev exclusively for the purposes of providing legal assistance in criminal proceedings conducted in Tajikistan. The procedure for detaining persons with a view to extradition is governed by Chapter 54 of the Code of Criminal Procedure of the Russian Federation.
>
> Chapter 54 does not limit the period of detention of individuals whose extradition is being sought... The international-law instruments submitted to the court do not limit [that period] either. In these circumstances, the court considers unsubstantiated counsel's reliance on Article 109 of the Code of Criminal Procedure and their reference to the fact that Mr Nasrulloyev's detention had never been extended.
>
> In the territory of the Russian Federation there is no investigation of Mr Nasrulloyev and he is not a party to criminal proceedings within the meaning of the Russian Code of Criminal Procedure...
>
> The court also takes into account the fact that the decision on Mr Nasrulloyev's extradition has not been taken to date because he had applied for asylum in Russia and then lodged an appeal against the decisions... rejecting his asylum claim."

29. On 9 June 2005 the Moscow City Court upheld that decision, reproducing its reasoning verbatim.

30. The applicant complained to the Constitutional Court, claiming that the legal situation where detention of a person with a view to extradition was not limited in time was incompatible with the constitutional guarantee against arbitrary detention.

31. On 4 April 2006 the Constitutional Court declared the application inadmissible. It pointed out that there was no ambiguity in the contested provisions because the general provisions governing measures of restraint should apply to all forms and stages of criminal proceedings, including proceedings on extradition (for further details on the Constitutional Court's decision, see paragraph 54 below).

32. On 6 April 2006 counsel for the applicant lodged a complaint against the Prosecutor General's Office. She submitted that there were no legal provisions permitting the holding of the applicant in custody beyond the maximum eighteen-month period and that the applicant's detention should be subject to judicial review. She alleged, in particular, a violation of Article 5 §§ 1 and 4 of the Convention.

33. On 23 June 2006 the Tverskoy District Court dismissed the complaint, finding that the Prosecutor General's Office was not responsible for the applicant's detention and that the Code of Criminal Procedure did not

require it to extend the period of detention until the decision on extradition had been taken.

34. On 26 June 2006 counsel for the applicant wrote to the Prosecutor General's Office and the director of the remand centre that the applicant's detention was unlawful and that he should be released immediately.

35. On 29 June 2006 the Moscow City Court rejected, in the final instance, the applicant's request for political asylum in Russia.

36. On 1 July 2006 the first deputy prosecutor of the Babushkinskiy District of Moscow asked the Babushkinskiy District Court to extend the applicant's detention by fourteen days on the ground that, after his application for asylum had been turned down, the prosecution needed additional time to examine the request for extradition.

37. On the same day the District Court granted the prosecution's request, relying on Articles 109 and 466 § 1 of the Code of Criminal Procedure. The District Court noted that the prosecution had produced evidence showing that the extradition request was being decided upon, and that the applicant was charged with serious and particularly serious crimes, had no permanent place of residence in Russia and would abscond if released.

38. On 13 September 2006 the Moscow City Court upheld that decision on appeal, finding that it was lawful and justified. It did not refer to any legal provisions governing the applicant's detention.

### C. Decision to extradite the applicant and application of an interim measure under Rule 39 of the Rules of Court

39. By letter of 3 July 2006, a deputy Prosecutor General informed the applicant that a decision had been taken to extradite him to Tajikistan. A copy of the decision was not enclosed.

40. Counsel challenged the decision before the Moscow City Court and applied to this Court with a request for interim measures under Rule 39 of the Rules of Court.

41. On 12 July 2006 the Court indicated to the respondent Government that the applicant should not be extradited to Tajikistan until further notice.

42. By letter of 19 July 2006, the Government acknowledged receipt of the Court's decision and confirmed that the domestic authorities had been informed accordingly.

43. On 21 August 2006 the Moscow City Court overruled the prosecutor's decision to extradite the applicant. It noted at the outset that the Tajikistan Government had not furnished the guarantees required by Russian law that the applicant would only be tried for the offences for which the extradition was sought, that he would be free to leave the country after serving the sentence and that he would not be deported, transferred or extradited to a third State without the consent of the Russian Federation.

44. The City Court further found that, in granting the extradition request, the deputy Prosecutor General had failed to consider whether the applicant could be prosecuted for an offence connected with a political offence, whereas the Convention on Extradition prohibited extradition in such situations. As the applicant's extradition was sought in connection with offences allegedly committed from 1992 to 1997, the City Court determined that his prosecution had been initiated in breach of the Amnesty Act of 1 August 1997 (see paragraph 9 above) and was therefore politically motivated. Moreover, the applicant was eligible for amnesty under the General Amnesty Act of 2001.

45. The City Court ordered the applicant's release, finding that the maximum detention period set out in Articles 108 and 109 of the Code of Criminal Procedure had expired and that his detention in excess of that period had been unlawful in the light of the Constitutional Court's decision of 4 April 2006.

46. On 25 August 2006 the prosecution lodged an appeal. They claimed, in particular, that the allegedly political motives of the applicant's prosecution had been examined "by way of an exchange of secret correspondence" between the Prosecutor General's Office, the Federal Security Service and the Ministry of the Interior which the City Court had not taken into account. They also alleged that the applicant's period of detention had not expired because the District Court's decision of 1 July 2006 had not been quashed.

47. On 2 October 2006 the Supreme Court of the Russian Federation dismissed the appeal by the prosecution and refused the extradition of the applicant to Tajikistan.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

### A. The Russian Constitution

48. The Constitution guarantees the right to liberty (Article 22):

> "1. Everyone has the right to liberty and personal integrity.
>
> 2. Arrest, placement in custody and detention are only permitted on the basis of a judicial decision. Prior to a judicial decision, an individual may not be detained for longer than forty-eight hours."

### B. The 1993 Minsk Convention

49. The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (signed in Minsk on 22 January 1993 and

amended on 28 March 1997, "the 1993 Minsk Convention"), to which both Russia and Tajikistan are parties, provides 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 or a final conviction and shall indicate that a request for extradition will follow..."

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

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

**Article 67. Surrender of the person being extradited**

"The requested Party shall notify the requesting Party of the place and time of surrender. If the requesting Party does not accept the person being extradited within fifteen days of the scheduled date of surrender, that person shall be released."

## C. The European Convention on Extradition

50. The European Convention on Extradition of 13 December 1957 (CETS no. 024), to which Russia is a party, provides as follows:

**Article 16 – Provisional arrest**

"1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

...

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought."

## D. The Code of Criminal Procedure

51. Chapter 13 of the Code of Criminal Procedure ("Measures of restraint") governs application of measures of restraint, or preventive measures (*меры пресечения*), which include, in particular, placement in

custody. A custodial measure may only be ordered by judicial decision in respect of a person who is suspected of, or charged with, a criminal offence punishable by more than two years' imprisonment (Article 108 "Placement in custody"). The time-limit for detention pending investigation is fixed at two months (Article 109 "Time-limits for detention"). A judge may extend that period up to six months (Article 109 § 2). Further extensions may only be granted by a judge if the person is charged with serious or particularly serious criminal offences (Article 109 § 3). No extension beyond eighteen months is permissible and the detainee must be released immediately (Article 109 § 4). A judicial decision ordering or extending the application of a custodial measure may be appealed against to a higher court within three days of its issue (Articles 108 § 10 and 109 § 2). A custodial measure may be revoked or varied by a judicial decision if it is no longer considered necessary (Article 110 "Revoking or varying the measure of restraint").

52. Chapter 54 ("Extradition of a person for criminal prosecution or execution of sentence") regulates extradition procedures. Article 466 is the only provision in the chapter that governs application of measures of restraint with a view to extradition. Paragraph 1 deals with the situation where a request for extradition is not accompanied by a detention order issued by a foreign court. In that case a prosecutor must decide whether it is necessary to impose a measure of restraint "in accordance with the procedure provided for in the present Code". Paragraph 2 establishes that, if a foreign judicial decision on placement in custody is available, a prosecutor may place the person in detention or under house arrest. In that eventuality no confirmation of the foreign judicial decision by a Russian court is required.

53. Chapter 15 ("Petitions") provides that suspects, defendants, victims, experts, civil plaintiffs, civil defendants, and their representatives may petition officials for taking procedural decisions that would secure rights and legitimate interests of the petitioner (Article 119 § 1). Chapter 16 ("Complaints about acts and decisions by courts and officials involved in criminal proceedings") provides for judicial review of decisions and acts or failures to act by an investigator or a prosecutor that are capable of damaging the constitutional rights or freedom of the parties to criminal proceedings (Article 125 § 1). The competent court is that which has jurisdiction for the place of the preliminary investigation (ibid.).

## E. Case-law of the Constitutional Court

### *1. Decision no. 101-O of 4 April 2006 in the case of Mr Nasrulloyev*

54. Verifying the compatibility of Article 466 § 1 of the Code of Criminal Procedure with the Russian Constitution, the Constitutional Court reiterated its constant case-law 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.

In the Constitutional Court's view, the absence of a 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 Russian Code of Criminal Procedure. Such procedure comprised, in particular, Article 466 § 1 of the Code and the norms in its Chapter 13 ("Measures of restraint") 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 examination of extradition requests.

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 Code of Criminal Procedure did not allow the authorities to apply a custodial measure without respecting the procedure established in the Code of Criminal Procedure or in excess of time-limits fixed in the Code.

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

55. The Prosecutor General asked the Constitutional Court for an official clarification of its decision in Mr Nasrulloyev's case (see above), for the purpose in particular of elucidating the procedure for extending a person's detention with a view to extradition.

The Constitutional Court dismissed the request, finding 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 courts of general jurisdiction.

## F. Case-law of the Supreme Court

56. In the case of Mr A., concerning his detention with a view to extradition to Armenia, the Criminal Division of the Supreme Court held as follows (case no. 72-005-19, 8 June 2005):

> "The term of detention of the person who is to be extradited to the place of commission of the offence... is not governed by Article 109 of the Code of Criminal Procedure. In accordance with the requirements of [the 1993 Minsk Convention], the person arrested at the request of a foreign state, may be held in custody for forty days

until a request for extradition has been received. Subsequent detention of the person is governed by the criminal law of the requesting party (Armenia in the instant case)."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLES 3 AND 18 OF THE CONVENTION

57. The applicant complained under Articles 3 and 18 of the Convention that his extradition to Tajikistan would expose him to a threat of torture or capital punishment. The relevant Convention provisions read as follows:

**Article 3**

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

**Article 18**

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

58. The Court reiterates at the outset that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue (see, among many other authorities, *Nsona v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-V, § 106, and *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII). In other words, the person concerned must be directly affected by it or run the risk of being directly affected by it (see, for example, *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, §§ 30-31). It is not therefore possible to claim to be a "victim" of an act which is deprived, temporarily or permanently, of any legal effect (see *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 92, ECHR 2007-...).

59. With particular reference to the specific category of cases involving expulsion measures, the Court has consistently held that an applicant cannot claim to be the "victim" of a measure which is not enforceable (see *Vijayanathan and Pusparajah v. France*, judgment of 27 August 1992, Series A no. 241-B, § 46; see also *Pellumbi v. France* (dec.), no. 65730/01, 18 January 2005, and *Etanji v. France* (dec.), no. 60411/00, 1 March 2005). It has adopted the same stance in cases where execution of the deportation or extradition order has been stayed indefinitely or otherwise deprived of

legal effect and where any decision by the authorities to proceed with deportation can be appealed against before the relevant courts (see *Kalantari v. Germany* (striking out), no. 51342/99, §§ 55-56, ECHR 2001-X, and *Mehemi v. France (no. 2)*, no. 53470/99, § 54, ECHR 2003-IV; see also *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 355, ECHR 2005-III; *Andrić v. Sweden* (dec.), no. 45917/99, 23 February 1999; *Benamar and Others v. France* (dec.), no. 42216/98, 14 November 2000; and *Djemailji v. Switzerland* (dec.), no. 13531/03, 18 January 2005).

60. In the instant case, by a decision of 21 August 2006, the Moscow City Court overruled the prosecutor's decision on the applicant's extradition, holding that his extradition to Tajikistan was barred by the Russian Code of Criminal Procedure and the European Convention on Extradition. That decision was upheld on appeal by the Supreme Court on 2 October 2006.

61. It follows that, as matters now stand, the decision on the applicant's extradition has no legal effect and that the applicant may not claim to be a "victim" of that act. This complaint is therefore incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

62. The applicant complained under Article 5 § 1 of the Convention that he had been unlawfully held in custody. In particular, he maintained that from 13 to 21 August 2003 he had been detained without any judicial decision, that the term of his detention had exceeded the maximum eighteen-month period under Russian law, and that the criminal-law provisions governing detention with a view to extradition did not meet the requirements of clarity and foreseeability. The relevant parts of Article 5 § 1 read 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 against whom action is being taken with a view to ... extradition."

### A. Admissibility

63. The Court considers that this complaint 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. It must therefore be declared admissible.

## B. Merits

### *1. Submissions by the parties*

64. In the Government's submission, the particular feature of the applicant's case was that the custodial measure had been applied for the period which had been necessary for a decision on extradition to be taken. The applicant himself had contributed to prolongation of his detention by filing "unfounded applications" for political asylum, refugee status and temporary asylum in Russia and subsequently contesting the refusals before Russian courts. During that entire period the applicant had enjoyed refugee status and his extradition had been prohibited by Russian law.

65. The Government pointed out that the applicant's detention had been authorised on 30 June 2003 by the acting Prosecutor General of Tajikistan without a time-limit. They maintained that the term of detention with a view to extradition was governed by Articles 62 and 67 of the 1993 Minsk Convention and had been determined solely with reference to the time-limit for receipt of the request for extradition and the time-limit for the person being extradited to be surrendered.

66. The Government noted that on 4 April 2006 the Constitutional Court had issued a decision on the applicant's complaint, in which it stated that the general provisions of Chapter 13 of the Code of Criminal Procedure were to apply to all forms and stages of criminal proceedings, including proceedings for extradition (see paragraph 54 above). Subsequently, the Constitutional Court refused to issue a clarification of that decision, noting that it had not been competent to indicate specific legal provisions regulating the procedure and time-limits for application of a custodial measure in extradition proceedings, that being the competence of courts of general jurisdiction (see paragraph 55 above). Referring to the Supreme Court's position in the case of Mr A. (see paragraph 56 above) and in another case, for which no copy of the decision was provided, the Government insisted that Article 109 of the Code of Criminal Procedure was not applicable for extending the period of detention of persons held in custody with a view to extradition. The Russian Supreme Court opined that the Russian legislation governing extradition matters was sufficiently clear and precise and that the provisions of Chapter 54 of the Code of Criminal Procedure were to be applied in conjunction with other criminal-law provisions.

67. The applicant pointed to inconsistency in the Government's submissions. On the one hand, the Government had claimed that, by virtue of the 1993 Minsk Convention, detention with a view to extradition was unlimited in time; on the other, they had cited the Constitutional Court's decision of 4 April 2006, which confirmed that Chapter 13 of the Code of Criminal Procedure should apply to extradition proceedings. Since Article 109 in Chapter 13 limited the period of detention to two months, the

applicant's detention had been unlawful already after 13 October 2003. In any event it had been unlawful after the expiry of the maximum eighteen-month period of detention mentioned in paragraph 4 of Article 109. That view had been endorsed in the Moscow City Court's decision of 21 August 2006, which had ordered the applicant's release by reference to the expiry of the maximum detention period.

68. The applicant submitted that the provisions of Russian criminal law on detention of persons with a view to extradition fell short of the requirement of legal certainty and the Convention principles. Although Chapter 13 of the Code of Criminal Procedure, and in particular its Articles 108 and 109, contained precise and detailed norms on application of measures of restraint and set specific time-limits, the absence of an explicit reference to these provisions from Article 466 of the Code of Criminal Procedure had led to the development of an administrative practice of holding detainees awaiting extradition in custody for lengthy periods of time, without judicial review of their detention and in excess of the maximum time-limit set out in Article 109. Even after the Constitutional Court had pointed out that Chapter 13 should apply to detention in extradition cases, the Babushkinskiy District Court on 1 July 2006 extended the applicant's detention for a further fourteen days, clearly exceeding the maximum term of detention.

*2. General principles*

69. The Court notes that it is common ground between the parties that the applicant was detained with a view to his extradition from Russia to Tajikistan. Article 5 § 1 (f) of the Convention is thus applicable in the instant case. This provision does not require that the detention of a person against whom action is being taken with a view to extradition be reasonably considered necessary, for example to prevent his committing an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation or extradition". It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 112).

70. The Court reiterates, however, that it falls to it to examine whether the applicant's detention was "lawful" for the purposes of Article 5 § 1 (f), with particular reference to the safeguards provided by the national system. 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 of national law, but it requires in

addition that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, § 50).

71. The Court must therefore ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the "quality of the law", requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-... (extracts); *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, cited above).

*3. Application of the general principles in the present case*

72. The Court observes that the request for the applicant's extradition was accompanied by an arrest warrant issued by a Tajikistani prosecutor rather than by a decision of a Tajikistani court. It was therefore the first paragraph of Article 466 of the Russian Code of Criminal Procedure that governed the application of a measure of restraint pending decision on the applicant's extradition (see paragraph 52 above). Article 466 § 1 required that a measure of restraint be imposed in accordance with the procedure established in the Code. Accordingly, the applicant's initial placement in custody was ordered, on 21 August 2003, by a Russian court on the basis of the provisions of Chapter 13 the Code of Criminal Procedure, which governed measures of restraint including custodial measures (see paragraph 15 above). The decision did not set a time-limit for the detention.

73. The main controversy between the parties relates to the issue whether that judicial decision was sufficient for holding 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 matter was to be reviewed at regular intervals. The applicant maintained that all the provisions in Chapter 13 and in particular Article 109, which instituted specific time-limits for reviewing detention, should have been applicable in his situation; the Government denied that the domestic law imposed any time-limits on detention with a view to extradition.

74. The applicant's thesis finds support in the case-law of the Russian Constitutional Court, which is the supreme judicial authority competent to give a binding interpretation of the constitutional guarantees of individual rights, such as the right to liberty and personal integrity (see paragraph 48 above). Deciding on the applicant's complaint, the Constitutional Court emphasised that in extradition proceedings the right to liberty should be attended by the same guarantees as in other types of criminal proceedings. It unambiguously indicated that the application of measures of restraint with a view to extradition should be governed not only by Article 466 but also by the norms of general character contained in Chapter 13 of the Code of Criminal Procedure (see paragraph 54 above). Although the Constitutional Court refused to indicate specific legal provisions governing the procedure for detention with a view to extradition, it constantly referred to the legal prohibition on continuing a custodial measure beyond the established time-limits (see paragraph 55 above). Since Article 109 is the only provision in the Code of Criminal Procedure that deals with time-limits for application of a custodial measure, an argument as to its non-applicability would obviously be at odds with the constant case-law of the Russian Constitutional Court.

75. The Government's claim that the initial judicial decision on the applicant's placement in custody furnished a sufficient legal basis for the entire duration of his detention is also contradicted by subsequent decisions of Russian courts in the applicant's case. Assuming that it did furnish a sufficient legal basis, it appears illogical and peculiar that on 1 July 2006 – almost three years after the applicant's placement in custody – the prosecutor considered it necessary to ask the court for a fourteen-day extension of his detention and the District Court granted the request (see paragraph 37 above). In doing so, the District Court explicitly cited Article 109 as the legal basis for its decision. It did not specify, however, which part of that Article permitted continued detention of the applicant, who had by then spent more than one year in custody in excess of the maximum eighteen-month time-limit set out in paragraph 4 of that Article (see paragraph 51 above). The Government omitted to comment on the legal provisions on which that decision could have been premised. Nor did they state what the legal basis for the applicant's detention had been after 14 July 2006, that is after the expiry of the detention period extended by the decision of 1 July 2006. Furthermore, it is likewise illogical and peculiar that on 13 September 2006 that decision was found to have been lawful and justified by the Moscow City Court, notwithstanding the fact that that finding was diametrically opposed to the same court's earlier decision of 21 August 2006, by which it had ordered the applicant's release with reference to Article 109 on the ground that the maximum detention period had already expired (see paragraphs 38 and 45 above).

76. On a more general level, the Court notes with concern the inconsistent legal positions of domestic authorities on the issue of provisions applicable to detainees awaiting extradition. In one case, to which the Government referred, the Supreme Court had expressed the view that the detention of persons whose extradition from Russia had been sought was to be governed, after the initial forty-day period provided for by the 1993 Minsk Convention, by foreign criminal law, i.e. that of the requesting party (see the Government's submissions and also paragraph 56 above). The same view was apparently held by the International Cooperation Department of the Prosecutor General's Office, which advised the applicant's counsel to petition the Tajikistani authorities for his release (see paragraph 23 above). However, a Moscow district court (Nagatinskiy) pointed out to the applicant's representative that her references to the provisions of the Tajikistani Code of Criminal Procedure were irrelevant for the purposes of criminal proceedings in Russia (see paragraph 22 above). Another district court in Moscow (Tverskoy) expressed the opposite view, holding that the applicant was not a party to criminal proceedings within the meaning of the Russian Code of Criminal Procedure (see paragraph 28 above). That finding implied that his detention was not attended by any of the safeguards and guarantees that ordinary suspects or defendants enjoyed. The same District Court subsequently opined that the Prosecutor General's Office, that is the authority processing the request for the applicant's extradition, was not responsible for the applicant's detention and therefore could not be held liable for a failure to put an end to his continued unlawful detention (see paragraph 33 above).

77. Having regard to the inconsistent and mutually exclusive positions of the domestic authorities on the issue of legal regulation of detention with a view to extradition, the Court finds that the deprivation of liberty to which the applicant was subjected was not circumscribed by adequate safeguards against arbitrariness. The provisions of the Russian law governing detention of persons with a view to extradition were neither precise nor foreseeable in their application and fell short of the “quality of law” standard required under the Convention. The national system failed to protect the applicant from arbitrary detention, and his detention cannot be considered “lawful” for the purposes of Article 5 of the Convention. In these circumstances, the Court does not need to consider separately whether the extradition proceedings were conducted with due diligence.

78. There has therefore been a violation of Article 5 § 1 (f) of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

79. The applicant complained under Article 5 § 4 and Article 13 of the Convention that he had not been able to obtain effective judicial review of his detention. As it has been the Court's constant approach to consider Article 5 § 4 as the *lex specialis* in relation to the more general requirements of Article 13 (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II), the Court will examine this complaint exclusively under Article 5 § 4, which reads as follows:

> "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. Admissibility

80. The Government claimed that the applicant had not exhausted effective domestic remedies because he had not lodged an appeal against the Nagatinskiy District Court's decision of 21 August 2003.

81. The applicant replied that the absence of any legal possibility of obtaining judicial review of his detention was the crux of his complaint under Article 5 § 4 and therefore it could not be declared inadmissible for non-exhaustion of domestic remedies.

82. The Court observes that the thrust of the applicant's complaint under Article 5 § 4 was not directed against the initial decision on his placement in custody but rather against the impossibility of obtaining judicial review of his detention after a certain lapse of time. The Government's objection as to the applicant's failure to appeal against the initial arrest warrant is therefore without substance and must be dismissed.

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

### B. Merits

84. The applicant complained that his detention had continued automatically, without any judicial decision or review. Citing by way of example the Tverskoy District Court's decision of 21 April 2005, the applicant pointed out that the Russian courts had considered such review unnecessary because it had not been explicitly required by the Code of Criminal Procedure or international instruments. The applicant had repeatedly but unsuccessfully attempted to obtain a review of his detention. He had received inconsistent and mutually exclusive responses from

Russian authorities. In his view, this had been a telling indication of the absence of a clearly defined procedure for reviewing the lawfulness of detention with a view to extradition. Moreover, he had not been able to contest his custody as an unlawful act by a prosecutor because, pursuant to Article 125 of the Code of Criminal Procedure, such complaints are to be filed with a court having jurisdiction for the place of preliminary investigation. As he had not been the subject of any investigation in Russia, his complaints had been disallowed (he referred to the Tverskoy District Court's decision of 23 June 2006).

85. The Government submitted that the Russian courts were not under a legal obligation to review his detention on their own initiative. Were it to be otherwise, that would be contrary to their function of independent arbiter. The Government maintained that the applicant had been able to obtain a review of his detention under Articles 108 and 109 of the Code of Criminal Procedure. Although he had many times complained about the acts and failures to act of prosecuting officials and petitioned for his release, he had never contested the lawfulness of the custodial measure.

86. The Court reiterates that the purpose of Article 5 § 4 is to assure 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*, judgment of 18 June 1971, Series A no. 12, § 76). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII (extracts)). 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, *mutatis mutandis*, *Čonka*, §§ 46 and 55, cited above).

87. The Court notes at the outset that the Government's submissions on this complaint contradict their own submissions above on the lawfulness of the applicant's detention. Commenting on the complaint under Article 5 § 1 (f), they denied that Article 109 was applicable in the applicant's situation since he had been detained with a view to extradition (see paragraph 66 above). In their submissions under Article 5 § 4, they maintained, nevertheless, that there existed a legal possibility of obtaining judicial review under the same Article 109 (see above). Furthermore, the Government's submissions on applicability of Article 109 were at variance with the case-law of the Supreme Court, to which they referred, and

decisions of the domestic courts in the applicant's case (see paragraphs 56 and 28 above).

88. It is not the Court's task to decide whether Article 109 of the Code of Criminal Procedure was, or should have been, applicable in the applicant's case. The question to be determined under Article 5 § 4 of the Convention is whether Article 109 entitled the applicant to initiate proceedings for examination of the lawfulness of his detention. In this connection the Court notes that the application of a custodial measure is governed by Articles 108 and 109 of the Code. While Article 108 covers the initial placement in custody, Article 109 sets specific time-limits by which the prosecutor must solicit the court for an extension of the custodial measure. In examining the application for an extension, the court must decide whether continuation of the custodial measure is lawful and justified and, if it is not, release the detainee. Admittedly, the detainee has the right to take part in these proceedings, make submissions to the court and plead for his or her release. There is nothing, however, in the wording of either Article 108 or Article 109 to indicate that these proceedings could be taken on the initiative of the detainee, the prosecutor's application for an extension of the custodial measure being the required element for institution of such proceedings. In the instant case it transpires that the proceedings under Article 109 were instituted only once in the three years of the applicant's detention and followed an application by a prosecutor. In these circumstances, the Court cannot find that Article 109, even assuming it was applicable, secured the applicant's right to take proceedings by which the lawfulness of his detention would be examined by a court.

89. The Court further notes that the Code of Criminal Procedure provided, in principle, for judicial review of complaints about alleged infringements of rights and freedoms which would presumably include the constitutional right to liberty. However, these provisions conferred standing to bring such a complaint solely on “suspects” or “defendants” (Article 119) or, more generally, on “parties to criminal proceedings” (Article 125). Under Russian criminal law, the applicant was neither a “suspect” nor a “defendant” because there was no criminal case against him in Russia. Furthermore, the Russian authorities consistently refused to recognise the applicant's position as a party to criminal proceedings on the ground that no investigation against him had been initiated in Russia (see, in particular, paragraphs 26, 28, 31 and 33 above). That approach obviously undermined his ability to seek judicial review of the lawfulness of his detention.

90. It follows that throughout the term of the applicant's detention he did not have at his disposal any procedure through which the lawfulness of his detention could have been examined by a court.

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

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. The applicant claimed 157,650 euros (EUR) in respect of non-pecuniary damage, representing EUR 150 for each of the 1,051 days during which he had been unlawfully detained. He claimed that a comparable award had been made in the case of *Lukanov v. Bulgaria* (judgment of 20 March 1997, *Reports of Judgments and Decisions* 1997-II, § 52). The applicant further requested the Court to recommend that the respondent Government amend the Russian legislation governing detention with a view to extradition.

93. The Government submitted that the claim was excessive and that a token amount would be an equitable award in the present case.

94. The Court considers that sufficient just satisfaction would not be provided solely by the finding of a violation and that compensation has thus to be awarded. Making an assessment on an equitable basis, it awards the applicant EUR 40,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

95. As regards the applicant's request for injunctive relief in the form of a recommendation to the respondent Government, the Court is not empowered under the Convention to issue recommendations of the kind sought by the applicant, for its judgments are essentially declaratory in nature. In general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention (see *Shofman v. Russia*, no. 74826/01, § 53, 24 November 2005, with further references). By finding a violation of Article 5 §§ 1 and 4 in the present case, the Court has established the Government's obligation to take appropriate general measures to remedy the existing legal deficiencies. Whether such measures would involve amending the Code of Criminal Procedure, reviewing the existing case-law, issuance of binding clarifications by the Supreme Court, or a combination of these and other measures, is a decision that falls to the respondent State. The Court, however, emphasises that any measures adopted must be compatible with the conclusions set out in the Court's judgment (see *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II, with further references).

### B. Costs and expenses

96. The applicant claimed EUR 2,250 for legal costs incurred in the proceedings before the Court. The amount claimed represented ten hours' work by Ms Moskalenko and thirty-five hours' work by Ms Stavitskaya at the hourly rate of EUR 50.

97. The Government submitted that the claim for legal fees was excessive in comparison to average legal fees in Russia, and that the applicant had not produced a legal-services contract.

98. According to the Court's case-law, an applicant is entitled to reimbursement of his 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. The Court is satisfied that the lawyers' rate and the number of hours claimed were not excessive. Deducting the amount of EUR 850 which has already been paid to the applicant by way of legal aid, the Court awards him EUR 1,400 in respect of costs and expenses, plus any tax that may be chargeable.

### C. Default interest

99. 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 concerning the lawfulness of the applicant's deprivation of liberty and the availability of judicial review of his detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention;

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

4. *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) EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage;

(ii) EUR 1,400 (one thousand four hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André WAMPACH
Deputy Registrar

Christos ROZAKIS
President