[2020] IEHC 370

THE HIGH COURT

IN THE MATTER OF THE EXTRADITION ACTS 1965 – 2001

[2015 No. 176 EXT]

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND

IGOR YURIEVICH KHATLAMADZHIYEV

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 27th day of July, 2020

1. This is a judgment on an application for the extradition of the respondent to the Russian Federation. The request is dated 19th August, 2014, in which it is stated that the respondent is charged with the crime of "assault with intent to rob, i.e. an attack for the purpose of stealing of another's property committed with application of force dangerous for life and health, or with the threat of application such force (sic), with illegal penetration into a dwelling, premise, or other storehouse with application of articles to be used as a weapon by an organised group." The offences concerned are alleged to have been committed in November, 1997.

2. In the request for the extradition of the respondent, the following assurances are provided:

> "We guarantee that according to norms of international law, in the Russian Federation I.YU. Khatlamadzhiyev will enjoy all the resources for defence, including legal consulting; he will not be subject to torture, cruel, inhuman or degrading treatment or punishment (Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and likewise corresponding conventions of the United Nations and the Council of Europe and protocols thereto).
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> The Prosecutor General's office of the Russian Federation guarantees that the request for extradition is not aimed at prosecution of the person for political reasons, or because of his race, religion, nationality and political views.
>
> The period of limitation for making I.YU. Khatlamadzhiyev criminally liable has not expired. He enjoys no immunity to criminal prosecution.
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> The Prosecutor General's office of the Russian Federation guarantees that, according to Art. 14 of the European Convention on Extradition of 13.12.1957 I.YU. Khatlamadzhiyev will be prosecuted only for the offence in relation to which his extradition is sought, and after completion of preliminary investigation at trial, and, in case of pronouncement of the conviction, after service of the sentence, he will be able to leave the territory of Russia.
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> We guarantee that during the period of his criminal prosecution I.YU. Khatlamadzhiyev will be detained in a correctional facility which meets standards stipulated by the European Convention for the Protection of Human Rights and

Fundamental Freedoms of 4th November, 1950 and the European Penitentiary Rules of 11th January, 2006, and consular officers of the Embassy of Ireland in Russia will be able to visit him at any time."

3. A further document simply described as a certificate was furnished to the applicant by the Prosecutor General's Office of the Russian Federation. The precise date of this document is unclear, but it is stated on the copy furnished to the Court to be April, 2019. This certificate contains similar guarantees and assurances to those set out above. Nonetheless, it is appropriate to set them out in full:

> "When submitting a request to the cognisant authorities of Ireland for Extradition of I.YU. Khatlamadzhiyev, General Procuracy of the Russian Federation guaranteed the compliance with his basic rights and freedoms of a man and a citizen.
>
> According to Art. 3, 6, 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 11, 1950 in the Russian Federation I.YU. Khatlamadzhiyev will not be subjected to torture, inhuman or degrading treatment or punishment, his right to due process of law as well as to respect for private and family life will be upheld. The latter will be provided with all opportunities for protection, including the assistance of counsel …
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> If I.YU. Khatlamadzhiyev is extradited to the Russian Federation he will be housed in a correctional institution, in which the standards set out in the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 and the European minimum principles for the treatment of persons housed in prisons (in the European prison rules) of January 11, 2006 are considered and the consular officers of the Irish Embassy in Russia will be able to visit him to monitor compliance with the above guarantees at any time."

4. The respondent was arrested on 1st August, 2018 and brought before this Court. A notice of objection to his extradition was filed on his behalf on 7th November, 2018. By this notice of objection, seven points of opposition were set forth, but in the end just two were advanced at the hearing of the matter. I address those below. No issue was raised on behalf of the respondent as regards the form of proofs required to satisfy the application, pursuant to the Extradition Act, 1965 (as amended) (the "Act of 1965") and I am satisfied from a review of the extradition request and the certificate executed under seal by the Minister for Justice, Equality & Law Reform on 13th August, 2015, pursuant to s. 26(1)(a) of the Act of 1965, that the formal requirements of the Act of 1965 have been fulfilled.

5. The respondent also swore an affidavit dated 23rd November, 2018 in opposition to this application. In this affidavit, he denies committing the crimes of which he is accused. He further avers that he was previously incarcerated in a Russian prison in respect of a crime he did not commit, in 1997. He says that in that year he was detained in Kapotnya prison for three months, and that the conditions there were very bad. He had very little space in the cell in which he was detained, which was very cold and dirty. He says that forty

prisoners shared a cell containing only twenty beds and the prisoners had to take turns to sleep. He said that they were only entitled to shower once a week and there was only one open toilet in the cell, which had only one window and no air conditioning. He avers that knives and blades were prevalent in the prison, and since he did not have any money he was victimised. He avers that he was only in the prison because he had made an admission of guilt, following a beating at the hands of the authorities. The respondent also avers that other persons mentioned in the extradition request were his friends and it is his opinion that some of those friends were tortured and forced to implicate him in the criminal acts described in the extradition request. He states that he has no doubt that he will be subjected to questioning and torture, if surrendered. He claims that Russia is corrupt, and that the judiciary are not truly independent.

6. The two grounds on which the respondent resists this application are:

   (1) Delay: The events giving rise to the request for the extradition of the respondent occurred more than twenty years ago. While in his affidavit the respondent does not say when he first came to this country, he says that he lived in Ashbourne until 2013 with his then partner, with whom he has two children, aged six and eleven years. Since 2013, he has lived in Blanchardstown with his present partner, with whom he has a three-year-old daughter.

   (2) Secondly, the respondent resists this application on the grounds that if he is extradited, his rights under Article 3 of the European Convention on Human Rights and Fundamental Freedoms (the "Convention") will be violated on account of the prison conditions in Russia, which will expose him to cruel, inhuman and degrading treatment.

7. In support of the respondent's arguments, his solicitor, Mr. Tony Hughes, exhibits a notarised statement taken from a Russian lawyer, namely a Ms. Galina Yurievna Anisomova, in which she describes the conditions of Russian pre-trial detention facilities and penitentiary facilities in Russia. She states that in 20 units in the Russian Federation, the norm of "sanitary area in the prison ward per one person on remand constitutes less than four square metres". By this I take her to mean that this is the cell space available to prisoners held on remand. She states that in other parts of the Russian Federation, the space available reduces to less than three square metres. She describes the living conditions as being unbearable and refers to infestation by fleas, lice and vermin. Those held suffer from preventative conditions such as skin diseases and scabies. She also states that convicted prisoners are obliged to work in prison facilities.

8. Ms. Anisomova states that when she went to have her statement notarised, she was obliged to remove a portion of it. As a result, she sent on the redacted text by email to Mr. Hughes. In this email she sets out in further detail the conditions in detention facilities in Russia. She also states that while the law provides for detention of prisoners only when it is impossible to apply a more lenient preventative measure, such as pledge or personal surety (by which I take her to refer to bail) nonetheless, detention is the

norm and such preventative measures are the exception. She states that the Russian courts will act upon the petition of an investigator and not on evidence. She says:

> "The worst thing is that our courts are designed in such a way that if a person got into the system of criminal proceedings, and especially in the detention facility (CN30), he will be convicted with almost 100% probability, regardless of whether he is guilty or not. From the detention facility (CN30), a person goes to this stage exhausted and lasting for weeks or even months in a 'correctional' colony, where the living conditions are often worse than in the detention facility. There, it is common practice to beat prisoners when entering the colony, and slave labour for several dozen rubles a month. One of the reasons for violation of human rights in pre-trial detention centres and correctional colonies is the closure of these institutions from public scrutiny."

Discussion and decision

9. The formal requirements of the Act of 1965 have been satisfied. Furthermore, it is clear that the requirements as to correspondence of the offences of which the respondent stands accused has been met, as has the requirement for minimum gravity. None of these matters were put in issue by or on behalf of the respondent.

10. The respondent contested this application principally on two grounds, delay in bringing the proceedings against him, such as to deprive him of the possibility of a fair trial contrary to Article 6 of the Convention, and the conditions of detention in the Russian Federation which he claims are so bad as to violate his rights under Article 3 of the Convention. In his points of objection, the respondent pleads other points in opposition to this application, but these were not advanced at the hearing of the application. However, one of these points is in my view of some significance in the light of the decision of Edwards J. in this Court in the case of *Attorney General v. N.S.S*. [2015] IEHC 349 and that is the plea that the respondent will not receive a fair trial in the requesting country.

Delay

11. While it is acknowledged that delay in itself is not a good ground to resist successfully an application for extradition, it is submitted that in circumstances where there has been a delay of more than 20 years since the dates of the alleged offences, the respondent is unlikely to receive a fair trial. The respondent relies upon the case of *Bolger v. Haughton* [2008] IESC 38. That case was concerned with an application advanced by the person whose extradition to the United Kingdom was sought, pursuant to s. 50 (2) (bbb) of the Act of 1965 which provides that the High Court may release a person in respect of whom an extradition warrant exists on the grounds that:

> *"by reason of the lapse of time since the commission of the offence specified in the warrant or the conviction of the person named or described therein of that offence and other exceptional circumstances, it would, having regard to all the circumstances, be unjust, oppressive or invidious to deliver him up under section 47."*

The respondent in this case however did not advance any detailed arguments pursuant to s. 50 (2) (bbb) of the Act of 1965, and so its relevance to this case is limited.

12. Nonetheless, the following passage from the decision of Fennelly J., which appears following upon a review of relevant authorities, is helpful:

> "However, the cases recognise a distinction throughout between the length of the lapse of time itself and responsibility for it. Responsibility or blame has to be addressed at the final stage, not when considering whether the lapse itself is exceptional. Responsibility or blame is not relevant to the question of whether there has been an exceptional lapse of time. The purpose of the section is a broadly humane one. It allows the Court to make an order protecting a person, whose delivery is justified in all other respects, from being in fact delivered. He must, however, prove the combined presence of exceptional lapse of time and other exceptional circumstances with the proven fact that it would be unjust, oppressive or invidious to continue with his delivery."

13. There can hardly be any doubt that a lapse of in excess of 21 years must be regarded as exceptional, but the respondent in this case has not even attempted to address the issue of responsibility for that delay. In particular, it would have been helpful for the respondent to have stated when he left Russia, the circumstances in which he did so and whether or not the fact that he left Russia may have been a significant contributory factor in the delay. In the absence of such an explanation, it is not unreasonable for the Court to infer that the fact that the respondent left the Russian Federation may well have been the main reason for the delay, in which case the respondent can hardly be entitled to rely upon it in opposition to this application.

14. Moreover, it is clearly necessary, on the wording of the section itself (and also as noted in the decision of Fennelly J. referred to above) for the respondent to satisfy the Court that there are other exceptional circumstances such as would justify a refusal of the application under the section. The respondent has not identified any such circumstances for the purpose of reliance on this section of the Act of 1965. Accordingly, for these reasons this argument, in so far as it was advanced at all, must be rejected.

Violation of Article 3 of the Convention

15. The principles upon which an argument based upon a possible violation of Article 3 of the Convention may succeed are long established and are clear. These were set forth by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, in which case the Supreme Court held, inter alia, in the context of an application for the surrender of the respondent in that case under the European Arrest Warrant Act 2003 (the "Act of 2003"), that a person resisting surrender on the grounds of a potential breach of Article 3 of the Convention was required to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were surrendered to the requesting country, he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. The mere possibility of ill treatment would not be sufficient. In considering the matter, the Court may attach importance to

reports of independent international human rights organisations, such as Amnesty International, as well as to governmental sources such as the U.S. State Department.

16. Although as I have mentioned above, *Rettinger* was concerned with an application under the Act of 2003, those principles have also been applied in applications under the Act of 1965, such as in the cases of *Attorney General v. O'Gara* [2012] IEHC 179, *Attorney General v. N.S.S.* [2015] IEHC 349 and most recently in *Attorney General v. Gary Davis* [2018] 2 ILRM 486.

17. In this application, the Court was referred to some very helpful decisions of the High Court of England, in particular in the recent cases *of Stanislav Dzgoev v. Prosecutor General's Office of the Russian Federation* [2017] EWHC 735 and *Alexander Ioskevich v. Government of the Russian* Federation [2018] EWHC 696. Each of those cases was concerned with appeals from the decision of the District Court whereby that court had made orders for the surrender of the appellants in each case. In the case of *Dzgoev*, his extradition was required to serve a sentence of three and a half years' imprisonment in respect of offences of robbery, and also to stand trial for a third, similar, offence. The appellant in *Dzgoev* relied on the decision of the ECtHR in *Ananyev and others v. Russia* (no. 42525/07), a pilot decision of the ECtHR in which that court, having found in favour of the complainants and upheld their claims as to violation of their rights under Article 3 of the Convention by reason of prison conditions in Russia, then went on to invoke the pilot judgment procedure by reason of the number of cases in which similar findings had been made against the Russian Federation (more than eighty). In *Dzgoev*, the court referring to Ananyev stated:

> "A pilot judgement will, within the scope of its application, displace the presumption that a Council of Europe country will honour its obligations under the Convention. In such circumstances, it will fall to the requesting State to show, that judgment notwithstanding, the requested person will not be exposed to conditions contrary to Article 3. In *Badre v. Italy* [2014] EWHC 614 (Admin) Hickinbottom J. (as he then was) said this:
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> > 'where the European Court of Human Rights has made a finding in a pilot judgment that the prison regime of a state is in systemic breach of Article 3, absent other specific evidence, there is a risk that, if detained in that prison system, a returned individual will be subjected to prison conditions that breach his human rights. Of course, it is open to that state to adduce evidence that there is no such risk. For example, it could produce evidence that, since the pilot judgment, prison conditions have improved, so that there is no longer a systemic problem with them; or give an assurance that, if the individual is returned and then detained, he will be kept in a particular prison (or in one of a number of identified prisons) which does not suffer from the general problem identified by the European Court'."

18. The court then went on to consider whether or not Russia had in that case discharged the burden on it to displace the effect of the pilot judgment in *Ananyev* which, the court

noted, referred only to remand facilities. The court considered information received from the Prosecutor General's Office of the Russian Federation in response to the assertion that the appellant's Article 3 rights would be violated. The Prosecutor General addressed allegations of overcrowding in facilities by reference to the specific facilities in which the appellant in that case would be held, if extradited. The court also had the benefit of two expert reports furnished by the appellant and noted that those experts did not disagree with the occupancy level of the facilities referred to by the Prosecutor General. On the basis of all the information before it, the court concluded that the Article 3 rights of the appellant would not be violated if the appellant was detained in the specific facilities referred to in the response of the Prosecutor General, and the court received assurances to this effect which it considered it could accept and rely upon.

19. Similarly, in the case of Ioskevich, the court was prepared to accept and rely upon assurances received from the Government of the Russian Federation. At para. 74, the court stated:

> "The position has thus been reached, in particular in view of recent case law, that the court should accept assurances from the Russian Federation provided, of course, that they are adequate and accurate in terms of scope and content. At this juncture in time the Court will give the Russian Federation the benefit of the doubt and assume that it has a strong incentive to adhere to assurances provided by it. It necessarily follows, of course, that were the Russian Federation to be proven to have acted in bad faith or otherwise not to be enforcing assurances (in this or in other cases) then it is highly probably that the door to future extraditions would be shut hard."

20. In each of *Dzgoev* and *Ioskevich*, the court had the benefit of specific assurances from the Russian authorities as to the institutions in which the appellant in each case would be held, as well as the opinions of experts in relation to those specific institutions. In *Ioskevich*, the court stated, at para. 26 and following:

> "26. The assurances identified the precise facilities where the appellant could be held. The Judge concluded that he could accept them. He set out the relevant case law which identified the test to be applied.
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> 27. He concluded that the assurances were specific and personalised towards the requested person and could be accepted. Ambiguities in early assertions had been comprehensively addressed in subsequent documents provided by the Russian Federation. The person or agency who had given the assurances had the power to bind the receiving State."

In these circumstances, the court was, in the cases of *Dzgoev* and *Ioskevich* prepared to accept the assurances given on behalf of the Russian Federation. In this jurisdiction, in the case of *Attorney General v. N.S.S.*, Edwards J. was also prepared to accept assurances, although he refused to extradite the respondent on other grounds, specifically that he concluded that there were substantial grounds for believing that the

respondent would not receive a fair trial in Russia. However, on the Article 3 point, which was advanced on the same basis as in the cases of *Dzgoev* and *Ioskevich* i.e. the risk of inhuman or degrading treatment in detention facilities in Russia, Edwards J. stated at para. 15.2.10:

> "In this particular case, however, it is urged upon the Court by counsel for the applicant that this Court is in receipt of very specific assurances concerning both where and in what conditions the respondent will be held if extradited. The Court agrees with counsel for the applicant that it has received important assurances. In that regard, the Court is referring to the assurances given at points four and five in the additional information furnished on the 9th October, 2014. The Court's concerns are allayed in the specific case of the respondent in the light of those assurances."

21. Edwards J. then went on to consider whether or not the respondent in that case would be likely to receive a fair trial in Russia. At para. 15.4.3 of his decision, he recorded that the respondent had adduced a substantial body of evidence that is consistent in painting a picture of longstanding structural weaknesses and deficiencies in the Russian judicial and criminal justice systems. At paras. 15.4.4, and 15.4.5 he stated:

> "15.4.4 Amongst the weaknesses and deficiencies identified are concerns about the independence of the judiciary; biasness and unfairness in the system; a disproportionately high rate of convictions (in excess of 99%) save where public officials are being tried for abuses where the rate of convictions is much less; difficulties in defendants obtaining effective legal representation; an unhealthy relationship between prosecutors and the judiciary where excessive deference is shown to the prosecution service and judges appear biased in favour of prosecutors; an unhealthy relationship between the prosecution service and law enforcement agencies with the latter frequently coercing confessions by means of violence, sometimes amounting to torture, excessive force and ill-treatment of persons in custody, and scant respect for the presumption of innocence.
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> 15.4.5 The evidence is really all one way in that regard, despite a number of initiatives mentioned in the additional information, furnished on behalf of the requesting state aimed at strengthening the independence of the judiciary and the prosecution service. However there has been no engagement whatever with the matter which this Court views with the greatest concern, i.e., that there is strong evidence to suggest that in many Russian trials no more than lip service is paid to the presumption of innocence. In this context the Court again recalls the comments at para. 45 of the report of the UN special rapporteur on the independence of Judges and Lawyers in the Russian Federation dated 30th April 2014…"

22. Later, at paras. 15.4.9 and 15.4.10, Edwards J. stated:

> "In fairness to the requesting state in this case, it has at no time sought to suggest that their criminal justice system does not recognise the presumption of innocence.

However, by the same token, it has not engaged at all with the considerable evidence that there is an exceptionally low rate of acquittals in Russian courts, that there is perceptible bias towards the prosecution, and whatever about the stated position in Russian Law, the reality is that in many cases the accused *de facto* has to prove his innocence. Accordingly, the issue for this Court is whether it can be confident that the presumption of innocence will be respected in the respondent's case in the event of him being extradited.

15.4.10 Regrettably, in the absence of any engagement with these issues by the requesting state the Court finds that its concerns are not allayed. It is therefore of the view that substantial grounds exist for believing that there is a real risk that the respondent will not receive a fair trial to such an extent that he is likely to suffer a flagrant denial of justice."

23. Accordingly, Edwards J. concluded that, if extradited, the respondent in N.S.S. would suffer a violation of his fair trial rights as guaranteed by Article 6 of the Convention. In arriving at this conclusion, Edwards J. had before him a significant body of evidence to assist him, and to which he gave detailed consideration. This included reports from the U.S. Department of State, the Council of Europe Committee on the Prevention of Torture, The United Nations, The U.K. Home Office, Human Rights Watch and a report from Professor William Bowring, a recognised expert in this field. Since there was no equivalent information before the Court in this application, and having regard to the very clear conclusions of Edwards J. in a case of relatively recent vintage, on 18th October, 2019, I adjourned these proceedings to afford the applicant an opportunity to take instructions from the Russian Federation on such relevant developments as may have occurred in the Russian Federation since the judgment of Edwards J. on 29th April, 2015 as might assist this Court in coming to a conclusion as to whether or not it remains the case that a defendant in criminal proceedings in the Russian Federation is at a real risk of not receiving a fair trial. I subsequently approved a letter to be sent to the Russian Federation raising enquiries in this regard, which was sent by the applicant to the Russian Federation on 22nd November, 2019. Thereafter the matter was adjourned on five further occasions, awaiting a response from the Russian Federation.

24. In the intervening period, the respondent obtained an affidavit from Professor Bowring of 5th January, 2020. In this affidavit, Professor Bowring avers (at para. 6 thereof):

> "On 2 March 2017, it was reported that in 2016 the authoritative Institute for Problems of Law and the Committee for Civic Initiatives (of the former Minister of Finance, Mr. Kudrin) had published a report of research into the criminal justice system focusing on the problem of "accusatory bias". According to the report, the acquittal rate in courts with a single judge and prosecutor, the acquittal rate does not exceed 0.3%. The acquittal rate in cases where there has been a "public accusation" is 0.2%. In jury trials the rate is 13%."

25. At para. 8 he says:

"In 2018 the acquittal rate [in the Russian Federation] fell four times and was now 0.24% of all verdicts. In 2018, 885,000 persons were brought to criminal trial, of them 682,000 were acquitted [this appears to be an error and should clearly state "convicted"] and only 2,082 were acquitted. In any event 43% of acquittals were overturned on appeal by the prosecution, and therefore only 1,463 persons had their acquittal upheld."

26. This affidavit was sent by the applicant to the Russian Federation on 5th February, 2020, for comment. All this time the respondent remained in custody, since his initial arrest in connection with this application on 1st August, 2018. On no occasion following upon the adjournment of the matter was the applicant given any specific instructions to indicate to the Court when the required information, or any response from the Russian Federation would be available. All the applicant could do on each occasion when the matter was listed for mention was to ask for another adjournment in the blind hope that instructions would be available by the next court date. Accordingly, on 4th March, 2020, having regard to the length of time the respondent had been in custody, I indicated to the applicant that while I was prepared to adjourn to the matter on one final occasion, to 1st April, this adjournment would be on a peremptory basis. I informed the applicant that if there was no response from the Russian Federation to the queries raised by that date then the application would be dismissed. Unfortunately, there was still no response from the Russian Federation on 1st April, 2020, and accordingly the application was struck out on that date.

27. It follows from the foregoing that the Court arrived at no determination as regards the issue that remained of greatest concern to the Court i.e. whether or not the extradition of the respondent would be likely to give rise to a violation of his rights under Article 6 of the Convention, although there was evidence before the Court to this effect.