

In The Bow Street Magistrates' Court

The GOVERNMENT of The RUSSIAN FEDERATION v AKHMED ZAKAEV

The Russian Federation seek the extradition of Akhmed Zakaev in respect of some thirteen allegations of conduct which, had it occurred in the United Kingdom, would have amounted to the offences of soliciting persons to murder, three counts of murder, two counts of wounding with intent to cause grievous bodily harm, one count of false imprisonment, and six counts of conspiring with others in a course of conduct which would necessarily involve the commission of offences of murder, wounding and hostage taking.

Mr James Lewis QC and Mr Qureshi appear on behalf of the Government of the Russian Federation, and Mr Edward Fitzgerald QC and Mr Julian Knowles appear on behalf of Mr Zakaev. I am greatly indebted to them all for the most thorough way this case has been investigated and presented to me. The case has been lengthy and I have been provided with a very considerable amount of evidence and background material. I have considered that material as a whole and in these reasons I am merely extracting the most salient of the facts to give an explanation for my decision. These proceedings fall within the European Convention on extradition and as such it is not my task to enquire into whether there is sufficient evidence to support these charges. Although I have heard and considered a considerable amount of evidence, that evidence has to be assessed and weighed to consider the validity of various issues that have been raised by the Defence to which different considerations apply.

With the exception of the issues raised by the Defence, the other formalities of the convention are complied with. I am satisfied that the defendant is the person being sought by the Government of the Russian Federation and that the documentation is properly authenticated and certified. The Defence however raise a number of substantial issues. Although many of these issues are intertwined, and some parts of the evidence touch upon more than one of the Defence issues, I have examined each issue separately.

The Queen's Peace

It has been submitted to me that the conduct, which would amount to an offence of murder in this country, should not be regarded as an extradition crime because the offence of murder can only take place during the currency of the Queen's peace, and that there is no peace during the existence of war. The killing of combatants in war would not amount to the crime of murder. The Government maintain that the fighting which was taking place in Chechnya amounted to a riot and rebellion, "banditry" and terrorism. The Defence submit that it is clear beyond peradventure that this was at the very least an internal armed conflict and could probably be described as a war. In many circumstances it would be difficult to decide the point at which civil riot becomes an internal armed conflict. Mr Lewis drew the analogy of Northern Ireland and suggested that the difference was purely a matter of degree. Although the line has to be drawn at some point, I am quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict. Indeed, many observers would have regarded it as a civil war. In support of that decision I have taken into account the scale of fighting - the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in the terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations.

Having satisfied myself that this amounted to an internal armed conflict which would fall within the Geneva Convention, I reach the conclusion that those crimes which allege

conspiring to seize specific areas of Chechnya by the use of armed force or resistance are not extraditable crimes because the conduct in those circumstances would not amount to a crime in this country. On that basis I propose to discharge counts 7, 8, 9 and 13. However, in respect of the other allegations of murder and conspiracy to murder, I am satisfied that the alleged victims in those cases should have had the protection of Article 3 of the Geneva Convention in so far as they were civilians. As such, any unlawful killing of them could amount to murder and I therefore do not discharge those charges on this ground.

The Political Defence

Having satisfied myself that the allegations of murder, of civilians should not be discharged merely on the grounds that there was internal armed conflict, I have to consider under Section 6(1) (a) whether the offence was of a political character. By virtue of the Suppression of Terrorism Act, I am satisfied that this exemption can not apply to the offence of murder.

Abuse of Process

It is the Defence submission that for a number of reasons it would now be unjust and oppressive to return Mr Zakaev to stand his trial in Russia. The first issue is one of delay. The alleged offences on which Mr Zakaev is sought occurred in 1995 and in 1996. The offences would have been apparent to the Authorities at the time and two witnesses assured me that they made statements to the Prosecution shortly after the event. It was not until some 6 years later that a decision was made to arrest Mr. Zakaev and it was not until the 25th October 2002 that the Russian request for his arrest was circulated by Interpol. That delay in itself is sufficient to cause me concern, but I believe I have to make some allowance for the fact that for some months of this time the Russian Government was involved in what have found to be a substantial internal armed conflict. I have therefore looked at the events which occurred between 1995 and October 2002 when Mr. Zakaev was arrested in Denmark.

In 1996 Mr. Zakaev played a significant part in securing the peace negotiations, and in 1997 became the first Deputy Prime Minister of Chechnya. From October 1999 to March 2000 Russian entered Chechnya and further fighting took place in which Mr. Zakaev was wounded. Throughout 2001 and 2002 Mr. Zakaev acted as a peace envoy, traveling extensively, but his whereabouts were apparently known to the Russian Authorities. Indeed, on the 18th November 2001 Mr. Zakaev travelled to Moscow Airport in an attempt to negotiate disarmament. He met with senior Government officials who had themselves been reassured that there were no proceedings anticipated against Mr. Zakaev. The existence of the decision to arrest Mr. Zakaev taken 2 months earlier appears to have been overlooked. Mr Fridinsky, the Russian prosecutor in this case, has explained that they had no idea that Mr Zakaev was going to attend a meeting in Moscow. Whilst I do, of course, accept that Mr Fridinsky may not have known, I find it surprising that a warrant for such serious crimes alleged to have been committed by such a well-known person should not have been noticed by the Russian Immigration Authorities. In October 2002 the World Chechen Congress took place in Copenhagen. Mr Zakaev was attending. On the 23rd October the Moscow theatre siege began and ended in tragedy. Before it ended, on the 25th October 2002 the Russian Government issued their request to Interpol to secure Mr Zakaev's arrest.

In addition to the delay in arrest, it is apparent that there has been delay in the investigation and preparation of the Prosecution's case. Although two witnesses told me that they had made statements soon after the events, those statements have not been produced or provided to the Defence. Although they were not required to do so, The Russian Government have supplied copies of the statements on which they rely. With one exception (an unnamed witness) who

made a statement on the 13th March 2000, the other 11 witnesses made their statements after Mr Zakaev was arrested. In respect of 4 of those witnesses, their statements were not taken until after the extradition request to Denmark had failed. I note that in the request to Denmark it was being alleged that Mr Zakaev was involved in the Moscow theatre siege and that he had murdered Father Serge (now known as Father Philip). Both allegations were later withdrawn, and indeed Father Philip has given evidence before me. In the months prior to Mr Zakaev's arrest in Denmark, Mr Zakaev attended press conferences and was received by members of the Upper House of the United Kingdom Parliament. Although protests were made, it was not alleged that he had committed any offences, or indeed that there was a warrant for his arrest.

Section 6(1) (c)

The Defence submit that the Russian Government's request for his return "is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions". The Defence point to Mr Zakaev's very high profile as a Chechen separatist. I have received evidence, called on behalf of the Defence, on the issue of the Russian Government's motivation. It is an issue on which honest and informed expert commentators could perfectly properly form entirely different views. Mr de Waal told me that in his view the decision to arrest Mr Zakaev was a political decision based upon the fact that the Russian Government's policy is now to win a military victory and to neutralise the moderate view. Mr. Rybakov told me that the Government's aim was to exclude Mr Zakaev from the peace process and Mr Rybkin told me that there was a desire to discredit him as a moderate and to remove him from the negotiation process. Whilst respecting their opinion, I thought it right to see whether there was any corroborative evidence. I have noted the long delay. I have also noted that the Kremlin denied the existence of any criminal proceedings against Mr Zakaev when in fact a warrant was still extant. I have noted that the Russian Government continued to negotiate with Mr Zakaev despite the existence of the warrant, and that there was no attempt to extradite Mr Zakaev until the World Chechen Conference and the Moscow theatre siege. I have also noted the statements of the Russian foreign minister likening Mr Zakaev to Osama Bin Laden.

Section 6(i) (d)

The Defence submit that if returned Mr Zakaev "would be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions". This provision in the Extradition Act requires me to make an assessment of what might happen if Mr Zakaev were to be returned to Russia. It is the Defence case that if returned Mr Zakaev will come to serious harm or be killed, because of his status as a senior Chechen politician, a member of the elected Chechen Government and one time Deputy Prime Minister. In order for this restriction to apply it is necessary for me to come to an assessment of what might happen if he were to be returned and also to be satisfied that that possible outcome is due to his race, religion, nationality or political opinions. The first part of the restriction relates to the trial. In Chechnya there is no right to a jury trial at the present time. However, Mr Zakaev could be tried by a jury in a neighbouring state. By virtue of the European Convention, the United Kingdom acknowledges that there is at the very least a presumption that any trial in Russia will take place fairly. I am therefore prepared to accept that the trial process itself will be fair in terms of its procedure. It is, however, necessary for me to examine and analyse the conditions in which Mr Zakaev would be likely to be detained and to consider whether that would have any prejudicial effect on his trial.

The Defence case is that if Mr Zakaev is returned he will be subject to torture whilst in detention. The Deputy Minister responsible for Russian prisons gave evidence to me about the

very considerable improvements that have taken place within Russian prisons in the past few years. They are commendable improvements made in difficult circumstances. He gave me an assurance that Mr Zakaev would come to no harm whilst he was detained in a Russian Ministry of Justice institution. I am sure that he gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate. I consider that such a guarantee would be almost impossible in any country with a significant prison population. I was also concerned as to the type of institution to which the defendant would be sent. Although the Minister indicated that he would be detained in a Ministry of Justice institution, another witness eventually confirmed that the decision could be taken by the Prosecutor who could choose to place Mr Zakaev in an institution run by the FSB.

Against that undertaking, I have to weigh the other evidence I have received and in particular the public statement made by the Council of Europe Anti-Torture Committee which assesses "that there is a continued resort to torture and other forms of ill treatment for members of the Law Enforcement Agencies and Federal forces operating in the Chechen Republic". It is apparent from the United Nations Committee on torture that there is deep concern over the Russian treatment of Chechens and they have identified numerous and consistent allegations of widespread torture of detainees.

Throughout the course of this hearing I have been referred to two leading Chechens who died in prison shortly after being sentenced to long terms of imprisonment. The deaths have clearly caused considerable concern, but the Russian Government's procedures do not provide any opportunity for public investigation of their deaths. At best it is an unfortunate coincidence, at worst it could be unlawful killing. Although there are good grounds for suspicion, there is no evidence before me on which I can properly make a finding of fact. There are, however, two other aspects of the evidence that I have heard and which assist me in making an assessment of what might happen if Mr Zakaev were returned. The first piece of evidence concerns the evidence from the witnesses that I have seen, particularly Mr Rybakov, Mr. Cherkasov, Mr Kovalov and Mr Rybkin. Mr Rybakov told me "that he could not be sure that methods of torture would not be used against Mr Zakaev. Political motivation can increase the risk of torture to people in custody and the risk to Mr Zakaev is of an order of magnitude greater than that to the ordinary criminal". Mr Kovalov told me that he could not guarantee Mr Zakaev's security. He told me "that people accused of crimes are often subject to torture whilst in custody during preliminary interrogation. For Russian Federation citizens they are often but not always tortured. Chechens are almost always tortured". Mr Rybkin, the former Speaker to the Russian Parliament, told me "that he was very worried about Mr Zakaev coming to harm whilst in detention".

The second aspect of the evidence that I consider to be significant is the evidence of the witness Mr Doshuev. The circumstances in which Mr Doshuev came to give evidence were extraordinary. Last December he made a statement to the Russian Authorities implicating Mr Zakaev. His name, address and date of birth were deleted from the statement and the statement formed part of the Russian Government's case. However, he was called by the Defence who in normal circumstances would not have had any knowledge of his identity or whereabouts. In giving evidence before me, Mr Doshuev told me that he had been detained at a roadblock, held in a pit for 6 days, and subjected daily to torture in the form of beatings and electric shocks. He admitted making the statement but denied the truth of it. He told me that having made the statement, he was then told that he would have to repeat the allegations on television. This he did whilst he was still in custody. That interview was broadcast throughout

Russia, including Chechnya. He was detained for a further 2 months and released in February, when he realised that he could not return to Chechnya and he believed that he would be in danger if he remained in Russia. He therefore left the Russian Federation and made his home elsewhere, from where he contacted the Defence lawyers. After an adjournment to obtain instructions, Mr Doshuev was cross-examined. His evidence was unshaken. To rebut the evidence, Mr Krivorotov, the Public Prosecutor who took Mr Doshuev's statement, was called to give evidence. He said that Mr Doshuev had attended voluntarily, that there was no-one from the FSB present, that he saw no visible signs of injury to Mr Doshuev, and no complaint of ill-treatment was made. In addition, the Government drew my attention to a document which related to the roadblock number 27 in Grozny. It was here that Mr Doshuev said that he had been detained. There was no evidence that he had been detained and the Government rely on the absence of any such record to say that he was not in fact detained. If Mr Doshuev's evidence is correct, I am quite sure that no record of his detention would have been made or retained. In weighing the evidence of Mr Krivorotov and Mr Doshuev, I have applied the test that the Defence need to satisfy me that it is more likely than not that Mr Doshuev's evidence is correct.

Section 11(3)

This Section of the Extradition Act applies on an application to the High Court for habeas corpus. Mr Fitzgerald drew my attention to the case of Kakis where the court exercising its powers under Section 11 decided that it would be unjust or oppressive by reason of a lapse of time to prosecute Mr Kakis for murder. Mr Fitzgerald goes on to say 'that here there is an overwhelming and inevitable case in which the High Court were to find that it was unjust or oppressive to extradite'. With that in mind, he submits that it is appropriate to adopt the Kashamu argument and to say where the evidence is overwhelming and the finding inevitable that this jurisdiction should be exercised by a District Judge.

Conclusions

I come to the following conclusions based upon the evidence that I have received and for the reasons that I have outlined. I am satisfied that there has been a delay in bringing these proceedings of some 7 years. In view of the gravity of the allegations I do not consider that delay in itself is sufficient to warrant a finding of abuse of process. However, there are other factors to be added to that delay. In particular, there is the delay in the proper investigation of these alleged offences and the fact that Government officials and others were led to believe that there were no charges pending against the defendant. The initial request to Denmark included allegations in relation to the Moscow theatre siege and to the murder of Father Philip, on which it is now conceded there was no evidence whatsoever. When those factors are added together the inevitable conclusion is that it would now be unjust and oppressive to return Mr Zakaev to stand his trial in Russia.

I found that the evidence given by Mr De Vaal, Mr Rybakov and Mr Rybkin was truthful and accurate, and from their evidence I am satisfied that it is more likely than not that the motivation of the Government of the Russian Federation was and is to exclude Mr Zakaev from continuing to take part in the peace process and to discredit him as a moderate. I therefore find as a fact that the Russian Government are seeking extradition for purposes of prosecuting Mr Zakaev on account of his nationality and his political opinions. I take the view that Mr Zakaev is entitled to the benefit of the protection provided by Section 6(i)(c).

In making the assessment as to what might happen to Mr Zakaev if he were to be returned to Russia, I am attaching particular weight to the evidence given Mr Rybakov, Mr Cherkasov and Mr Rybkin. However, it is the evidence given by Mr Doshuev which I find the most persuasive. It was clear, unequivocal and unshaken by cross-examination. With some reluctance I have to come to the inevitable conclusion that if the Authorities are prepared to resort to torturing witnesses there is a substantial risk that Mr Zakaev would himself be subject to torture. I am satisfied that such punishment and detention would be by reason of his nationality and political opinions. I therefore believe that Mr Zakaev is entitled to the benefit under Section 6(i)(d) and should not be returned to face trial in the Russian Federation.

I was also asked to consider discharging Mr Zakaev on the basis that there was an overwhelming and inevitable case in which the High Court would find it would be unjust or oppressive to extradite Mr Zakaev. This provision in Section 11(3) of the Extradition Act is a jurisdiction exercised by the High Court. It has been submitted to me that by an extension of the principles in *Kashamu* it would be open to this Court to apply that provision. Whilst I have some sympathy with the submission, it seems to me that in any case where there was overwhelming evidence and an inevitable conclusion, it would in almost every case (as in this case) give rise to grounds for discharging the defendant under Section 6. I therefore decline to rely upon Section 11 for this decision.

I am therefore discharging the defendant.

JUDGE T.WORKMAN
Senior District Judge
13 November 2003