CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 49491/99
by Igor Alexandrovich BORDOVSKIY
against Russia

The European Court of Human Rights (Second Section), sitting on 11 May 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr A. KOVLER,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 19 October 1998,

Having deliberated, decides as follows:

THE FACTS

The applicant, Igor Alexandrovich Bordovskiy, is a Belarussian citizen who was born in 1967 and lives in Gomel. He is represented before the Court by Ms Karinna Moskalenko, a lawyer practising in Moscow. The respondent Government are represented by Mr Pavel Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

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

A. The circumstances of the case

In 1996 the General Prosecutor's Office of Belarus (the "Belarussian GPO") instituted criminal proceedings against the applicant under Article 91 § 4 of the Criminal Code of Belarus. The applicant was suspected of having committed large-scale fraud and embezzlement during his work in a financial company.

As the applicant evaded the investigation, on 22 September 1997 the Belarussian GPO issued a detention order and an international search and arrest warrant in his respect.

On 9 July 1998 the Russian police arrested the applicant in St. Petersburg. According to the applicant, the policemen did not inform him of the reasons for his arrest or produce any documents justifying it.

On 13 July 1998 the applicant was placed in a temporary detention unit of the St. Petersburg Police Department.

On an unspecified date, but, according to the applicant, not earlier than one month after his arrest, the applicant was informed orally that his detention was based on an arrest warrant issued by the Belarussian authorities.

On 13 August 1998 a senior investigator of the Belarussian GPO interrogated the applicant for the first time, having come to St. Petersburg from Minsk. The investigator informed the applicant about the nature of the accusation against him but did not serve formal charges.

On 20 August (19 August, according to the Government) 1998, the applicant was transferred to Remand Centre IZ-47/4 in St. Petersburg.

In August–October 1998 the applicant's lawyer lodged a number of applications for the applicant's release from custody. In particular, the lawyer applied to the Dzerzhinskiy and Kalininskiy District Courts of St. Petersburg under Article 220-1 of the Code of Criminal Procedure. He also applied to the General Prosecutor's Office of Russia (the "GPO"), the Human Rights Commissioner and the Human Rights Department of the Office of the President.

On 25 September 1998 the GPO agreed to extradite the applicant.

On 5 October 1998 the St. Petersburg Prosecutor's Office informed the applicant's lawyer that, on 11 August 1998, the GPO had ordered that the applicant should stay in custody pending the extradition proceedings because a request by the Belarussian authorities had been received and because the applicant was not a Russian citizen.

On 25 October 1998 the applicant was re-located to Remand Centre no. 1 in Smolensk.

On 17 November (12 November, according to the Government) 1998 he was handed over to the Belarussian authorities.

On 24 November 2000 the Zheleznodorozhnyi District Court of Gomel (Belarus) convicted the applicant under Article 166 § 2 of the Criminal

Code and sentenced him to three years' suspended imprisonment with compulsory community work.

B. Relevant domestic law

1. CIS Agreement on crime control

On 24 April 1992 the Ministries of Internal Affairs of the Independent States signed an Agreement on Co-operation in the Sphere of Crime Control (the "CIS Agreement"). Section 6 of that Agreement provides as follows:

> "A Party shall, with regard to its internal legislation, assist another Party who requests:
>
> (a) to arrest a person who evades investigating authorities, trial or serving a sentence, or to detain such a person if necessary;
>
> (b) to extradite a person for criminal prosecution or for serving a sentence."

2. CIS Convention on legal assistance

On 22 January 1993 the Independent States signed a Convention on Legal Assistance in civil, family and criminal cases (the "CIS Convention"), the relevant provisions being 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 58. Request for extradition

> "1. A request for extradition (*требование о выдаче*) 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 61. Arrest or detention before the receipt of a request for extradition

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

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

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

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

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

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

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

Article 62. Release of the person arrested or detained

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

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

Article 67. Handing over the person to be extradited

“The requested Contracting Party shall inform the requesting Contracting Party about the place and time of the hand-over. If the requesting Contracting Party does not take the person to be extradited within 15 days after the fixed date for handing over, the person shall be released.”

3. Code of Criminal Procedure

Pursuant to Article 220-1 of the Code of Criminal Procedure 1960, in force at the material time, a detainee could apply for the judicial review of his pre-trial detention.

4. Criminal law of Belarus

Article 91 § 4 of the Criminal Code of Belarus of 1960, in force at the material time, provided that appropriation or embezzlement of third parties' property of which the defendant has custody, or appropriation of the property by abuse of office, committed on several occasions, in concert with others and on a large scale, is punishable by eight to fifteen years' imprisonment, confiscation of property and prohibition on holding certain offices or on engaging in certain activities for a period ranging from three to five years.

COMPLAINTS

1. The applicant complained that his detention was incompatible with Article 5 § 1 of the Convention because it was unlawful and because the relevant law provided no time-limits for the detention of persons facing extradition.

2. He also complained under Article 5 § 2 of the Convention that he had spent more than four months in custody without any proper explanation of the grounds of his detention.

3. The applicant complained further under Article 5 § 3 of the Convention that he had never been brought before a judge or any other officer who could have reviewed the lawfulness of his detention.

4. The applicant complained under Articles 5 § 4 and 13 of the Convention that his applications for release to the courts of St. Petersburg had never been examined and that no judicial appeal lay against the GPO's decision to extradite him.

5. Lastly, the applicant alleged, with reference to Articles 3, 6 § 2 and 6 § 3 of the Convention, that his extradition to Belarus—a country which did not live by the rule of law—could lead to his being subjected to torture, an unfair trial and the death penalty.

THE LAW

1. The applicant complained under Article 5 § 1 that his detention was unlawful. Article 5, in so far as relevant, 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."

1. Arguments of the Government

The Government submitted that the applicant's arrest and detention complied with this provision.

According to them, the applicant was detained pursuant to Section 6 of the CIS Agreement on the basis of the detention order issued by the Belarussian GPO. Since the applicant was a citizen of Belarus, he was extradited in accordance with the CIS Convention. Pursuant to Article 56 § 2 of that Convention, a person could be extradited if he or she faced charges punishable with at least one year's imprisonment. Pursuant to Article 60 of the CIS Convention, on receipt of an extradition request, the State had immediately to arrest the person in question.

2. Arguments of the applicant

The applicant insisted that his detention was not "lawful" within the meaning of the Convention case-law.

According to him, Section 6 of the CIS Agreement did not provide details of the procedure for detention with a view to extradition. Hence, he could not regulate his behaviour or foresee the consequences that a given action might entail.

Secondly, the conditions laid down in Articles 58 to 62 of the CIS Convention were not fulfilled. In particular, a person should normally be arrested on the basis of an extradition request, but there was no evidence that any such request was received by the Russian authorities prior to the applicant's arrest. Nor did the Belarussian authorities submit any petition which could have justified the applicant's arrest prior to the submission of the extradition request. In the absence of these documents, he could only be arrested if the Russian authorities had reason to suspect that he might have committed an offence in Belarus. However, there were no such reasons. The Belarussian detention order could not serve this purpose because Belarus and Russia were independent States with their own rules of criminal procedure. In any event, if the applicant had been arrested on a suspicion and no request for extradition had been received, he should have been released after 72 hours—the maximum period for the detention of suspects laid down in the Russian law.

Furthermore, the CIS Convention provided no time-limits for detention and the applicant hence remained unaware of his fate until his extradition.

Lastly, in 1997–98 the applicant had travelled several times from Belarus to Russia which proved that he had not evaded the Belarussian authorities.

3. The Court's assessment

The Court reiterates that the "lawfulness" of detention essentially means conformity with national law (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, § 50). It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see, for example, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, § 41).

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant also complained under Article 5 § 2 of the Convention that he was not informed of the reasons for his arrest. Article 5 § 2 reads as follows:

> "2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

The Government submitted that the applicant had been immediately informed of the reasons for his arrest and the charges against him. In fact, the applicant had made written notes in this respect in the course of questioning.

The applicant argued that he could not have been informed about the reasons for his arrest and the charges against him because, at the time of his arrest, the Belarussian authorities had not submitted a request for extradition. The applicant first heard about the charges on 13 August 1998 from the investigating officer of the Belarussian GPO. However, no documents were served at that time either.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant next complained under Article 5 § 3 of the Convention that, after his arrest, he was not brought before a judge. Article 5 § 3 reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Court notes that the right in question only extends to detention under Article 5 § 1 (c), i.e. effected "for the purpose of bringing [the person] before the competent legal authority on reasonable suspicion of having committed an offence..." (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 71).

The applicant, however, was deprived of his liberty with a view to extradition, i.e. under Article 5 § 1 (f). The Court concludes that the provisions of Article 5 § 3 of the Convention did not apply to him.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

4. The applicant further complained under Articles 5 § 4 and 13 of the Convention that his applications for release were not examined and that he could not challenge the extradition order.

Article 5 § 4 reads as follows:

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

Article 13 reads as follows:

> "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."

The Government claimed that this complaint was manifestly ill-founded. According to them, the applicant's lawyer did not file any applications for release with the Dzerzhinskiy and Kalininskiy District Courts. Even though a copy of the application to the Kalininskiy District Court bore a reference number, the court's records assigned this number to a different case. Had the applicant lodged the applications, the courts would have examined them.

The applicant argued, first, that his lawyer did lodge the applications. The lawyer learned the reference number from the courts' registry, and he cannot take the blame for the registry's possible mistakes. Secondly, Russian law did not provide any remedy by which detention with a view to extradition could be challenged. Even though the applicant tried to challenge his detention under Article 220-1 of the Code of Criminal Procedure, this remedy would have been futile because it was intended for the judicial review of criminal detention orders, not orders with a view of extradition.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court

concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

5. Lastly, the applicant alleged under Articles 3 and 6 §§ 2 and 3 of the Convention that, by extraditing him to Belarus, Russia put him in danger of treatment contrary to these Articles, or even Article 2 of the Convention.

In this regard, the Court reiterates that the Convention does not guarantee, as such, a right for an alien to enter or to reside in a particular country.

However, expulsion or extradition of an alien may in exceptional circumstances involve a violation of fundamental rights, in particular where there is a serious risk that the person to be extradited or expelled will be subjected to treatment contrary to Articles 2 or 3 of the Convention in the receiving country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 81).

Moreover, an issue might also exceptionally arise under Article 6 of the Convention where the alien to be extradited has suffered, or risks suffering, a flagrant denial of a fair trial in the country requesting his extradition (see *Soering*, cited above, § 113).

However, the Court reiterates that a mere possibility of exposure to ill-treatment on account of the general unsettled situation in a country is insufficient to give rise to a breach of Article 3 of the Convention (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 111). The applicant has not submitted any evidence that he personally risked being subjected to ill-treatment. Furthermore, the fact that capital punishment as such existed in Belarus did not automatically imply that it would be applied to the applicant if convicted. According to the information available to the Russian authorities at the time of the extradition, the applicant was charged with offences under Article 91 § 4 of the Criminal Code of Belarus. The severest sanction that could be handed down under that Article was fifteen years' imprisonment.

Equally, the applicant has failed to substantiate that there was a real risk that his trial in Belarus would be flagrantly unfair. Russia cannot be held responsible under the Convention for extraditing the applicant simply because of his personal belief that Belarussian courts usually fail to secure the rights guaranteed by Article 6 §§ 2 and 3 of the Convention.

Lastly, now that the applicant has been tried and sentenced in Belarus, it does not appear that his misgivings have proved to be correct.

In these circumstances, the Court concludes that this part of the application is to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints that his detention was unlawful, that he was not informed promptly of the reasons for his arrest, and that he could not challenge his detention before a court;

Declares inadmissible the remainder of the application.

S DOLLÉ
Registrar

J.-P. COSTA
President