



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

FIRST SECTION

DECISION

Application no. 20696/12
Igor Anatolyevich KULEVSKIY
against Russia

The European Court of Human Rights (First Section), sitting on 20 November 2012 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having regard to the above application lodged on 6 April 2012,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Igor Anatolyevich Kulevskiy, is a Belarusian national, who was born in 1966 and lived in Gomel, Belarus. He is represented before the Court by Mr V.S. Korchevskiy, a lawyer practising in Tula, Russia.

2. The Russian Government (“the Government”) are represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

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

1. Criminal proceedings against the applicant in Belarus

3. In 2004 the applicant left Belarus for Russia.

4. In the same year the Prosecutor General’s Office of the Republic of Belarus started an investigation of the activities of a criminal gang which operated in 1989-2004 in the Gomel region. As a result of the investigation forty-six members of the gang stood trial before the Supreme Court of the Republic of Belarus. Proceedings against the remaining alleged members of the gang, including the applicant, whose whereabouts could not be established, were separated.

5. On 12 January 2005 the Prosecutor General’s Office charged the applicant *in absentia*, issued an order for him to be remanded in custody and declared him a wanted person. The charges against the applicant, as amended on 15 March 2007, included, in particular, attacks on businesses and citizens (under Article 286 of the Criminal Code of the Republic of Belarus), acquisition, transfer, storage, transportation and carrying of firearms (under Article 295 § 4 of the Criminal Code), murder of one person in February 1994, murder with particular cruelty of four persons in September 1994 and three more persons in April 1995 (under Article 100 of the 1960 Criminal Code punishable by fifteen to twenty-five years’ imprisonment, life imprisonment or death).

2. Arrest and detention in Russia and extradition decision

6. On 6 August 2010 the applicant was arrested in the Tula region in Russia.

7. On 16 August 2010 a deputy Prosecutor General of Belarus, relying on Articles 56 and 80 of the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (“the 1993 Minsk Convention”), requested a deputy Prosecutor General of the Russian Federation to extradite the applicant to Belarus so that he could be prosecuted for the offences with which he was charged. The Prosecutor General’s Office of Belarus guaranteed that the applicant would only be prosecuted for offences in connection with which he would be extradited, that after his trial or after serving his sentence, if convicted, he would be free to leave Belarus and that he would not be transferred to a third state

without the Russian Federation's consent. It was stated further that the request was not aimed at persecuting the applicant on the grounds of his race, religion, ethnic origin or political convictions, and that the statute of limitation for his prosecution had not expired.

8. On 28 October 2010 the Aleksin Town Court, Tula region, convicted the applicant of forgery of a Russian passport, using which he had lived in Russia under a false name, and sentenced him to one year's imprisonment. A decision on the applicant's extradition was postponed. His conviction became final on 6 April 2011.

9. On 23 May 2011 the deputy Prosecutor General of the Russian Federation ("the RF"), relying in particular on Articles 56 and 66 of the 1993 Minsk Convention and Articles 462-463 of the RF Code of Criminal Procedure, granted the request for the applicant's extradition. The decision noted that the offences with which the applicant had been charged in Belarus constituted crimes under the Russian criminal law punishable with more than one year's imprisonment, and that the statute of limitation for their prosecution had not expired. The applicant was a Belarusian national and did not have Russian citizenship.

10. On the same day the RF deputy Prosecutor General communicated his decision to the Belarus Deputy Prosecutor General, inviting the latter to inform him, under Article 69 of the 1993 Minsk Convention, of the outcome of the criminal proceedings against the applicant. The extradition was to take place once the applicant's sentence for passport forgery had been served and the extradition decision had entered into force.

11. On 8 July 2011 the Belarus Deputy Prosecutor General, in reply to the RF Deputy Prosecutor General's inquiry, supplemented his request for the applicant's extradition with additional assurances, notably that in the event of the applicant's extradition to Belarus the requirements of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms would be observed, the applicant would not be subjected to torture, inhumane or degrading treatment or punishment. If convicted, he would not be sentenced to death. He would be given a fair trial and, if necessary, provided with appropriate medical care.

12. The applicant appealed against the extradition decision to the Tula Regional Court. A judge to whom the case had been allocated enquired with the RF Prosecutor General about the possibility of obtaining additional assurances from Belarus, to the effect that the relevant court there would not impose the death penalty on the applicant, or that the death penalty would not be carried out. Following that inquiry the RF Ministry of Foreign Affairs obtained a Note of 26 July 2011, no. 04-21/1379-k, of the Embassy of the Republic of Belarus in the Russian Federation which states as follows:

"The Embassy of the Republic of Belarus in the Russian Federation presents its compliments to the Ministry of Foreign Affairs of the Russian Federation and, in reply

to Note no. 8372/2 *oCH2* of 19 July 2011, has the honour to present the following information.

The Embassy of the Republic of Belarus in the Russian Federation confirms that compliance by all Belorussian law-enforcement organs, including courts and organs of execution of sentences, with the undertakings given by the Republic of Belarus Prosecutor General's Office on behalf of the Republic of Belarus of the non-application of the death penalty to Igor Anatolyevich Kulevskiy, is both lawful and compulsory.

By virtue of the law of the Republic of Belarus, in particular Article 494 § 4 of the Code of Criminal Procedure of the Republic of Belarus, only the Republic of Belarus Prosecutor General's Office has the power to give a written undertaking on behalf of the Republic of Belarus of the non-application of the death penalty to a person whose extradition is being sought. In this connection, the written undertaking by the Republic of Belarus Prosecutor General's Office on behalf of the Republic of Belarus of the non-application of the death penalty to Igor Anatolyevich Kulevskiy has in essence the force of an international legal obligation of the Republic of Belarus which is subject to rigorous observance.

Taking into account the aforementioned circumstances, the written undertaking by the Republic of Belarus Prosecutor General's Office specifically indicates that in the event of delivery of a "guilty" verdict a court with jurisdiction to examine the case will not sentence I.A. Kulevskiy to death (*«... в случае вынесения обвинительного приговора в нем компетентным судом Республики Беларусь не будет назначено наказание И.А. Кулевскому в виде смертной казни ...»*). That court will be bound to examine that undertaking at the [Kulevskiy's] trial and regard it as an obligation of the Republic of Belarus not to apply the death penalty to him.

We should also inform you that the Ministry of Foreign Affairs of the Republic of Belarus and its diplomatic representation offices are not vested by Belorussian law with powers to give additional legally binding guarantees of non-application of the death penalty.

The Embassy of the Republic of Belarus in the Russian Federation avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Russian Federation the assurances of its highest consideration."

13. From 15 September 2011, after serving his sentence for the passport forgery, the applicant was in custody pending extradition. He was released on 22 September 2012 when the maximum time-limit for detention had been reached.

14. The applicant's request for refugee status was refused by a final decision of the Russian Federal Migration Service on 29 November 2011; on an appeal by the applicant that decision was upheld by the Moscow Basmanniy District Court on 11 January 2012 and the Moscow City Court on 24 February 2012.

3. Judicial review of the extradition decision

15. On 6 March 2012 the Tula Regional Court, sitting in a panel of three judges, held an open hearing. Having heard the applicant, his counsel and the prosecutor and having examined other evidence, the Regional Court upheld the extradition decision, which it found to be in compliance with the European Convention on Extradition of 1957, the Minsk 1993 Convention and the RF Code of Criminal Procedure. The Regional Court examined the assurances given by the Belarus Prosecutor General's Office of 16 August 2010 and 8 July 2011, as well as its authority to give an undertaking that the death penalty would not be applied, which was binding on Belarusian courts on the basis of Article 494 § 4 of the Belarus Code of Criminal Procedure, as confirmed by the Note of the Belarus embassy. Having further noted that Belarus had ratified the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Regional Court found the assurances sufficient in the circumstances of the case to guarantee that the applicant, if extradited, would not be subjected to treatment contrary to Article 3 of the Convention and that he would not be sentenced to death if convicted.

16. In particular, as regards the applicant's argument that three leaders of the gang convicted of the murders, which offences formed part of the charges against him, had been sentenced to death and executed, the Regional Court established, on the basis of official information from the Belarusian authorities, that those individuals had never been extradited; they had been arrested in Belarus in 2004 and detained there until their conviction and execution.

17. The applicant's allegations that he had been persecuted in Belarus for his political activity, detained unlawfully and ill-treated were found by the Regional Court to be incoherent, unsubstantiated and lacking essential details. No evidence of his detention or ill-treatment had been provided. Political motives for leaving his home country had for the first time been raised at the last hearing before the Regional Court, without any details being provided. He had stated to the court previously that he had left Belarus to find a job. He admitted at the hearing that he was not a member of any political, religious, non-governmental or military organisation, and had never distributed materials or appeals in the context of agitation. He had made the same statements when detained with a view to extradition. His wife, daughter and sister were Belarusian nationals, resided in Belarus and had never been persecuted. Upon arrival in Russia he had not applied for refugee status or for Russian citizenship, but had lived under a forged Russian passport.

18. The Regional Court examined human rights organisations' reports submitted by the defence, which indicated that the human rights situation in Belarus was unstable. Relying on the Convention case-law, the Regional

Court noted that the reference to a general problem concerning human rights observance in a particular country could not alone serve as a basis for refusal of extradition. The charges against the applicant did not relate to political activity. The applicant's allegation that any detainee would be subjected to ill-treatment in Belarus was too general. He was accused of banditry, illegal weapons trafficking and the murder of eight people with aggravating circumstances. There was no evidence that the applicant had engaged in any political activity. His allegations of earlier instances of ill-treatment in Belarus were vague, totally unsubstantiated and unconvincing. The Regional Court concluded that there were no grounds to believe that the applicant would be subjected to treatment dangerous to his health or life, or that his trial would be unfair. The applicant had no health issues requiring him to stay in Russia on humanitarian grounds.

19. On 26 April 2012 the Supreme Court of the Russian Federation dismissed the applicant's appeal against the Regional Court's judgment, having endorsed the Regional Court's findings.

4. Application of Rule 39 of the Rules of Court

20. On 21 May 2012 the Court, acting upon the applicant's request, decided to apply Rule 39 of the Rules of Court, indicating to the Government of the Russian Federation that the applicant should not be extradited to Belarus until further notice by the Court.

B. Relevant international and domestic law and practice

21. The CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (signed in Minsk on 22 January 1993 and amended on 28 March 1997, "the 1993 Minsk Convention"), to which both Russia and Belarus are parties, provides as follows:

Article 56. Obligation of extradition

"1. The Contracting Parties shall ... on each other's requests extradite persons, who find themselves in their territory, for criminal prosecution or serving a sentence.

2. Extradition for criminal prosecution shall extend to offences which are criminally punishable under the laws of the requesting and requested Contracting Parties, and which entail at least one year's imprisonment or a heavier sentence."

Article 57. Refusal of extradition

"1. Extradition shall not be carried out if:

(a) the person whose extradition is being requested is a citizen of the requested Contracting Party;

(b) At the moment of receipt of the request criminal prosecution cannot be initiated according to the legislation of the requested Contracting Party ... as a result of the expiry of the statute of limitations or on another legal ground;

(c) a judgment or a decision on termination of proceedings have been delivered and entered into force on the territory of the requested Contracting Party in respect of the person whose extradition is being requested for the same crime;

(d) in accordance with the legislation of the requesting and requested Contracting Parties the crime is being prosecuted by way of private prosecution (on a victim's request) ..."

Article 58. Request for extradition

"1. A request for extradition shall include the following information:

(a) the title of the requesting and requested authorities;

(b) the description of the factual circumstances of the offence, the text of the law of the requesting Contracting Party which criminalises the offence, and the punishment sanctioned by that law;

(c) the [name] of the person to be extradited, the year of his birth, citizenship, place of residence, and, if possible, the description of his appearance, his photograph, fingerprints and other personal information;

(d) information concerning the damage caused by the offence.

2. A request for extradition for the purpose of criminal persecution shall be accompanied by a certified copy of a detention order ..."

Article 66. Scope of criminal prosecution of the extradited person

"1. Without the requested Contracting Party's consent the extradited person must not be prosecuted or punished for the crime committed before his extradition for which he had not been extradited.

2. Furthermore, without the requested Contracting Party's consent the person cannot be transferred to a third state ..."

Article 69. Notification of the outcome of the criminal proceedings

"The Contracting Parties shall notify each other of the outcome of the criminal proceedings against the extradited person. On request, a copy of the final judgment shall be sent. "

Article 80. Particular order of relations

"Relations concerning extradition and criminal prosecution are performed by Prosecutor Generals (prosecutors) of the Contracting Parties."

22. Similar provisions are contained in chapter 54 (Articles 460-468) of the Code of Criminal Procedure of the Russian Federation, which governs the procedure to be followed in the event of extradition. Under Article 462 § 4 of the Code, the extradition decision is taken by the Prosecutor General of the Russian Federation or his deputy.

23. Under Article 59 of the Criminal Code of the Republic of Belarus, the death penalty is applied, until its abolition, as an exceptional punishment for certain very grave crimes. The death penalty cannot be imposed on anyone who has committed offences when under the age of eighteen, on women, or on men who have reached the age of 65 by the date of delivery of a judgment. The death penalty can be replaced by a life sentence by way of clemency. The last two executions reportedly took place in March 2012.

24. Under Article 494 § 4 of the Code of Criminal Procedure of the Republic of Belarus, the Prosecutor General's Office of the Republic of Belarus encloses with a request for extradition a written undertaking on behalf of the Republic of Belarus that the death penalty will not be applied to a person whose extradition is being sought, if such an undertaking is a condition of the requested state's granting the extradition request.

25. Under Article 34 of the Code of Criminal Procedure of the Republic of Belarus, prosecution in criminal proceedings and the bringing of criminal charges before the courts are carried out by prosecutors on behalf of the State. Under Article 17 of the 2007 Law on the Prosecutor's Office of the Republic of Belarus, the Prosecutor General's Office supervises the activities of all prosecutors' offices in the Republic of Belarus.

26. The Coordination Council of the Prosecutor Generals of States Parties to the Commonwealth of Independent States (CIS) was created in 1995 and given the status of CIS inter-state organ in 2000. One of its tasks is to assess the efficiency of the CIS 1993 Minsk Convention and to propose measures for improvement of regulation of the relations governed by that Convention. It organises cooperation between the prosecutors of the States members and facilitates the defence of rights of their citizens.

THE LAW

A. Alleged risk of death penalty

27. The applicant complained that if extradited to Belarus he would be sentenced to death and executed, as had been done in respect of three members of the gang who had been convicted of the murders which formed part of the charges against him. He relied on Articles 2 and 3 of the Convention. Article 2, where relevant, provides:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law ...”

Article 3 provides:

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

1. The parties’ submissions

(a) The Government

28. The Government submitted that, in view of the assurances given by the Prosecutor General’s Office of Belarus in accordance with Article 66 of the 1993 Minsk Convention and Article 494 § 4 of the Code of Criminal Procedure of the Republic of Belarus, as confirmed by the Belarus Embassy’s Note of 26 July 2011, the applicant would not be at risk of a death sentence in the event of his extradition to Belarus. The situation of the three executed members of the gang was different. They had never been extradited; in 2004 they had been arrested in Belarus and had been detained there until the execution of a judgment in their case.

29. The assurances of the Prosecutor General’s Office of Belarus were sufficiently specific. There had been no instances of a breach of the assurances given to Russia by the Belarusian authorities, including assurances that the death penalty would not be imposed. The Prosecutor General’s Office of the Russian Federation had effective means of exercising control over the observance by the Republic of Belarus of assurances given to Russia in the context of extradition proceedings, via channels of cooperation with the Prosecutor General’s Office of Belarus within the framework of existing international agreements including the Co-ordination Council of Prosecutor Generals of the CIS or via diplomatic channels. Under Article 69 of the 1993 Minsk Convention information about the outcome of criminal proceedings against a person whose extradition had been requested was communicated to the extraditing State. Belarus had complied with that obligation, providing Russia regularly with information about judgments delivered in respect of persons whose extradition it had sought.

30. The decision to extradite the applicant had been taken in full compliance with the Constitution of the Russian Federation, the federal laws and the general principles of international law. The applicant’s arguments had all been carefully examined in the course of the extradition proceedings.

(b) The applicant

31. The applicant argued that Belarus continued to impose and carry out the death penalty. According to information published by the Belarusian

Ministry of Interior, from 1998 to 2010 some 102 individuals had been sentenced to death. According to Amnesty International, since 1991 about 400 people had been executed. In 2011 Belarus executed two of its nationals whose complaints were being examined by the United Nations Human Rights Committee.

2. *The Court's assessment*

32. The Court reiterates that expulsion 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 a belief that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008). Similarly, Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for a belief that he or she would face a real risk of being subjected to the death penalty there (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 123, ECHR 2010 (extracts)).

33. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of the above Articles. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, the liability is incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Saadi*, cited above, § 126). In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable circumstances of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (*ibid.*, § 130).

34. Where assurances are given in support of an extradition request the Court will examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (*ibid.*, § 148).

35. The Court observes that the applicant's extradition was sought and granted for the applicant's prosecution on, among others, the charges of multiple murder, which carries the death penalty as one of the possible punishments (see paragraph 5 above). The death penalty is imposed and carried out in Belarus (see paragraph 23 above). Having no evidence before it to the contrary, the Court will proceed on the assumption that without the

assurances there would be a real risk that the applicant, if convicted, would be sentenced to death and executed.

36. It will therefore examine whether the assurances of the Republic of Belarus, which is not a party to the Convention, were sufficient to remove any real risk that the death penalty would be applied. The Court observes that the Prosecutor General's Office of the Russian Federation obtained, among others, a specific and unequivocal assurance from Belarus that the applicant would not be sentenced to death if convicted. The Court considers it important that this assurance was issued under the authority of the Belarusian Prosecutor General, who is responsible within the Belarusian system for the supervision of the activities of all prosecutors in the Republic of Belarus, including the prosecution of charges before the courts (see paragraph 25 above). Furthermore, the Belarusian Prosecutor General's Office was empowered, by virtue of a special provision in Belarusian law, notably Article 494 § 4 of its Code of Criminal Procedure, to give undertakings on behalf of the Republic of Belarus not to apply the death penalty to a person whose extradition was being sought, if such an undertaking was required by the requesting State in order for the extradition to take place (see paragraph 24 above). In the course of the careful judicial review of the extradition decision which followed, the Tula Regional Court went further and enquired about the practical application of such an undertaking. As a result, the Embassy of the Republic of Belarus in the Russian Federation in the Note of 26 July 2011 to the Russian Ministry of Foreign Affairs confirmed that the said undertaking of the Belarus Prosecutor General's Office was binding on all Belarusian courts and authorities in charge of execution of sentences, that the court with jurisdiction would be bound to examine that undertaking at the applicant's trial and regard it as an obligation of the Republic of Belarus not to apply the death penalty to the applicant (see paragraph 12 above).

37. The Court further attaches importance to the fact, which is uncontested by the applicant, that to date it has not been Russia's experience that assurances of non-application of the death penalty given to them in the course of proceedings concerning extradition to Belarus are not respected in practice. The Court also notes that Article 69 of the 1993 Minsk Convention binds Belarus to inform Russia of the outcome of the criminal proceedings against the applicant (see paragraph 21 above) and the Russian Prosecutor General's Office explicitly invited his Belarusian counterpart to do so (see paragraph 10 above). According to the Government, Belarus has complied with its obligation under that provision and informed Russia about judgments delivered in respect of extradited persons.

38. In the light of the foregoing, the Court considers that the assurance obtained by the Russian authorities was such as to avert the risk of the applicant being subjected to the death penalty in the event of his extradition and conviction (see, with necessary changes made, *Abu Salem v. Portugal*

(dec.), no. 26844/04, 9 May 2006; *Saoudi v. Spain* (dec.), no. 22871/06, 18 September 2006; *Einhorn v. France* (dec.), no. 71555/01, 16 October 2001; *Nivette v. France* (dec.), no. 44190/98, 14 December 2000; *Babar Ahmad and Others v. the United Kingdom* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 119, 6 July 2010; and *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, § 91, 17 January 2012; see also, *a contrario*, *Al-Saadoon and Mufdhi*, cited above, §§ 43-44, and *Bader and Kanbor v. Sweden*, no. 13284/04, § 45, ECHR 2005-XI).

39. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

40. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

B. Other complaints

41. As regards the applicant's remaining complaints that, if extradited, he would be tortured by law-enforcement authorities and would have an unfair trial and that the Russian courts' decisions in his case had all been erroneous, having regard to the materials in its possession, and in so far as they fall within its jurisdiction, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

42. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible;

Decides to discontinue the application of Rule 39 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President