



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

THIRD SECTION

CASE OF KISLOV v. RUSSIA

(Application no. 3598/10)

JUDGMENT

STRASBOURG

9 July 2019

FINAL

09/10/2019

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

In the case of Kislov v. Russia,

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

Vincent A. De Gaetano, *President*,

Georgios A. Serghides,

Helen Keller,

Dmitry Dedov,

Branko Lubarda,

Alena Poláčková,

María Elósegui, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 11 June 2019,

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

PROCEDURE

1. The case originated in an application (no. 3598/10) 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 Belarusian national, Mr Vladimir Borisovich Kislov (“the applicant”), on 19 December 2009.

2. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged that he would be at risk of ill-treatment in the event of his extradition to Belarus; that he had been sentenced to imprisonment in Belarus as a result of proceedings which were a flagrant denial of justice; that he had had no effective remedies in that respect and that his detention in Russia had been unlawful.

4. On 30 May, 21 September and 25 November 2010 the Court rejected the applicant’s requests under Rule 39 of the Rules Court.

5. On 16 October 2015 the Government were given notice of the complaints under Articles 3, 5, 6 and 13 of the Convention and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

6. On 1 April 2016 the Court granted priority treatment to the case and decided to indicate to the Russian Government, under Rule 39 of the Rules of Court, that the applicant should not be removed from Russia to Belarus for the duration of the proceedings before the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1974. He lived in St Petersburg until 2011 and then in Lomonosov, the St Petersburg area. His current whereabouts are not specified.

A. Proceedings in Belarus

1. The applicant's employment and complaints to various authorities in Belarus

8. The applicant, who is a lawyer, resided in Minsk (Belarus). Until September 2003, he worked as chief officer of the legal unit in the Minsk regional office of *Potrebsoyuz* (*Минский облпотребсоюз*). Its staff also elected him to the local electoral board for election to the Minsk municipal council. In September 2003 he was employed by the legal and propaganda unit of the Minsk district office of *Potrebsoyuz* (*Минский райпотребсоюз*), which appears to have been an organisation pursuing commercial activities. The applicant's functions included providing the staff with information about the internal and external policies of the State. The applicant also claimed that he ran "opposition meetings" of the staff there.

9. Mr P., head of the district *Potrebsoyuz*, dismissed the applicant from his post. In June 2004 a court ordered his reinstatement in his post. However, later in June 2004 he was dismissed again.

10. In July 2004 the applicant wrote to the local (official) newspaper and made written complaints to various public authorities, alleging misappropriation of funds within the district *Potrebsoyuz*, in particular by Mr P. The applicant also listed various (allegedly, dubious) transactions. For instance, the district *Potrebsoyuz* had paid the debt of another organisation without any reason, whereas the latter had actually owed money to the *Potrebsoyuz*. He also implicated in those unlawful activities officials of the higher supervising organisation, the Belarusian Cooperative Union (*Белкоопсоюз*).

11. On 16 August 2004 the National Office of *Potrebsoyuz* replied to the applicant and the Belarusian State Control Agency, indicating that following an inquiry it had been ascertained that certain unlawful conduct had indeed taken place. The relevant data had then been forwarded, *inter alia*, to the Organised Crime Unit of the Ministry of the Interior, for criminal investigation.

12. On 27 August 2004 the Minsk City prosecutor's office replied that in 2003 and 2004 several criminal investigations against Mr P. had been

opened and then discontinued. One aspect of the applicant's complaint had been forwarded by the district prosecutor's office for examination.

13. On 1 October 2004 the district prosecutor's office replied that the complaint had been joined to the pending pre-investigation inquiry in respect of the staff of the district *Potrebsoyuz*.

2. Criminal proceedings against the applicant in Belarus

14. On an unspecified date, criminal proceedings were instituted against a Mr G. and Mr Z. on suspicion of receiving bribes (Article 430 of the Belarusian Criminal Code). It appears that the case-file materials also contained indications implicating the applicant in the criminal activity.

15. On 5 February 2004 a Mr M. was interviewed within the context of the above-mentioned criminal investigation. He admitted that he had given a bribe to the applicant.

16. It appears that following Mr M.'s statement, certain investigative measures were carried out. As a result, on 5 August 2004 criminal proceedings were instituted against the applicant on suspicion of receiving a bribe of 550 United States dollars (USD) from M. On 1 September 2004 the applicant was further accused of forgery of an official document in relation to the bribe from Mr M. Those offences had allegedly been committed between October and December 2003.

17. The applicant was ordered not to leave the area of his residence.

18. In July 2004 the applicant wrote to the local office of the Organisation for Security and Co-operation in Europe (OSCE), complaining about his dismissal and the criminal proceedings against him. In December 2004 he asked that an OSCE representative attend his trial hearings.

19. The criminal case against the applicant was submitted for trial before Judge K., of the Moskovskiy District Court of Minsk. According to the applicant, several years later, that judge was included in the European Union's sanction list in relation to cases arising from public demonstrations in 2010.

20. Several trial hearings were held in March 2005. It appears that the applicant was present at them and was assisted by a privately retained lawyer, Mr D.

21. According to the applicant, at the hearing of 27 March 2005 he asked the presiding judge to examine carefully his case, which had been "fabricated". Apparently, the judge replied that he would not study the case as it had already been studied and investigated for a year by the Prosecutor General's Office. In support of this allegation, the applicant submitted to the Court concordant written statements dated 16 September 2010 from two persons who had been present at the trial. Those people also stated that the applicant had then tried to read out his motions and requests, including a request to be heard; the judge had refused to hear the applicant but had

admitted certain written submissions, including the applicant's statement, to the file.

22. Allegedly, at some point during the trial the presiding judge dismissed an application lodged by the defence to hear two witnesses on its behalf (Ms Ka. And Mr Ve.), who had been guards at the building in which the bribe had allegedly been handed over and who had stated at the investigative stage that they had not seen it (see Mr M.'s statement at paragraph 26 below). An investigator had interviewed those persons during the preliminary investigation. It is unclear whether the interview records were admitted to the case file submitted to the trial court.

23. On 27 March 2005 the applicant left Belarus and arrived in Russia. He claimed that he had decided to leave Belarus on account of persecution and harassment by the domestic authorities.

24. On 28 March 2005 the Moskovskiy District Court of Minsk ordered the applicant's detention.

25. It appears that, for unspecified reasons, the applicant's lawyer, Mr D., stopped participating in the trial hearings after the applicant's departure.

26. By a judgment of 5 December 2005 the District Court convicted the applicant of taking a bribe and forgery of an official document. The applicant was sentenced to seven years' imprisonment in a strict-regime prison. The court also ordered confiscation of his property. It relied on various pieces of documentary evidence and numerous statements, in particular:

- Mr M.'s statement at the trial that the applicant had indicated to him that he was a member of a committee which might vote (or not) on the sale of a "pavilion" in Kryzhovka village that Mr M. had wanted to purchase; Mr M. perceived the applicant's statement as an extortion of a bribe and promised payment for a favourable outcome of the vote; the applicant had then telephoned him, announcing the favourable outcome; he had then handed over USD 550 to the applicant at the Le-Grand factory;

- the testimony of Ms P., secretary to the sales commission of the district *Potrebsoyuz*, who stated at the trial that the committee had decided to proceed with the registration of the body's title to the pavilion and then to sell it;

- the testimony of Ms K., chairwoman of the above-mentioned committee, who stated at the trial that the committee had decided to register the body's title to the pavilion and then to sell it; that the applicant had asked her to sign the minutes of the committee meeting reflecting such terms, which she had done;

- the testimony of Mr Y., who stated at the trial that he had been present at the committee meeting as a representative of a higher authority; he had stated at the meeting that the sale of the pavilion would require the higher

authority's approval; however, the committee had issued the decision to sell the pavilion;

- the testimony of Ms S., President of the sales commission of the district *Potrebsoyuz*, who stated at the investigative stage that P. had asked her commission to examine the possibility of selling the pavilion; she had sent a colleague to inspect the building but he had been unable to find it; in December 2003 the applicant had presented the sale proposal to the committee, whereas a representative of the higher authority had indicated that it had not approved any such sale; nevertheless, the committee had proceeded to vote for the sale;

- the statement of Mr Ye., who said at the investigative stage that having received documents relating to the sale of a building in Kryzhovka, representatives of the higher authority had tried to locate it but had been unable to do so; in December 2003 the higher authority had asked the district *Potrebsoyuz* to carry out an inquiry into the submission of false documents.

27. As follows from the text of the trial judgment, it could be challenged by way of an ordinary appeal. For unspecified reasons, the lawyer, Mr D., did not receive a copy of the trial judgment and did not appeal against it within the statutory time-limit.

28. The trial judgment became final on 16 December 2005.

29. Following the institution of extradition proceedings (see below), in 2010 the applicant sought a supervisory review of the 2005 judgment against him. On 21 July 2010 the President of the Minsk City Court agreed to proceed with the request and applied to the Presidium of the City Court to have the sentence reduced in view of recent favourable legislative changes. At the same time, he maintained that the conviction was lawful and well-founded. On the same date, the Presidium (comprising the President and five other judges) followed the President's indications and reduced the prison term to four years.

30. The applicant then sought a supervisory review before the Supreme Court of Belarus. By a letter of 18 November 2010 the deputy President of the Supreme Court dismissed his application for a review. The judge ruled that the applicant's conviction had been based on testimony from the person from whom he had extorted a bribe, and had been corroborated by other statements and written material.

31. In reply to a request from the applicant, in September 2011 the District Court sent him a copy of the trial transcript. However, the applicant has not submitted a copy thereof to the Court.

32. In 2013 the applicant lodged another application for a review with the Supreme Court of Belarus. By a letter of 21 May 2013 the First Deputy President of the Supreme Court dismissed the application.

B. Arrest and extradition proceedings in Russia

33. The applicant arrived in Russia in March 2005. He did not apply for refugee status or temporary asylum under the Refugees Act.

34. On 7 July 2009 the applicant was arrested in Russia. When interviewed by an assistant to the St Petersburg transport prosecutor, he stated that he had left Belarus because he had been unlawfully persecuted by the Belarusian authorities. He opposed his possible extradition, stating that he “fear[ed] for [his] life and might be subjected to unlawful deprivation of liberty”.

35. On 8 July 2009 the St Petersburg transport prosecutor ordered the applicant’s continued detention for forty days until 15 August 2009, awaiting receipt of a formal extradition request from Belarus.

36. On 29 July 2009 the Deputy Prosecutor General of Belarus sent a letter to the Deputy Prosecutor General of Russia, seeking the applicant’s extradition in order to execute the trial judgment of 5 December 2005 (see paragraph 26 above). The letter read as follows:

“We hereby provide assurances that [the applicant] will be prosecuted only for the offences which are listed in the extradition request and that, after serving the sentence, he will be allowed to leave Belarus and will not be removed from or surrendered by Belarus to another State without Russia’s consent.

The extradition request does not aim at persecuting [the applicant] for political reasons or on account of his race, religion, ethnicity or political views ...

We also provide assurances as to [the applicant’s] right, under Article 375 of the Belarusian Code of Criminal Procedure, to seek restoration of the time-limit for a cassation review of the trial judgment. If such an application is granted, the criminal case against him will be examined, upon his appeal, by the Cassation Section of the Minsk City Court, with the benefit of legal assistance. Moreover, pursuant to Article 408 of the Code of Criminal Procedure, [the applicant] has a possibility to seek a supervisory review of the trial judgment.”

37. On 10 August 2009 another Russian prosecutor ordered the applicant’s detention until 7 January 2010, pending examination of the extradition request. On 13 August 2009 the applicant sought a judicial review under Article 125 of the Russian Code of Criminal Procedure (CCrP), arguing that his detention had been and continued to be in breach of Article 466 of the CCrP. The complaint was received by the Smolninskiy District Court of St Petersburg on 19 August 2009. On 17 September 2009, while upholding the initial detention order of 8 July 2009, that court declared the ensuing detention order of 10 August 2009 unlawful because prosecutors did not have competence to decide on detention. The court held that the prosecutor in question should have applied to a court under Article 109 of the CCrP. The court then noted that the procedure under Article 125 of the CCrP did not authorise it to annul the impugned decision or to decide on a preventive measure such as remand in custody. Thus, the court dismissed the applicant’s application for release or for substituting

detention with house arrest, for instance. However, it ordered the prosecutor to “remedy the violation of the law which has been identified by the court”.

38. The prosecutor’s office appealed. On 9 November 2009 the St Petersburg City Court upheld the judgment of 17 September 2009. The appeal court did not order the applicant’s release, so he remained in detention.

39. In the meantime, on 2 October 2009 the Prosecutor General’s Office of the Russian Federation granted the extradition request. The extradition order contained no findings relating to a risk of ill-treatment in respect of the applicant in Belarus.

40. The St Petersburg transport prosecutor’s office applied to the District Court for an extension of the applicant’s detention. At a hearing on 13 November 2009 the District Court refused to authorise the applicant’s detention, noting that pursuant to Article 109 of the CCrP, such a request should have been lodged within two months of the applicant’s arrest. The applicant was released after that court hearing.

41. It appears that for some time between August and November 2009 the applicant was kept in cells nos. 52 and 146 of St Petersburg detention centre no. 47/4, together with convicts. In January 2010 the St Petersburg prosecutor’s office considered that this had violated section 33 of Federal Law no. 103-FZ of 15 July 1995.

42. The applicant sought a judicial review of the extradition order. Referring to the European Convention on Extradition of 1957 (see paragraph 48 below), he argued that prior to granting the extradition request, the Russian Prosecutor General’s Office had not assessed whether it had to be refused since it was related to execution of a sentence imposed as a result of proceedings that had not afforded him the minimum guarantees of a fair trial. Namely, there had been no public hearing and his counsel had not taken part in the trial. The conviction had been merely based on a denunciation made by a person who himself had been under the pressure of a pending criminal investigation. The applicant pointed out that the Belarusian authorities had provided no assurances as regards the availability of a retrial, this time with the benefit of legal assistance, nor as regards amendment of the final trial judgment on account of recent favourable changes in Belarusian criminal legislation (see also, in this connection, paragraph 29 above). Article 464 of the Russian CCrP listed grounds for refusing extradition for the purpose of executing a sentence and also mentioned that it could be refused “on other lawful grounds”. The applicant argued that the above considerations constituted such lawful grounds, in view of Russia’s obligations under international law.

43. On 22 July 2010 the St Petersburg City Court held a brief hearing (allegedly, lasting just fifteen minutes). Referring to the Court’s judgments in *Koktysh v. Ukraine* (no. 43707/07, 10 December 2009), and *Kamyshev v. Ukraine*, (no. 3990/06, 20 May 2010), the applicant’s lawyer argued that

the human-rights situation in Belarus was worsening and there were increasing negative tendencies as regards the problem of treatment proscribed by Article 3 of the Convention. She said that the applicant might be subjected to such treatment and that the Belarusian authorities should have submitted assurances to the contrary. The court, however, upheld the extradition order of 2 October 2009, stating as follows:

“[The applicant’s] arguments relating to human-rights violations in Belarus are unsubstantiated and have no objective confirmation. He has submitted no substantiated information that he would be subjected to persecution on the grounds of race, religious or political beliefs or opinions, nationality, ethnic origin or membership of a specific social group.

[The applicant] has not claimed asylum in Russia ... There are no grounds mentioned in Article 464 of the Code of Criminal Procedure to block the extradition ... There is no final judgment by a Russian court establishing obstacles to extraditing [the applicant], on account of Russian legislation or Russia’s international treaties.”

44. Having heard a prosecutor and a lawyer on behalf of the applicant, on 29 September 2010 the Supreme Court of Russia upheld the judgment. The appellate court stated as follows:

“Russian law makes provision for situations in which a criminal judgment may be issued without the defendant’s participation in the trial. This does not contravene international law. It transpires that a lawyer did participate in the trial ...

[The applicant] was convicted of taking a bribe and forgery of an official document. Thus, his arguments concerning violations of human rights in Belarus are unsubstantiated.”

45. The applicant went into hiding. It appears that, at least as of March 2016, he was still in Russia.

II. RELEVANT DOMESTIC LAW AND PRACTICE

46. Pursuant to Article 1 § 3 of the Russian Code of Criminal Procedure (CCrP), the generally recognised principles and norms of international law and international treaties to which the Russian Federation is a party are constituent parts of the legislation of the Russian Federation regulating criminal proceedings. If an international treaty to which the Russian Federation is a party has laid down rules different from those stipulated by the CCrP, the rules of the international treaty must be applied.

47. Under Article 464 of the CCrP, extradition must be refused where the person concerned is a Russian citizen or has been granted asylum in Russia on account of possible persecution on grounds of race or religious beliefs, or on account of his membership of a particular social group or his political views. Extradition must be refused where there has been a final judgment “impeding extradition on account of the provisions of Russian legislation or international treaties to which the Russian Federation is a party”. In accordance with Ruling no. 11 of 14 June 2012 by the Plenary

Supreme Court of Russia, extradition may be refused where exceptional circumstances of the case disclose a threat to the person's life and limb; on judicial review the prosecutor bears the burden of proving that there are no serious grounds for believing that the person is at risk of ill-treatment (paragraphs 13 and 14 of the Ruling).

48. Russia's reservation, contained in the instrument of ratification deposited on 10 December 1999 in relation to the European Convention on Extradition of 13 December 1957, states as follows:

“In accordance with Article 1 of the Convention the Russian Federation reserves the right to refuse extradition:

a. if extradition is requested for the purpose of holding [a person] responsible before an ad hoc tribunal or by way of summary proceedings or for the purposes of carrying out a sentence rendered by an ad hoc tribunal or by summary proceedings when there are grounds for believing that in the course of these proceedings the person will not be or was not provided with the minimum guarantees set forth in Article 14 of the International Covenant on Civil and Political Rights and Articles 2, 3 and 4 of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The terms ‘ad hoc tribunal’ and ‘summary proceedings’ do not include any international criminal court with authority and jurisdiction recognised by the Russian Federation;

b. if there are grounds for believing that the person requested for extradition in the requesting State was or will be exposed to torture or other cruel, inhuman or degrading treatment or punishment in the course of the criminal proceedings, or the person was not or will not be provided with the minimum guarantees set forth in Article 14 of the International Covenant on Civil and Political Rights and Articles 2, 3 and 4 of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms; ...”

III. OTHER RELEVANT MATERIAL

A. Belarusian law

49. Under the Belarusian Code of Criminal Procedure of 1999 (which was applicable at the material time), a defendant's presence during trial proceedings was mandatory, except if he or she had left Belarus and had been evading the trial (Article 294 of the Code).

50. Under Law no. 3514-XII of 13 January 1995 (applicable at the material time) district, town and regional judges were appointed by the President of Belarus (section 7 of the Law). Judges could be removed from office for a premeditated violation of legality or for an act that was incompatible with their high status (section 72). The removal decision was to be issued by the appointing authority, taking into account the report issued by the competent judicial qualification board.

B. Documents relating to the human-rights situation in Belarus

1. United Nations documents

51. The applicant referred to the Report of the Special Rapporteur on the situation of human rights in Belarus (A/HRC/4/16, 15 January 2007, paragraphs 10 and 14) to the UN General Assembly, and to the UN General Assembly Resolution on the situation of human rights in Belarus (A/RES/62/169, 18 December 2007).

52. The Court has also examined the following material.

53. The concluding observations (CAT/C/BLR/CO/4, 7 December 2011) on the fifth periodic report of Belarus, by the United Nations Committee against Torture, the relevant parts of which read as follows:

“2. While welcoming the submission of the fourth report of Belarus, the Committee regrets that it was submitted nine years late, which prevented the Committee from conducting an analysis of the implementation of the Convention in the State party following its last review in 2000.

...

Torture

10. The Committee is deeply concerned over the numerous and consistent allegations of widespread torture and ill-treatment of detainees in the State party. According to the reliable information presented to the Committee, many persons deprived of their liberty are tortured, ill-treated and threatened by law enforcement officials, especially at the moment of apprehension and during pretrial detention. These confirm the concerns expressed by a number of international bodies, inter alia, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Human Rights Council (resolution 17/24), the United Nations High Commissioner for Human Rights and the Organization for Security and Cooperation in Europe. While noting article 25 of the Constitution which prohibits torture, the Committee is concerned about the substantial gap between the legislative framework and its practical implementation (arts. 2, 4, 12 and 16).

As a matter of urgency, the State party should take immediate and effective measures to prevent acts of torture and ill-treatment throughout the country, including by implementing policies that would produce measurable results in the eradication of torture and ill-treatment by State officials.

Impunity and lack of independent investigation

11. The Committee continues to be deeply concerned about the persistent and prevailing pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture and ill-treatment and to prosecute alleged perpetrators, the lack of independent investigation and complaint mechanisms, the intimidation of the judiciary, the low level of cooperation with international monitoring bodies, which have led to serious underreporting and impunity (arts. 2, 11, 12, 13 and 16). In particular, the Committee is concerned about:

(a) The lack of an independent and effective mechanism for receiving complaints and conducting prompt, impartial and effective investigations into allegations of torture, in particular of pretrial detainees;

(b) Information suggesting that serious conflicts of interest prevent the existing complaints mechanisms from undertaking effective, impartial investigations into complaints received;

(c) The lack of congruence in information before the Committee regarding complaints presented by persons in detention. The Committee notes with serious concern the information about reprisals against those who file complaints and the cases of denial of the complaints made by detainees, including the cases of Ales Mikhalevich and Andrei Sannikov; and

(d) Reports indicating that no officials have been prosecuted for having committed acts of torture. According to information before the Committee, over the last 10 years, only four law enforcement officers have been charged with the less serious offence, “abuse of power or official authority” and “transgression of power or official authority” under articles 424 and 426 of the Criminal Code.

The Committee urges the State party to take all necessary measures to ensure that all allegations of torture and ill-treatment by public officers are promptly investigated in the course of transparent and independent inquiries and that the perpetrators are punished according to the gravity of their acts. To that end, the State party should:

(a) Establish an independent and effective mechanism to facilitate submission of complaints by victims of torture and ill-treatment to public authorities, including obtaining medical evidence in support of their allegations, and to ensure in practice that complainants are protected against any ill-treatment or intimidation as a consequence of their complaint or any evidence given. In particular, as previously recommended (A/56/44, para. 46 (c)), the State party should consider establishing an independent and impartial governmental and non-governmental national human rights commission with effective powers to, inter alia, promote human rights and investigate all complaints of human rights violations, in particular those pertaining to the implementation of the Convention;

(b) Publicly and unambiguously condemn the use of all forms of torture, addressing in particular law enforcement officers, the armed forces and prison staff, and including in its statements clear warnings that any person committing or participating in such acts or acting as an accomplice shall be held personally responsible before the law and liable to criminal penalties;

(c) Ensure that, in cases of alleged torture, suspects are suspended from duty immediately for the duration of the investigation, particularly if there is a risk that they might otherwise be in a position to obstruct the investigation; ...

Independence of the judiciary

12. While noting that article 110 of the Constitution and article 22 of the Code of Criminal Procedure provide for an independent judiciary, the Committee is deeply concerned that other provisions in Belarusian law, specifically those on discipline and removal of judges, their appointment and tenure, undermine these provisions and do not guarantee judges’ independence towards the executive branch of Government ...

[T]he Committee urges the State party to:

(a) Guarantee the full independence of the judiciary in line with the Basic Principles on the Independence of the Judiciary;

(b) Ensure that judicial selection, appointment, compensation and tenure are made according to objective criteria concerning qualification, integrity, ability and efficiency; ...”

54. The report of the Special Rapporteur on the situation of human rights in Belarus, 21 April 2016 (A/HRC/32/48), to the United Nations Human Rights Council, the relevant parts of which state:

“80. The Special Rapporteur notes that allegations of torture continued to be brought to his attention. As in past years, and despite the repeated recommendations by the United Nations human rights bodies, such allegations rarely lead to any criminal investigation against perpetrators. The authorities still do not allow access to the penitentiary system to independent investigators or monitors ...

90. The Special Rapporteur has also recommended that Belarus ensure the absolute prohibition of torture and other ill-treatment in law and in practice, and take measures to bring conditions of detention in places of deprivation of liberty into line with the Standard Minimum Rules for the Treatment of Prisoners and other relevant international and national law standards (A/HRC/26/44, para. 139 (j)). No reforms or preparations in this regard were discernible in the period under review.”

55. The concluding observations (CAT/C/BLR/CO/5, 7 June 2018) on the fifth periodic report of Belarus, by the United Nations Committee against Torture, the relevant parts of which read as follows:

“11. The Committee welcomes recent amendments made by the State party to its Code on the Judicial System and the Status of Judges, which transferred responsibility for key aspects of the functioning of the judiciary from the Ministry of Justice to the Supreme Court. Nevertheless, the Committee remains concerned that the President of Belarus exerts significant control over the appointment, promotion and dismissal of judges or prosecutors, and at frequent reports that judges appear to take direction from the Executive in reaching decisions in sensitive cases relevant to the Convention. The Committee is also concerned that recent legislative changes provide for the possibility of judges being appointed for renewable five-year terms rather than indefinitely (arts. 2 and 6).

12. The State party should strengthen the independence of the judiciary in line with the Basic Principles on the Independence of the Judiciary, in part by reducing the control of the President over the appointment, promotion and dismissal of judges and providing them with security of tenure.

...

13. The Committee continues to be deeply concerned by reports that the practice of torture and ill-treatment is widespread and that the State party's authorities are presently failing to conduct prompt, impartial and full investigations into such allegations and to prosecute the alleged perpetrators, as reflected in the information provided by the State party. For example, of the 614 reports of acts constituting torture or ill-treatment received by the State party's Investigative Committee and other relevant officials between 2012 and 2015, only 10 were subject to criminal investigation under article 426 (3) of the Criminal Code, none of which had reportedly resulted in a criminal conviction as of 2018. The Committee is concerned at reports that the Investigative Committee lacks independence from the Executive branch and does not have specialized units tasked with investigating allegations of torture and ill-treatment. The Committee is further concerned that the State party did not provide information in response to its request for examples of cases in which officials accused of torture were suspended from duty pending an investigation.”

56. The concluding observations (CCPR/C/BLR/CO/5, October 2018) on the fifth periodic report of Belarus, by the United Nations Human Rights Committee, the relevant parts of which read as follows:

“29. The Committee, while observing the note added to article 128 of the Criminal Code in 2015 that specifically defines torture, is concerned that shortcomings in the definition and its applicability remain, as not all acts that constitute torture are covered by the definition and the penalties for torture are not commensurate with the gravity of the crime. The Committee is also concerned at continued allegations that: (a) law enforcement officers resort to the use of torture and ill-treatment in order to extract confessions from suspects and that such confessions are used as evidence in court; (b) allegations of torture and ill-treatment are often not investigated, and the Investigative Committee lacks the required independence to conduct effective investigations into such allegations; and (c) medical units called to document injuries inflicted on prisoners are structurally part of the prison system. The Committee notes with concern the State party’s statement that no convictions under articles 128 and 394 of the Criminal Code took place until 2016, and regrets that no updated information was provided in that regard ...

30. The State party should take vigorous measures to eradicate torture and ill-treatment, inter alia, by:

(a) Bringing the definition of torture into conformity with article 7 of the Covenant and other internationally accepted standards, including by ensuring that the crime of torture is not subject to a statute of limitations and is punished with sanctions that are commensurate with the nature and gravity of the crime;

(b) Providing law enforcement officials with adequate training on torture prevention and humane treatment;

(c) Ensuring independent and reliable medical examinations and recording of injuries;

(d) Ensuring that confessions obtained in violation of article 7 of the Covenant are not accepted by courts under any circumstances;

(e) Ensuring that all allegations of torture and ill-treatment are promptly and thoroughly investigated by an effective and fully independent and impartial body; that perpetrators are prosecuted; that those convicted are punished with sanctions commensurate with the gravity of the crime; and that victims and, where appropriate, their families are provided with full reparation, including rehabilitation and adequate compensation ...”

2. Other documents

57. For other relevant material, see various references and citations in the Court’s judgments in the cases of *Kozhayev v. Russia* (no. 60045/10, §§ 55-59, 5 June 2012), and *Y.P. and L.P. v. France* (no. 32476/06, §§ 38-43, 2 September 2010).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3, 6 AND 13 OF THE CONVENTION

58. The applicant complained that he had been, and remained, exposed to a risk of ill-treatment in Belarus, in breach of Article 3 of the Convention, in the event of his extradition there. He also argued that he had had no effective remedies for his grievance, in breach of Article 13 of the Convention.

59. The applicant also alleged that he had been sentenced to imprisonment in Belarus as a result of proceedings which amounted to a flagrant denial of justice. Thus his extradition there to serve the sentence would be in violation of Article 6 of the Convention. He also argued that he had had no effective remedy for this complaint, in particular given that the courts had not examined his related grievances.

60. Article 3 of the Convention reads:

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

61. Article 6 of the Convention reads:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

62. Article 13 of the Convention reads:

“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.”

A. The parties’ submissions

1. Article 3 of the Convention alone and in conjunction with Article 13

(a) The Government

63. The Government submitted that, in its extradition request, the Belarusian Prosecutor General’s Office had provided assurances that the request was not aimed at political persecution against the applicant, nor did it relate to his race, religion, nationality or political views (see paragraph 36 above). The applicant’s allegations about violations of human rights in Belarus had not been substantiated and remained unsubstantiated. He had not submitted any valid proof that he ran a risk of being persecuted on the grounds of his race, religion, nationality, social status or political views.

64. Prior to issuing the extradition order, the deputy Prosecutor General of the Russian Federation had verified that there were no grounds listed in

Article 464 of the Russian CCrP which would prevent extradition (see paragraph 47 above). In particular, he had ascertained that the applicant had not received asylum in Russia, and that there had been no final court decision acknowledging any obstacle to his extradition. When reviewing the matter, the Supreme Court of Russia had dealt with the applicant's arguments pertaining to a potential violation of his rights in Belarus in the event of extradition (see paragraph 44 above). The Supreme Court had considered that the assurances submitted by the Belarusian authorities sufficed in order to dispel any doubts about such a risk. In the Government's view, those assurances were sufficiently specific and clear. The Government indicated that they had no evidence of any breach of this type of assurance in the extradition procedure on the part of the Belarusian authorities. The effectiveness of such assurances could be ensured on account of the existing international treaties, in coordination with the Belarusian Prosecutor General's Office, for instance, within the framework of the Commonwealth of Independent States Coordination Council of Prosecutor Generals' Offices, or via diplomatic channels.

65. As to Article 13 of the Convention, the Government argued that the applicant had had effective remedies and had used them, namely by way of seeking a judicial review of the extradition order. Moreover, prior to that, when interviewed on 7 July 2009 by the assistant to the St Petersburg transport prosecutor, the applicant had used the opportunity to raise his concerns relating to a risk to his life or limb in the event of his extradition to Belarus (see paragraph 34 above).

(b) The applicant

66. The applicant pointed out that both in the domestic proceedings and before the Court, he had referred to a "risk of ill-treatment" or "treatment in breach of Article 3 of the Convention". In the event of his extradition, he would run such a risk for two reasons. First, the human-rights situation in Belarus was unsatisfactory and continued to worsen. That had indeed been the case in 2016 when he had submitted his observations to the Court. He referred in this connection to various international reports (namely, United Nations reports of 2013 and 2015), Belarus's continued failure to comply with its international obligations, and the decisions of the UN Human Rights Committee in individual applications. Secondly, following his complaints about unlawful actions and corruption within the district *Potrebsoyuz*, criminal charges had been "fabricated" against him (see paragraphs 10-13 and 16 above). Various procedural violations had occurred during the investigation and the trial in March 2005 (for a summary of the applicant's arguments, see paragraphs 71-74 below under Article 6 of the Convention). In his observations submitted in 2016, he also mentioned that the Belarusian authorities would "retaliate" for his

complaints to the OSCE, the Court and the United Nations (see paragraph 18 above).

67. The applicant stated that the respondent Government had not refuted any of his above arguments relating to the risk of ill-treatment, but had confined their reasoning to the assurances given by the Belarusian Prosecutor General's Office. The applicant insisted, however, that the extradition request of 29 July 2009 contained no assurances relating to (and even less dispelling any doubt about) the risk of ill-treatment in the event of his extradition (see paragraph 36 above). No such assurances had been sought by the Russian authorities and none had been given.

2. Article 6 of the Convention alone and in conjunction with Article 13

(a) The Government

68. The Government submitted that in its extradition request the Belarusian Prosecutor General's Office had provided assurances regarding the applicant's right to seek restoration of the statutory time-limit, under Article 375 of the Belarusian Code of Criminal Procedure (CCrP), for appealing against the trial judgment by way of a cassation review. If such an application were successful, the criminal case against the applicant would be examined by the Cassation Section of the Minsk Town Court and the applicant would benefit from a right to legal assistance. Moreover, pursuant to Article 408 of the Belarusian CCrP, the applicant could lodge an application for a supervisory review.

69. Pursuant to Article 463 of the Russian CCrP, a court reviewing an extradition order could not delve into matters relating to a foreigner's criminal guilt but had to confine the review to whether the extradition order was in compliance with Russian legislation and international treaties to which the Russian Federation was a party. When reviewing the extradition order in respect of the applicant, the court had had no reason to doubt the trial judgment issued in respect of him by the Moskovskiy District Court of Minsk. Both Belarusian and Russian legislation provided for exceptions to the rule that a criminal judgment could not be delivered in the absence of a defendant. This approach did not contradict international law. Moreover, as indicated in the trial judgment, the applicant had been represented by a lawyer during the trial.

70. Prior to issuing the extradition order, the Deputy Prosecutor General of the Russian Federation had verified that there had been no grounds listed in Article 464 of the Russian CCrP which would prevent extradition. In particular, he had ascertained that the applicant had not received asylum in Russia, and that there had been no final court decision acknowledging any obstacle to his extradition. When reviewing the matter, the Supreme Court of Russia had dealt with the applicant's arguments pertaining to a potential violation of his rights in Belarus in the event of extradition. The Supreme

Court had considered that the assurances submitted by the Belarusian authorities sufficed to dispel any doubts about such a risk. In the Government's view, those assurances were sufficiently specific and clear. The Government indicated that they had no evidence of any breach of this type of assurance in the extradition procedure on the part of the Belarusian authorities. The effectiveness of such assurances could be ensured on account of the existing international treaties, in coordination with the Belarusian Prosecutor General's Office, for instance, within the framework of the Commonwealth of Independent States Coordination Council of Prosecutor Generals' Offices, or via diplomatic channels.

(b) The applicant

71. The applicant argued that the charges against him had been "fabricated" and that he had not received a fair trial in Belarus. As confirmed by, *inter alia*, the trial transcript, the trial judge had not afforded him an opportunity to examine three key prosecution witnesses, Ms S., Mr Ye. and a Mr/Ms Sh. (see paragraph 26 above) or to have two witnesses on his own behalf heard, who might have "refute[d] the accusation of taking a bribe" (see paragraph 22 above). In addition, the judge had dismissed his requests for expert reports to be ordered. The trial judge had placed the prosecution in a privileged position, for instance, by allowing them to make an oral pleading twice during the trial. The trial record did not include the content of questions raised by the parties before witnesses, thereby depriving the applicant of any meaningful right to appeal by way of a cassation or supervisory review, which would be based on the case file, including the trial transcript.

72. According to the applicant, Belarusian judges lacked independence, in particular because they were appointed and removed from office by the President of Belarus. As regards specifically the trial judge in his case, he had refused to delve into the factual and legal details of the case, stating that "the prosecutor had studied it for a year" (see paragraph 21 above); he had not heard any oral submissions from the applicant at the trial, and the applicant had not made any statement during the investigation either. Subsequently, the judge in question had been included in the European Union's sanction list in relation to cases arising from public demonstrations in 2010 (EU Council Decision 2012/642/CFSP of 15 October 2012).

73. According to the applicant, the above considerations had prompted him to abstain from further participating in the trial. Thereafter, he had left Belarus.

74. The applicant's lawyer, D., had not received the trial judgment until 2009 and had been unable to lodge an appeal against it because the statutory time-limit had elapsed. The supervisory-review procedure could not be considered an effective remedy because it did not allow the court to reassess the facts. In any event, he had used that remedy (see paragraphs 29-32

above). Therefore, any assurances relating to that procedure were devoid of merit. Thus, as of 2016, the applicant had no longer had an effective remedy available to him in Belarus to challenge his conviction, in respect of either the factual or the legal findings made in the judgment of 5 December 2005.

B. The Court's assessment

1. Preliminary considerations common to the applicant's grievances under Articles 3 and 6 of the Convention

75. The Court notes that the extradition proceedings in Russia took place in 2009 and 2010. Thereafter, the applicant went into hiding. Between 2010 and 2013 he sought supervisory review of the 2005 trial judgment before the Minsk City Court and the Supreme Court of Belarus (see paragraphs 29-32 above). In 2016 the Court granted the applicant's request under Rule 39 of the Rules of Court and the parties submitted their observations to the Court.

76. Although the applicant has been in hiding since 2010, it appears that he is still in Russia and that the extradition order in respect of him is still valid. Thus he continues to run a risk of being extradited to Belarus. The Government have not argued otherwise.

77. If the applicant has not already been removed from the respondent State, the material point in time for the assessment must be that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken. Since the nature of the Contracting States' responsibility under Articles 3 and 6 in cases of that kind lies in the act of exposing an individual to the risk of ill-treatment or to being exposed to a "flagrant denial of justice" or its direct consequences, the existence of the risk and the consequences mentioned above must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the removal (see *F.G. v. Sweden* [GC], no. 43611/11, § 115, 23 March 2016).

78. The Court will assess the allegations under Article 3 of the Convention and those relating to being required to serve a four-year prison term imposed following a "flagrant denial of justice" on the basis of the situation as it obtains at present. However, it is material to take note of earlier events, namely those that occurred between the Russian courts' judgments upholding the extradition order and this assessment.

2. Article 3 of the Convention taken alone and in conjunction with Article 13

(a) General principles

79. The applicable general principles (see, among other authorities, *Mamazhonov v. Russia*, no. 17239/13, §§ 128-35, 23 October 2014, and the cases cited therein) may be summarised as follows:

“128. ... expulsion or 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 individual concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3 ...

129. The assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 inevitably requires the Court to assess the conditions in the destination country against the standards of that Convention provision ... These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative and depends on all the circumstances of the case ...

130. In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3 if extradited, the Court will examine the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* ... Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition; the Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition. This may be of value in confirming or refuting the assessment that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears ...

131. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ... Where such evidence is adduced, it is for the Government to dispel any doubts about it ...

132. As regards the general situation in a particular country, the Court can attach a certain importance to the information contained in recent reports by independent international human rights protection associations or governmental sources ... Furthermore, in assessing whether there is a risk of ill-treatment in the requesting country, the Court assesses the general situation in that country, taking into account any indications of improvement or worsening of the human-rights situation in general or in respect of a particular group or area that might be relevant to the applicant's personal circumstances ...

133. At the same time, reference to a general problem concerning human rights observance in a particular country cannot alone serve as a basis for refusal of extradition. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other

evidence, with reference to the individual circumstances substantiating his fears of ill-treatment ...

134. In a case where assurances have been provided by the receiving State, they constitute a further relevant factor the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time ...

135. In respect of the standard of review of ill-treatment claims on the domestic level the Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic material as well as by material originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations ...”

80. A certain degree of speculation is inherent in the preventive purpose of Article 3; it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see *X v. the Netherlands*, no. 14319/17, § 74, 10 July 2018 and cases cited therein). Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (*ibid.*, § 75).

81. In respect of the domestic assessment of such claims, the Court has previously identified the critical elements that must be subjected to thorough scrutiny (see *Mamazhonov*, cited above, § 136): whether an applicant presented the national authorities with substantial grounds for believing that he faced a real risk of ill-treatment in the destination country; whether the claim was assessed adequately by the competent national authorities discharging their procedural obligations under Article 3 of the Convention; and whether their conclusions were sufficiently supported by relevant material (see also *F.G. v. Sweden*, cited above, § 119, and *M.A. and Others v. Lithuania*, no. 59793/17, §§ 105-15, 11 December 2018). Having regard to all of the substantive aspects of a case and the available relevant information, the Court would then assess the existence of a real risk of suffering torture or treatment incompatible with the Convention standards.

82. The Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see *F.G. v. Sweden*, cited above, § 117). By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of

the Convention (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-87, ECHR 2011).

(b) Application of the principles in the present case

83. The applicant's arguments under Article 3 of the Convention were twofold. They concerned, first, the unsatisfactory human-rights situation in Belarus that continued to worsen, including in 2016 when he submitted his observations to the Court; and secondly, his claim that following his complaints of unlawful actions and corruption within the district *Potrebsoyuz*, criminal charges had been "fabricated" against him (see paragraphs 10-13 and 16 above). He also alleged that there had been various procedural violations during the investigation and the trial in March 2005 (for a summary of the applicant's arguments, see paragraphs 71-74 above). On the basis thereof, the applicant claimed that he had adduced sufficient evidence that there had been and were, at least as of 2016, substantial grounds for believing that if he were extradited to Belarus, he would be exposed (to a real risk of being subjected) to treatment contrary to Article 3 of the Convention.

84. The Court will now examine in turn each aspect of the complaint, on account of the general human-rights situation in Belarus and as regards the applicant specifically.

(i) Considerations relating to the general human-rights situation in the requesting State

85. The Court notes at the outset that, in view of the unspecific nature of the applicant's allegation, it is difficult to assess whether the "ill-treatment" the applicant alleges he will face if extradited might attain the minimum level of severity required in order for it to fall within the scope of Article 3 (see *F.G. v. Sweden*, cited above, § 112). The Court will proceed on the understanding that the applicant meant physical ill-treatment in a Belarusian post-conviction detention facility at the hands of agents of the State and the mere fact of having to serve an allegedly arbitrary sentence thus amounting to "inhuman punishment".

86. The Court notes that a number of international reports produced between 2007 and 2018 expressed concerns as to the human-rights situation in Belarus (see paragraphs 51-57 above).

87. The Court held in 2010 that although international reports supported concerns as to the human-rights situation in Belarus, those concerns were primarily related to political opposition activities and the exercise of political freedoms. The applicant in the present case has not claimed that his fears of ill-treatment are based on his political views (see *Galeyev v. Russia*, no. 19316/09, § 55, 3 June 2010).

88. The Court notes that a recent UN report on Belarus refers to the use by law-enforcement officers of torture and ill-treatment in order to extract

confessions from suspects, and states that such confessions are used as evidence in court (see paragraph 56 above). However, those findings are not directly relevant to the applicant, who would serve a final sentence of imprisonment following his conviction in 2005.

89. As a rule, reference to a general problem concerning human-rights observance in a particular country cannot alone serve as a basis for refusal of extradition. Having examined the available material and the parties' submissions, the Court considers that it has not been substantiated that the human-rights situation in Belarus is such as to call for a total ban on extradition to that country, for instance on account of a risk that detainees will be ill-treated (see *K. v. Russia*, no. 69235/11, §§ 66 and 72, 23 May 2013; see also, in relation to periods between 2004 and 2012, *Bordovskiy v. Russia* (dec.), no. 49491/99, 11 May 2004; *Puzan v. Ukraine*, no. 51243/08, § 34, 18 February 2010; *Kamyshev v. Ukraine*, no. 3990/06, § 44, 20 May 2010; *Galeyev*, cited above, § 55; and *Kozhayev v. Russia*, no. 60045/10, § 90, 5 June 2012). The material before the Court does not conclusively indicate that every detainee held in a Belarusian post-conviction detention facility (namely, the strict-regime prison as indicated in the applicant's 2005 trial judgment) ran in 2009-10, or currently runs, a real risk of physical ill-treatment.

90. Thus, the general situation in Belarus in 2009-10 was not, and is not presently, of such a nature as to show, on its own, that there would be a breach of Article 3 of the Convention if the applicant were extradited there. The Court therefore has to establish whether the applicant's personal situation (in 2009-10 or presently) was/is such that his extradition to Belarus would contravene Article 3 of the Convention.

91. The Court will therefore now examine the applicant's other allegations in order to ascertain whether he has adduced evidence capable of proving that there are substantial grounds for believing that, if extradited, he would be exposed to treatment and/or punishment contrary to Article 3 or a real risk of such treatment.

(ii) Individual circumstances of the convicted fugitive whose extradition was sought, and their assessment in the requested State

92. Firstly, the applicant's underlying argument that the prosecution had "fabricated" criminal charges against him as vengeance for his complaints to the authorities (see paragraph 10 above) amounted, in substance, to an allegation that the investigating and prosecuting authorities had acted in bad faith by using the criminal procedures, at least predominantly, for a reprehensible ulterior purpose (compare with *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 292 and 305, 28 November 2017).

93. The applicant has not specified what the "fabricated" charges actually consisted of. For instance, there is no indication that he was entrapped or incited to commit a criminal offence (compare with

Ramanauskas v. Lithuania [GC], no. 74420/01, §§ 51-61, ECHR 2008) or convicted on the basis of planted evidence (see *Sakit Zahidov v. Azerbaijan*, no. 51164/07, §§ 47-59, 12 November 2015). However, the applicant may be understood as claiming that he had not committed the offences (that is, he had not received a bribe or forged a document). In this connection, it suffices for the Court to note, in so far as the assessment of the extradition request is concerned, that the material before the Russian authorities and before the Court disclosed that there was sufficient basis for a reasonable suspicion against the applicant in relation to the allegation that he had taken a bribe and forged a document, on account of, *inter alia*, the incriminating statement from the person who had given the bribe. There is enough material to confirm that this suspicion was supported by an array of documentary evidence and witness statements (see paragraph 26 above).

94. The applicant's related reference to his "political" persecution may be understood as retaliation for whistleblowing. In cases relating to alleged violations of Article 10 of the Convention by Contracting States, the Court has held that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection (see *Guja v. Moldova* [GC], no. 14277/04, § 72, ECHR 2008, and *Heinisch v. Germany*, no. 28274/08, § 43, ECHR 2011 (extracts)). However, there is not sufficient material to confirm that the applicant's criminal prosecution in Belarus was an act of retaliation or intimidation for any act of whistleblowing carried out in good faith and on reasonable grounds.

95. The Court notes in this connection that indications of the applicant's involvement in a criminal offence committed in October-December 2003 (see paragraph 14-16 above) and a reasonable suspicion against him resulting, in August 2004, in the institution of criminal proceedings against him (see paragraph 16 above) had both arisen prior to his complaints in July 2004 alleging misappropriation of funds within the district *Potrebsoyuz* (see paragraph 10 above). It is also noted that those complaints were lodged against the background of his dismissal from that body in June 2004 and the ongoing conflict and litigation relating to his employment there (see paragraph 9 above).

96. The applicant is wanted by the Belarusian authorities for the purpose of executing a sentence for ordinary criminal offences, which did not appear to be related to any particular political context (see, by contrast, *Y.P. and L.P. v. France*, no. 32476/06, §§ 10-13 and 66-74, 2 September 2010). The material before the Court does not disclose that the context of the impugned offences (bribery within an organisation related to the State) was such as to give rise, *per se*, to substantial grounds for believing that the applicant runs a real risk of ill-treatment. Furthermore, the applicant has not submitted sufficient detail or evidence to support his allegation that, while working for the propaganda unit of an organisation, he had run "opposition meetings" of

the staff (see paragraph 8 above). The substance and extent of his alleged divergence or dissent from the “official” propaganda remain unclear. It is also noted that he was not subjected to detention pending the investigation or the trial in Belarus, and sustained no “inhuman treatment” within the meaning of Article 3 of the Convention at the hands of agents of the State during that period of time. Despite the applicant’s allegation, the Court is not satisfied that the trial judge’s attitude or comments at the trial (see paragraph 21 above) amounted to an example of mistreatment of such gravity.

97. The Court is thus not convinced that the applicant was in 2010, and remains now, over thirteen years after the trial in Belarus, at a real risk of ill-treatment.

98. As to the applicant’s references to various procedural violations during his trial in Belarus, this type of allegation raised by a fugitive convicted in a requesting country may raise issues under Article 5 of the Convention in so far as he or she is exposed to a risk of serving a prison term after a flagrant denial of justice (see *Hammerton v. the United Kingdom*, no. 6287/10, § 98, 17 March 2016 and the cases cited therein) or, as in the present case, under Article 6 of the Convention. The Court does not discern any causal link between the alleged procedural irregularities and a risk of physical ill-treatment because of them in the event of the applicant’s extradition in order to serve the prison term. In any event, the complaint of “inhuman punishment” fails in so far as the applicant’s complaint of procedural irregularities is dismissed as unfounded (see paragraphs 111-132 below). Measures depriving persons of their liberty inevitably involve an element of suffering and humiliation (see *Rooman v. Belgium* [GC], no. 18052/11, § 142, 31 January 2019). The applicant has not put forward any arguments to show that in the individual circumstances of his case, he is at risk of punishment that would go beyond the inevitable suffering inherent in deprivation of liberty.

99. The Court concludes that the applicant has not indicated any individual circumstances that substantiate his fears of treatment or punishment contrary to Article 3 in the requesting country.

100. Lastly, while the Court agrees with the applicant that the extradition request contained no assurances relating to a risk of treatment in breach of Article 3 of the Convention (see paragraphs 36 above; compare with *Kozhayev*, cited above, § 84, and *A.Y. v. Slovakia* (dec.), no. 37146/12, §§ 14, 28-29 and 56-65, 1 March 2016), in view of the foregoing findings that his substantive allegations are unfounded, the absence of relevant assurances does not change the outcome of the complaint under Article 3 of the Convention.

(iii) *Conclusion as regards Article 3 of the Convention*

101. While being sensitive to its subsidiary role and finding it regrettable that the Russian authorities did not adduce more detailed reasoning for dismissing the applicant's allegations when deciding whether to extradite him in order to serve the sentence or to uphold the extradition order, the Court cannot but note that such allegations were unfounded during the extradition proceedings and remain unfounded now. In this context, it cannot be said that the Russian authorities failed to discharge their procedural obligations, under Article 3 of the Convention, to assess his claims properly and to sufficiently support their conclusions with relevant material (compare with *Mamazhonov*, cited above, § 136).

102. The Court concludes that the applicant's extradition to Belarus would not be in breach of Article 3 of the Convention.

103. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

104. In view of the above conclusion, the Court considers that the related complaint under Article 13 of the Convention is likewise inadmissible.

3. *Article 6 of the Convention*

(a) **General principles**

105. In *Harkins v. the United Kingdom* ((dec.) [GC], no. 71537/14, §§ 62-65, 15 June 2017) the Court summarised the applicable approach as follows.

106. The right to a fair trial in criminal proceedings, as embodied in Article 6 of the Convention, holds a prominent place in a democratic society. Consequently, an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, in the Court's case-law the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein.

107. Although it has not yet been required to define the term more precisely, the Court has nonetheless indicated that certain forms of unfairness could amount to a "flagrant denial of justice". These have included (in relation to criminal proceedings within a Contracting State, in the context of extradition or other removal proceedings from one Contracting State to another or, as in the present case, from a Contracting State to a destination country which is not a Contracting State): conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access

to an independent and impartial tribunal to have the legality of the detention reviewed; a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country; and the use in criminal proceedings of statements obtained as a result of torture of the accused or a third person in breach of Article 3 of the Convention (see also *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §§ 258-59, ECHR 2012 (extracts), with further references).

108. Consequently, “flagrant denial of justice” is a stringent test of unfairness which goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. The Court has to date never found it established that an extradition would be in violation of Article 6.

109. In assessing whether this stringent test of unfairness has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to (or has already suffered, as in the present case) a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.

(b) Application of those principles in the present case

110. The present case concerns an extradition request made in a context in which both the requested State and the Court have had the benefit of having to decide with reference to a final criminal court judgment imposing a sentence of imprisonment, as upheld following a supervisory review. This can be distinguished from a context in which there is a risk of a “flagrant denial of justice” that might ensue in the course of eventual proceedings after extradition to a requesting State.

111. The applicant’s arguments under Article 6 of the Convention, in relation to the proceedings in Belarus and with the aim of preventing his extradition in order to serve the sentence there, are twofold. First, he argued that the prison sentence resulted from proceedings that had arisen from “fabricated” charges and serious procedural irregularities. Secondly, he alleged that having been sentenced *in absentia*, Article 6 of the Convention would be breached because after his extradition he would have to serve the prison sentence imposed in those circumstances, without obtaining a new determination of the charges, this time with his presence in court.

112. The Court notes at the outset that the majority of the applicant’s arguments in relation to the unfairness of the trial in Belarus were raised before the Russian courts, at best, in a cursory manner. However, as the

Government have not pleaded non-exhaustion of domestic remedies and have made no specific comments on Belarusian law and judicial practice, the Court will examine those arguments and take, as a starting point, the applicant's account of Belarusian law.

(i) *The applicant's absence from the trial and the alleged unavailability of a retrial following extradition to the requesting State*

113. The Court will first deal with the applicant's argument, aimed at preventing the extradition, alleging the unavailability of a retrial in Belarus. The only basis for this claim under Article 6 of the Convention was that the sentence of imprisonment had been imposed *in absentia*.

114. The trial court in Belarus issued a judgment after the applicant's departure from Belarus, so he was absent from a part of that trial (see paragraphs 19-23 above). According to his account of Belarusian law as of 2010, when the impugned extradition order was issued and upheld on judicial review by the Russian courts, Belarusian law does not allow for a retrial. Although the applicant did not use the ordinary appeal procedure (see paragraph 27 above), he lodged applications for a supervisory review. To date, he has lodged such appeals up to the Supreme Court of Belarus (see paragraphs 29-32 above).

115. The Court reiterates that it is of paramount importance that a defendant in criminal proceedings should be present during his or her trial. However, criminal proceedings held in the absence of the accused are not necessarily incompatible with the Convention if the person concerned can subsequently obtain a fresh determination of the merits of the charge, in respect of both law and fact, from a court which has tried him or at a hearing before a court of appeal (see, as a recent authority, *Idalov v. Russia* [GC], no. 5826/03, §§ 170-71, 22 May 2012, and *Sejdovic v. Italy* [GC], no. 56581/00, § 85, ECHR 2006-II). However, the absence of such fresh determination of the charge is not problematic under Article 6 of the Convention if it has not been unequivocally established that the defendant has waived his right to appear and to defend himself or that he intended to evade trial (see *Sanader v. Croatia*, no. 66408/12, §§ 67-71, 12 February 2015, and *Sejdovic*, cited above, §§ 81-88, both cases concerning criminal proceedings within a Contracting State).

116. In *Sejdovic* (cited above, §§ 105-06) the applicant had not received any official information about the charges against him or the date of his trial in Italy; he had then been convicted *in absentia*, without the benefit of legal representation. In this context the Court examined whether the applicant had waived his right to be present at the trial or had evaded justice, and whether the domestic law offered, with sufficient certainty, a possibility to obtain a fresh determination of the charges against him in his presence and with due regard to his defence rights. The Court concluded that the Italian authorities

had violated Article 6 of the Convention in so far as the applicant had not waived his right to be present and had been unable to obtain a retrial.

117. In *Pirozzi v. Belgium* (no. 21055/11, §§ 70-72, 17 April 2018) the Court found that the transfer of the applicant under the European Arrest Warrant from Belgium to Italy in relation to an *in absentia* conviction on appeal there had not offended against Article 6 of the Convention. The Belgian court had been competent to refuse the transfer in that context and had concluded that such surrender would not amount to a “flagrant denial of justice” on account of the ensuing unavailability of a retrial as the applicant had been officially informed of the date and place of the hearing before the appeal court. He had not attended it but had been represented before it by a lawyer of his choosing, who had assisted him at the first-instance trial and had then obtained a reduction of the sentence on appeal.

118. In the present case, during one part of the trial the applicant exercised his right under Belarusian law to be present at his trial in that country and to defend himself. As to his subsequent absence from the remainder of the trial, there is nothing to suggest that he then fled Belarus on account of any treatment in breach of Article 3 of the Convention, substantial grounds relating to a real risk of such ill-treatment or any valid concern of political persecution there (see *S.D. v. France* (dec.), no. 5453/10, § 74, 26 November 2013). In the Court’s view, the applicant has failed to substantiate that the Convention would require the criminal proceedings in Belarus to be taken up again in the context of the present case, where the applicant had left the country before the proceedings ended and may be returned there to serve his sentence. Furthermore, the applicant has submitted no explanation to the Court as to why his privately retained counsel in Belarus no longer represented him after his departure for Russia; what prevented his counsel from exercising other procedural rights on the applicant’s behalf and in his interests, despite his absence; or why the applicant did not seek restoration of the time-limit for a review in the cassation appeal proceedings. It appears that he could have made such an application by post, as he did as regards a supervisory review in his case (see paragraphs 29-32 above).

119. The Court concludes that the applicant’s conviction despite his absence did not amount to a “flagrant denial of justice” in breach of Article 6 of the Convention. Nor would the unavailability of a retrial amount to such a denial of justice, be it in relation to such absence from the trial, or because of the other procedural irregularities examined below.

(ii) Procedural irregularities and lack of safeguards at the trial in the requesting State and their assessment in the requested State

120. In the Court’s view, the allegations relating to the procedural irregularities or lack of safeguards in the proceedings in Belarus, in so far as substantiated and taken cumulatively, would be unlikely to give rise to a

violation of Article 6 of the Convention, even under the “ordinary” test of unfairness in respect of a trial in a Contracting State. *A fortiori*, the alleged irregularities did not amount to a “flagrant denial of justice” in relation to the criminal trial in a State which is not a Contracting State. The applicant has failed to substantiate his allegations both before the Russian authorities and before the Court. The Court considers that some of the applicant’s factual assertions and legal arguments at the national level and before it were cursory and/or unsubstantiated, and that the remainder failed to meet the above-mentioned stringent test of a “flagrant denial of justice”.

121. Thus, the Court will only address those arguments that appear *prima facie* meritorious.

122. The Court has already dismissed as unfounded (see paragraphs 92-93 above) the underlying argument that the charges were “fabricated” as retaliation for his complaints to the authorities. In so far as Article 6 of the Convention is concerned, the Court also reiterates that its paragraph 2 safeguards the right to be “presumed innocent until proved guilty according to law”. It will be infringed where, as a matter of fact or on account of the operation of the applicable law, the burden of proof is shifted from the prosecution to the defence (see *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001). Clearly, there was no such problem of particularly slim adverse evidence or reversed burden of proof during the applicant’s trial in Belarus. The applicant’s conviction was based on numerous pieces of documentary and witness evidence (see paragraph 26 above). The bribe-giver’s initial and subsequent statements were not the only adverse evidence in the criminal case.

123. As regards an opportunity to examine prosecution witnesses Ms S. and Mr Ye. (see paragraph 26 above), the applicant provided no details in relation to them: for instance, the reasons for their absence from the trial; whether any requests or measures relating to ensuring their presence had been made and taken (prior to the applicant’s departure for Russia or thereafter); or the defence’s position at the trial as regards the admission of their pre-trial statements. Moreover, having examined the trial judgment, the Court is not satisfied that their untested pre-trial testimony laid a foundation for either charge. Overall, the Court is not satisfied that the reliance on their pre-trial testimony in the trial judgment was indicative of a “flagrant denial of justice” (compare with *Zadumov v. Russia*, no. 2257/12, §§ 44-49, 12 December 2017). The trial judgment does not rely on any adverse testimony from witness Sh., and thus the complaint in this part is clearly unfounded.

124. In so far as the applicant referred to the trial court’s refusal to hear witnesses on behalf of the defence (see paragraphs 22 and 71 above), there is no evidence that he made any such request or that the trial judge refused it. For instance, the applicant has not submitted a copy of the trial transcript, to which he repeatedly referred in his observations before the Court, as

regards various requests or motions lodged before the trial court in 2005 (see paragraphs 31 and 71 above). Even accepting the relevance of that testimony to the subject matter of the accusation, its ability to influence the outcome of the proceedings – or, at least, to strengthen the position of the defence – remains unsubstantiated (compare with *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 160, 18 December 2018, as regards the Convention standards for issues relating to the examination of witnesses on behalf of the defence).

125. At the same time, it is noted that prior to his decision to leave Belarus the applicant was present at the trial and was assisted by counsel of his choosing. The trial did contain elements of an adversarial procedure.

126. Furthermore, the fact that judges were not elected does not, as such, appear to offend against Article 6 of the Convention. The applicant did not develop and substantiate his assertion relating to the dismissal of judges by the President of Belarus (see paragraph 50 above) and the alleged adverse effect on the requirement of their impartiality and independence. For its part, the Court notes with concern the UN findings on that matter (see paragraphs 53 and 55 above), but finds them insufficient to reach a conclusion relating to a “flagrant denial of justice” in respect of the proceedings against the applicant.

127. As regards the impartiality of the trial judge, the applicant’s allegation was twofold: that the judge had refused to hear him and that this person was then sanctioned by the European Union. The Court notes that the witness statements submitted by the applicant to the Court indicate that the trial judge admitted the applicant’s written statement to the file (see paragraph 21 above). Therefore, even accepting as established the fact that the trial judge refused to hear oral representations from the applicant, this shortcoming was counterbalanced, to a certain extent, by the admission of the written submissions. Thus, the omission did not entail a “flagrant denial of justice” within the stringent test of unfairness applicable in the extradition context. Moreover, it does not appear that the applicant articulated and substantiated his allegations under this heading before the appeal court in his extradition case, in particular with reference to the witness statements, which he submitted only to this Court (see paragraph 21 above). Similarly, the fact that many years later the judge was sanctioned by the European Union on account of unrelated proceedings in which he had issued judgments (see paragraph 71 above) is not, by itself, sufficient either, in particular given the Court’s findings relating to the overall fairness of the proceedings conducted by that judge at the applicant’s trial.

128. Lastly, the Court has not been given sufficient reason to doubt that the actions imputed to the applicant, and for which he had been convicted, constituted criminal offences under the Belarusian Criminal Code (compare with *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, §§ 115-16, 23 February 2016). Having said this, in so far as the applicant’s

remaining submissions before the Court were related to the finding of guilt by the Belarusian court, it is not for this Court to determine, under Article 6 of the Convention, whether the Belarusian court convincingly established the applicant's guilt on the strength of the evidence examined by it. In so far as the observance of Article 6 of the Convention by a Contracting State is concerned, it is not the function of this Court to deal with errors of fact or of law allegedly committed by a domestic court of the Contracting State unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Murtazaliyeva*, cited above, § 149). In the determination of whether the proceedings were fair, this Court does not act as a court of fourth instance deciding on whether the evidence had been obtained unlawfully in terms of domestic law, its admissibility or on the guilt of an applicant (*ibid*). It is not appropriate for this Court to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court's only concern is to examine whether the proceedings have been conducted fairly (*ibid*). The above considerations apply, *a fortiori*, in the extradition context as to the Court's role and the role of the domestic courts reviewing the extradition order.

129. While the Court accepts that the proceedings in Belarus were not without reproach, it has not been convincingly shown that they constituted a "flagrant denial of justice".

(iii) Conclusion as regards Article 6 of the Convention

130. The applicant is a lawyer and he was represented by other lawyers at the court hearings assessing the extradition order. The onus was on him to put forward arguments and substantial grounds for believing that he faced the consequences of a "flagrant denial of justice" in the requesting State. He was required to substantiate his claim that the long term of imprisonment to which he had been sentenced had resulted from final proceedings which amounted to such a "flagrant denial of justice", namely a breach of the principles of a fair trial guaranteed by Article 6 which was so fundamental as to amount to a "nullification or destruction of the very essence" of the right guaranteed by that Article, or on account of the unavailability of a retrial. The applicant has not complied with this requirement.

131. In view of the above considerations, the Court does not need to examine whether the assurances given by the Belarusian authorities (see paragraph 36 above) were adequate and constituted a relevant factor in addressing the issues under Article 6 of the Convention (compare with *Othman (Abu Qatada)*, cited above, §§ 186-87).

132. Accordingly, the complaint under Article 6 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

4. *Article 13 of the Convention in conjunction with Article 6*

133. As to the applicant's complaint under Article 13 in conjunction with his complaint under Article 6 of the Convention about prospects of success in opposing extradition with reference to a denial of justice in the requesting country, the Court reiterates that by virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *S.K. v. Russia*, no. 52722/15, §§ 70-74, 14 February 2017, with further references). The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief.

134. The applicant considered that the Russian authorities, including the courts, should have relied, as a formal legal basis for dealing with his grievances in the light of the Court's case-law (see paragraphs 105-109 above), on Article 1 § 3 of the CCrP (see paragraph 46 above) or Russia's reservation to the European Convention on Extradition (see paragraph 48 above). However, in view of its conclusion under Article 6 of the Convention, the Court will not delve into whether those provisions were applicable in the circumstances of the applicant's case (extradition to Belarus, which was not a party to that convention). Nor will it examine whether, prior to issuing an extradition order or in subsequent judicial review proceedings, there was a meaningful possibility for the applicant to raise such arguments and, if they were convincing, obtain adequate redress.

135. Having regard to the fact that the complaint under Article 6 of the Convention has been declared inadmissible (compare with *Shamayev and Others v. Georgia and Russia*, no. 36378/02, §§ 323, 353, 445 and 466, ECHR 2005-III, and *Ilias and Ahmed v. Hungary*, no. 47287/15, §§ 99-101, 14 March 2017), the Court considers that the related complaint under Article 13 of the Convention is likewise inadmissible in the present case.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

136. The applicant alleged, under Article 5 of the Convention, that his detention from 16 August to 13 November 2009 had been unlawful and that he had had no enforceable right to compensation on account of his unlawful detention. He also argued that the judicial review of the decision of 10 August 2009 had been neither speedy nor effective. Moreover, there had been no procedure by which a court could have ordered his release between August and November 2009.

137. Article 5 of the Convention reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition ...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. The parties’ submissions

1. The Government

138. The Government made no submissions regarding Article 5 § 1 of the Convention.

139. As to Article 5 § 4 of the Convention, the Government submitted that the applicant had not lodged any complaint about the length of the relevant proceedings.

140. As to Article 5 § 5 of the Convention, following the court decisions of 17 September and 13 November 2009, the applicant could have claimed compensation under Articles 1070 and 1100 of the Civil Code of the Russian Federation. He had not used that remedy and thus he had not exhausted domestic remedies in respect of Article 5 § 5 of the Convention.

2. The applicant

141. The applicant argued that following receipt of the extradition request and the expiry, on 15 August 2009, of the forty-day time-limit which had started to run from the date of his arrest, a prosecutor could not issue a new detention order; this should have been done by a judge, as acknowledged in the domestic court decisions (see paragraphs 37-40 above). Furthermore, despite the findings in the first-instance and appeal decisions of 17 September and 9 November 2009, the applicant had not been released between 17 September and 13 November 2009. During that period of time he had remained in detention without a valid court order. The prosecutor had not applied for an extension of his detention beyond the forty-day time-limit, which had expired on 15 August 2009. In view of the findings made in the court decision of 13 November 2009 (see paragraph 40 above), the applicant’s preceding detention had been manifestly unlawful and in breach of Article 5 of the Convention. Moreover, as acknowledged at

national level (see paragraph 41 above), his detention had also been in violation of the statute relating to pre-trial detention.

142. Thereafter, the applicant had had no prospect of success in bringing compensation proceedings in respect of any related non-pecuniary or pecuniary damage, with reference to Articles 1070 and 1100 of the Civil Code, because he would have had to prove that public officials had been at fault. The Government had not submitted any example from domestic case-law to support their assertion.

143. The applicant argued that he had had no effective procedure available to him for challenging the detention ordered by a prosecutor. Even when, on 17 September 2009, a court had acknowledged the unlawfulness of the decision taken by the prosecutor, it had not provided any redress itself (such as release from custody), but had merely invited the prosecutor to remedy the violation of the law. The applicant had remained in detention even after the appeal court had upheld the first-instance court's decision on 9 November 2009. He had had to wait until a prosecutor chose to lodge an application with a court. As it had turned out, the court had dismissed the application in view of the earlier findings made on 17 September 2009.

B. The Court's assessment

1. Admissibility

144. The Government have made a general argument concerning exhaustion of domestic remedies in relation to the "speediness" requirement under Article 5 § 4 of the Convention. However, it is not necessary to deal with it since the applicant has not maintained this aspect of the complaint in his observations. Instead, he focused on the more general issue that the court in his case had had no power to release him.

145. The Court considers that the Government's argument concerning exhaustion of domestic remedies in respect of the complaint under Article 5 § 5 of the Convention is closely linked to the substance of the issue and should therefore be joined to the merits.

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

2. Merits

(a) Article 5 §§ 1 and 4 of the Convention

147. The essential factual and legal aspects of the applicant's complaints under Article 5 §§ 1 and 4 of the Convention are similar to those already

dealt with by the Court in previous cases in respect of Russia in relation to the same legislative framework (see *Zokhidov v. Russia*, no. 67286/10, §§ 153-63 and 183-92, 5 February 2013; *Shcherbina v. Russia*, no. 41970/11, §§ 37-41, 26 June 2014; and *Kholmurodov v. Russia*, no. 58923/14, §§ 87-93, 1 March 2016).

148. Having regard to the scope of the applicant's complaints, the above considerations and, foremost, the findings made by the domestic courts (see paragraphs 37-40 above), the Court concludes that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 16 August to 13 November 2009.

149. In addition, the Court notes that in the proceedings under Article 125 of the CCrP, the domestic court indicated that it had no power to order the applicant's release (see paragraph 37 above). It also notes that those proceedings took nearly two months (see paragraphs 37-38 above). The Court concludes that there has been a violation of Article 5 § 4 of the Convention on account of the applicant's right to "take proceedings" by which the lawfulness of his detention could be decided by a court and his release ordered if the detention was not lawful, as regards the period between August and early November 2009.

(b) Article 5 § 5 of the Convention

150. The Court reiterates that the right to compensation under Article 5 § 5 of the Convention arises if a breach of one of its other four paragraphs has been established, directly or in substance, either by the Court or by the domestic courts (see *Shcherbina*, cited above, § 46).

151. As in *Shcherbina*, in the instant case the deprivation of liberty to which the applicant was subjected was covered by sub-paragraph (f) of Article 5 § 1 and was found to be unlawful at the domestic level. The domestic courts established in substance that the applicant had been deprived of his liberty in a manner that was not in accordance with a procedure prescribed by law, that is, in breach of the requirements of paragraph 1 of Article 5.

152. As to compensation, in the case of *Shcherbina* the Court held in 2014 (in relation to the legislative framework in 2011 and afterwards) as follows:

"51. ... the liability of law-enforcement authorities is described in Article 1070 of the Civil Code. This provision covers two types of situation. The first is when the damage is caused by 'unlawful conviction, unlawful institution of criminal proceedings, unlawful application of a preventive measure in the form of placement in custody ..., or the unlawful application of an administrative penalty ...' (Article 1070 part 1). The second situation concerns other types of damage not described in part 1 of Article 1070: in this case the State is liable for tort pursuant to the rules of Article 1069, which, in turn, does not provide for strict liability and requires the plaintiff to prove the 'fault' of the authority or official involved. Rules on non-pecuniary damage contained in Chapter 59 part 4 of the CC establish a rule

similar in essence: strict liability is provided only for cases where non-pecuniary damage has been caused by the ‘unlawful conviction, unlawful institution of criminal proceedings, unlawful application of a preventive measure in the form of placement in custody ...’. In other situations the plaintiff had to prove the fault of the tortfeasor.

52. There is no disagreement that the custodial measure in the present case was ‘unlawful’ in domestic terms. The next question is whether the applicant was entitled to seek compensation on the basis of the strict liability of the authorities, pursuant to Article 1070 § 1 and Article 1100 of the Civil Code, or whether he was only entitled to obtain compensation if the ‘fault’ of the authority involved were proven (Article 1070 § 2 of the CC read in conjunction with Article 1069; Article 1099 read in conjunction with 151 § 2).

53. The Court notes that a textual reading of the relevant provisions of the CC suggests that not every unlawful detention leads to the strict liability of the State, but only such which can be characterised as ‘the unlawful application of a preventive measure in the form of placement in custody’ ... The Court has already observed that ‘the Russian law of tort limits strict liability for unlawful detention to specific procedural forms of deprivation of liberty which include, in particular, deprivation of liberty in criminal proceedings and administrative punishment’ ... The unlawful detention in the present case was imposed within extradition proceedings, not as a custodial measure within a criminal case opened in Russia. The Court is aware that, in the absence of special provisions concerning detention pending extradition, the Russian courts apply *mutatis mutandis* provisions of the CCrP which regulate custodial measures ... However, it is not certain whether they would be prepared to consider ‘unlawful detention pending extradition’ an equivalent of ‘unlawful application of a preventive measure in the form of placement in custody’, which undoubtedly gives rise to a strict liability. Thus, the Court finds that it was not certain whether the strict liability rules applied to the situation under examination.

54. If the applicant was to prove the authorities’ ‘fault’, the question is what form of ‘fault’ was required to trigger the liability of the State for the applicant’s unlawful detention. The Court notes that the notion of ‘fault’ is quite vague: it includes intentional behaviour as well as various forms of negligence. Furthermore, it is unclear whether under the law the applicant had to prove the fault of the prosecutor who issued the detention order, or the fault of the prosecution authority in general for an error committed by one of their employees. The Government did not refer to any case-law or other source of law which would demonstrate that the applicant’s unlawful detention would be regarded as resulting from the ‘fault’ of the authority or official involved, whatever it meant.

55. It is not the Court’s role to give a definitive interpretation of the relevant provisions of Russian law on the liability of the State for unlawful detention within extradition proceedings. However, the law referred to by the Government as such is not sufficiently clear and left room for interpretation. The Government did not refer to other sources of law which would help in interpreting the legislative provisions at issue. Therefore, the Court is not persuaded that the applicant’s claim for damages had prospects of success. Due to that uncertainty, the Court is prepared to conclude that ... that the applicant cannot be blamed for not having used that legal avenue. Hence, the applicant did not have an ‘enforceable right to compensation’ to which he was entitled under Article 5 § 5.”

153. In their observations before the Court in 2016, the Government did not put forward any argument or submit any evidence which would prompt

the Court to reach a different conclusion in the present case in relation to the same legislative framework.

154. Accordingly, the Government's objection must be dismissed and a violation of Article 5 § 5 of the Convention, in conjunction with Article 5 § 1 thereof, found.

III. RULE 39 OF THE RULES OF COURT

155. In view of its decision to declare inadmissible the applicant's complaint under Article 3 of the Convention, the Court considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraph 6 above) must be discontinued.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

156. 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

157. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

158. The Government made no comment.

159. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

160. The applicant made no related claim.

C. Default interest

161. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objection relating to Article 5 § 5 of the Convention and *dismisses it*;
2. *Declares* the complaints concerning Article 5 §§ 1, 4 and 5 of the Convention admissible and the remainder of the application inadmissible;
3. *Decides* to discontinue the indication made to the respondent Government under Rule 39 of the Rules of Court;
4. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
6. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
7. *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 amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Elósegui is annexed to this judgment.

V.D.G.
F.A.

CONCURRING OPINION OF JUDGE ELÓSEGUI

I have followed the rest of my colleagues in the conclusion of this judgment, which we have adopted unanimously in favour of the applicant's complaints of a violation of Article 5 §§ 1, 4 and 5.

My concurring opinion is merely aimed at going into greater depth on why the Chamber has concluded that the applicant's extradition to Belarus will not be in breach of Article 3 of the Convention (see paragraph 102 of the judgment). The judgment concludes: "[a]ccordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention".

Having requested thorough research on the available data given by the parties, I have arrived at the same conclusion as my colleagues.

The Court has in many cases analysed the general principles as regards extradition. More concretely, in the decision of the 3rd Section case *B.T. v. Russia* (dec.), no. 40755/16, 5 December 2017, the Court examined the general principles and applied them to the above concrete case. The application also concerned an order by the Russian authorities for the extradition of the applicant to Uzbekistan. In the case of *B.T. v. Russia* the Court concluded as follows: "... beyond a broad reference to ill-treatment in the light of the general practice in the criminal justice system of Uzbekistan, the applicant, both at domestic level and in his submissions before the Court, failed to refer to any individual circumstances and to substantiate his fears of ill-treatment in the event of his extradition to Uzbekistan. He did not refer to any personal experience of ill-treatment at the hands of the Uzbek law-enforcement authorities, neither did he allege that members of his family had been politically or religiously active or persecuted" (see *B.T. v. Russia*, cited above, § 29). See by contrast, *Garayev v. Azerbaijan*, no. 53688/08, § 71, 10 June 2010; *Mamazhonov v. Russia* no. 17239/13, § 141, 23 October 2014; and *Ismoilov and Others v. Russia*, no. 2947/06, § 121, 24 April 2008.

Moving on to the present case, the Court has applied to it the general principles as set out in *B.T. v. Russia*, in paragraphs 18-23 of the decision. The present judgment exposes in detail the general situation of Belarus in the context of an extradition case (see §§ 51-57), with the most recent reports issued by the UN Committee against Torture (CAT/C/BLR/CO/5, 7 June 2018).

As has been pointed out, the mere possibility of ill-treatment on account of the situation in the receiving country does not in itself give rise to a breach of Article 3. That is why the Court went on to examine the applicant's specific allegations and the Russian domestic authorities' responses to the latter. In my view, it is not only for the applicant to prove the allegations and for the Government to refute them, but it is also the

Court's responsibility if the fact of expelling a person to a given country is deemed to entail a risk of ill-treatment or torture.

The Court, after a detailed analysis of all the facts available on the observations of both parties, has reached the conclusion that the applicant has evidenced neither a real risk of ill-treatment in 2010 nor any future possible risk, over thirteen years after the trial in Belarus (see paragraphs 97 and 99 of the judgment).

The applicant has not proved to our Court that he belongs to any political, religious or ethnic group liable to suffer any kind of persecution (see *B.T. v. Russia*, cited above, §§ 27 and 28). According to the available information he was a civil servant. Moreover, the trial, the charges, and the sentence were all dealt with by the Belarusian courts "for ordinary criminal offences, which did not appear to be related to any particular political context" (see paragraph 96 of the judgment). Similarly, *mutatis mutandis*, in the case *K. v. Russia*, no. 69235/11, 23 May 2013, which also concerned a national of Belarus, the Court concluded that "[h]aving regard to the decision of the Russian courts in the course of the extradition proceedings, as well as the material before it, the Court considers that the applicant's statement concerning his being a victim of political persecution in Belarus lacks substantiation. The Court observes that the applicant is wanted by the Belarusian authorities on charges of aggravated kidnapping, robbery and extortion, which, although grave, are ordinary criminal offences. The decisions by the Belarusian authorities describing the circumstances of the crimes and outlining the suspicions against the applicant are detailed and well-reasoned" (*K. v. Russia*, cited above, § 68).

Moreover, and similarly, the applicant has not provided our Court with any proof of his claim that the prosecution in Belarus "fabricated" criminal charges against him as vengeance for his complaints to the authorities (see paragraphs 92 and 83 of the judgment). According to the information given by the applicant and the Russian authorities, the trial in Belarus was based on suspicion of his receiving a bribe of 550 United States dollars and an accusation of forgery of an official document in relation to a bribe (see § 16). Furthermore, there is no proof that he was subjected to any ill-treatment on Belarus, where he was never imprisoned.

In fact, the applicant arrived in Russia in March 2005 and at no stage applied for refugee status or temporary asylum under the Refugees Act (see, paragraph 33 of the judgment). Moreover, "[t]he Court notes that the extradition proceedings in Russia took place in 2009 and 2010. Thereafter, the applicant went into hiding" (see paragraph 75 of the judgment) and it appears that he is still hiding in Russia (see paragraph 76 of the judgment). The Court has said on many occasions that the applicants cannot be protected by the Convention when they have behaved culpably (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 240, 15 December 2016; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 184, ECHR 2012,

M.A. v. Cyprus, no. 41872/10, § 247, ECHR 2013 (extracts); *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII (extracts); and *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011).

In a different connection, the Court usually asks the authorities of the Contracting Parties for guarantees in each concrete case on ensuring respect for the rights set out in the Convention, indicating to them not to expel persons to countries where there are real risks of ill-treatment. In this concrete situation, on the one hand the Russian Government informed the Court of the following: “the Belarusian Prosecutor General’s Office had provided assurances that the request was not aimed at political persecution against the applicant, nor did it relate to his race, religion, nationality or political views The applicant’s allegations about violation of human rights in Belarus had not been substantiated and remained unsubstantiated. He had not submitted any valid proof that he ran a risk of being persecuted on the ground of his race, religion, nationality, social status or political views” (see paragraph 63 of the judgment). On the other hand, it is clear that diplomatic assurances “are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment, and there is an obligation to examine whether they provide, in their practical application, a sufficient guarantee that the applicant will be protected against any such risk” (see *K. v. Russia*, cited above, § 64).

I would also like to set out some comments on the violation of Article 5 §§ 1, 4, and 5 of the Convention. In this case, the Court has recognised a violation of this article under three aspects. The applicant provided cogent evidence, which the Russian Government also accepted in their observations. In short, the applicant was detained in Russia under the unlawful resolution of 10 August 2009 of the St Petersburg transport prosecutor between 16 August 2009 and 13 November 2009 (90 days), without an appropriate court order in breach of Article 5 § 1 of the Convention (see paragraph 47 of the applicant’s observations and paragraphs 147-49 of the judgment). He was not awarded any compensation by the Russian Government, in violation of Article 5 § 5 of the Convention (see paragraphs 150-154 of the Government’s observations).

Finally, it is worthwhile repeating some of the applicant’s observations which have not been reflected in the judgment, because they are quite eloquent even though there are lumped together under the breach of Article 5 § 1 of the Convention. They concern the conditions of detention in SIZO-4 from 7 June to 13 November 2009. The applicant “notes to the European Court that he lodged a complaint against his conditions of detention in the St Petersburg pre-trial detention facility, SIZO-4, with the General Prosecutor’s Office of Russia on 11 November 2009” (Applicant’s Observations in response to the Observations of the Government, § 58). The applicant complained “of his detention in the cell with prior criminal

convicted persons (recidivists), who fought with each other, with blood spilling over the cell, which posed a risk of violence towards the applicant; of the lack of responses to his written applications to the Governor of SIZO-4; of him being transferred for a day to another cell and back again in order to psychologically suppress and humiliate him; and of his poor medical treatment” (Applicant’s Observations, no. 59). The Russian General Prosecutor’s Office’s reply no. 17-200/2009 of 29 January 2010 answers the applicant as follows: “in respect of placing you in SIZO-4 cells, a violation was found of Article 33 of the Federal Law requiring the separate placement of different categories of accused persons in pre-trial detention facilities” (Observations n° 60). According to the applicant, no steps were taken to redress his rights (Observations, no. 61).

As a final conclusion, it could be said that the Court has supported its finding of a violation of Article 5 §§ 1, 2, 4 with appropriate evidence, as well as, conversely, declaring the inadmissibility of a violation of Articles 3 and 6 in the absence of any cogent evidence.