

NATIONAL COURT OF ASYLUM

No.18031582

FRENCH REPUBLIC

Mr. Mukhtar ABLYAZOV

**IN THE NAME OF FRENCH
PEOPLE**

Mr. Beaufays
President

The National Court of Asylum
(3rd Section, 2nd Chamber)

Hearing of July 29, 2020

Reading of September 29, 2020

In view of the following proceedings:

Through an appeal and three briefs, registered on July 5, 2018, February 17, 2020, April 30, 2020 and June 15, 2020, Mr. Mukhtar ABLYAZOV, represented by Ms. Piquois, Ms. Tcholakian and Ms. Prosper, asks the Court:

1) To annul the decision of May 31, 2018, by which the Director General of the French Office for the Protection of Refugees and Stateless Persons (OFPRA) rejected his request for asylum, and recognize him as a refugee or, failing that, grant him the benefit of subsidiary protection;

2) To charge the OFPRA the sum of five thousand (€ 5,000) euros to be paid to M. ABLYAZOV in application of article 75, I of law no. 91-647 of July 10, 1991.

Mr. ABLYAZOV, of Kazakhstani nationality, born on May 16, 1963, states that:

he fears being exposed to persecution or serious harm from the Kazakhstani authorities if he returns to his country of origin because of his political opposition activities;

there are no serious reasons to believe that he was guilty of serious common law crimes within the meaning of Article 1, F, b) of the Geneva Convention as all legal proceedings concerning him were politically motivated; the brief on voluntary intervention is inadmissible.

Through two defense pleadings, recorded on February 3 and April 30, 2020, the OFPRA concludes that the appeal should be dismissed. It argues that:

the pleas raised by the applicant are unfounded, the political reasons for prosecution not being such as to call into question the adverse character of the fraud in which he is involved;

- There are serious reasons for believing that he was guilty of serious common law crimes within the meaning of Article 1, F, b) of the Geneva Convention.

Through a brief in intervention, recorded on May 13, 2020, Mr. Yerkin Tatishev, represented by Ms. Kay Gatjens and Ms. Agnes Laget, requests that the Court grant the conclusions of the briefs in defense of the OFPRA. He argues that:

- the intervention is admissible as it was justified by a sufficient interest in regard to the nature and the subject of the dispute brought before the Court, as a brother of the victim of the murder for which Mr. ABLYAZOV was sentenced to Kazakhstan; there are serious reasons to believe that Mr. ABLYAZOV has committed a serious common law crime within the meaning of Article 1, F, b) of the Geneva Convention as a result of this life sentence by the Kazakhstani courts for having ordered the murder of his brother, Erzhan Tatishev, in 2004.

Given:

- the contested decision;
- other documents in the case.

Given:

- the investigative measures taken on October 1, 2019, January 6, 2020, January 24, 2020 and June 24, 2020 in application of article R. 733-15 of the code on the entry of stay of foreigners and the right of asylum;
- the letter of March 9, 2020 sent by the President of the Court to the judicial authority on the basis of article L. 713-5 of the code on the entry and stay of foreigners and the right of asylum;
- the ordinance of June 17, 2020 establishing the closure of the investigation on July 10, 2020 in application of article R. 733-13 of the entry and stay of foreigners and the right of asylum.

Given:

- the Geneva convention of July 28, 1951 and the protocol signed in New York on January 31, 1967 relating to the status of refugees;
- the code on the entry and stay of foreigners and the right of asylum;
- French Law No. 91-647 of 10 July 1991.

The parties were regularly notified of the day of the hearing.

They were heard during the hearing, which was held behind closed doors, pronounced by decision of the president of the trial court, in application of article 733-1-1 of the code on the entry and stay of foreigners and the right of asylum:

- the report by Ms. Huebner, rapporteur;
- the explanations of Mr. ABLYAZOV, heard in Russian and assisted by Mrs. Shevaga and Mr. Barbier, sworn interpreters;
- the observations of Ms. Piquois and Ms. Tcholakian;
- and the observations of the representatives of the Director General of the OFPRA.

Through an additional instruction of July 29, 2020 ordered in application of Article R. 733-29 of the Code on the entry and stay of foreigners and the right of asylum, the president of the trial court invited the parties to produce observations on the documents sent to the Court after the closure of the investigation by the Advocate General at the Paris

Court of Appeals and the Minister of the Interior, registered on July 14 and 17, 2020, respectively.

The post-hearing submissions, recorded on July 30, 2020, was produced for Mr. ABLYAZOV in response to the further investigation order.

The post-hearing submissions, recorded on August 6, 2020, was produced by the Director General of the OFPRA in response to the further investigation order.

Whereas:

On the intervention of Mr. Tatishev:

1. Any person who can justify a sufficient interest with regard to the nature and subject of the dispute is permitted to bring an intervention before the asylum judge. Such an intervention, which is ancillary in nature, does not however have the effect of giving its author the status of party to the proceedings and cannot, therefore, confer on him a right to access the documents of the proceedings. In addition, the Court applies the general rule of procedure according to which the judgment of the main case cannot be delayed by an intervention.

2. By limiting himself to asserting that he is the brother of a deceased third party whom he presents as a former victim of the applicant as a result of a homicide for which the latter was convicted in his country of origin, Mr. Tatishev does not justify, in regard to the nature and the subject of the dispute between Mr. ABLYAZOV and the OFPRA, a sufficient interest likely to render him personally admissible to intervene.

On the asylum application:

3. Mr. ABLYAZOV, of Kazakhstani nationality, born on May 16, 1963 in Galkino, maintains that he fears being persecuted by the authorities of Kazakhstan for political reasons. He argues that in March 1998, he acquired the Turan Alem bank, the future BTA, in response to a call for tenders launched by the State as part of a privatization operation. A month later, President N. Nazarbayev appointed him Minister of Energy of Kazakhstan. After the fall of the government to which he belonged in October 1999, he refused a new government post, before publicly denouncing the corruption reigning within the Kazakhstani state apparatus for the benefit of the presidential clan. On November 18, 2001, he participated in the founding of an opposition movement called the "Democratic Choice of Kazakhstan (DVK)." In retaliation, he was arrested in March 2002 and sentenced to six years in prison for abuse of office, embezzlement and tax evasion in the exercise of his ministerial functions. The television channel and opposition newspapers he owned at the time were either closed or set on fire. While in detention, he ceded his BTA shares to his associate, Yerzhan Tatishev, to prevent the state from illegally appropriating them. At that time, he was the indirect owner of 75% of the bank's capital. He was released through presidential pardon in May 2003 as a result of international pressure after suffering ill-treatment in detention. He then moved to Moscow, where he continued his opposition activities by creating a Kazakhstani opposition headquarters in 2004 and by creating the opposition channel K+. In October 2004, he was the victim of an assassination attempt in Russian territory. In February 2005, President N. Nazarbayev offered him the post of chairman of the board of directors of the BTA bank, which became vacant after the accidental death, in December 2004, of his partner Mr. Tatishev. The proposal was conditional on the transfer to the State of 50% of the capital of the bank and the cessation of his political activities. He accepted this proposal to ensure his safety and took up his new

functions in May 2005, without, however, giving in to the pressures relating to the transfer of shares to the State and while continuing his opposition activities clandestinely. The pressure from President N. Nazarbayev to control the bank never ceased and then intensified. In January 2009, aware that his arrest was imminent, he decided to leave his country for refuge in London. On the following February 4, the BTA bank was nationalized. A month later, a criminal investigation was initiated against him and some of his subordinates for embezzlement of BTA funds by an organized group. At the same time, civil lawsuits were brought by the BTA bank in the UK courts. As part of these UK proceedings, a judgment dated August 21, 2009 issued an injunction to freeze his assets and disclose some of his property. In January 2011, he was notified of an "*Osman warning*" by the security services of the British police, informing him of the existence of a serious threat to his life and safety and the impossibility for the police to protect him. In July 2011, he was granted refugee status in the United Kingdom. After an attack and taking into account the numerous threats, he left the United Kingdom illegally. He then stayed between France and Italy, where his wife and children lived. In December 2011, his K+ television channel broadcast footage of a murderous police crackdown on strikers in Zhanaozen, Kazakhstan, sparking a national scandal followed by increased repression of the opposition. In February 2012, the High Court of London sentenced him by default to twenty-two months in prison for "contempt of court" on the grounds that he had not respected the injunction to decline his assets. On May 31, 2013, the Kazakhstani authorities convinced the Italian police to carry out a raid at the place of residence of his wife and daughter in Italy, believing that he was there. In his absence, they were apprehended and expelled to Kazakhstan under the escort of Kazakhstani diplomats, causing a political scandal at the highest level of the Italian state until their return to that country at the end of December under pressure from the Italian Minister for Foreign Affairs, Ms. Emma Bonino. On July 31, he was arrested by the French police and placed under extradition on the basis of two extradition requests from Ukraine and the Russian Federation for acts of fraud and organized group fraud, all in connection with the BTA bank. He was located by private detectives working on behalf of the Kazakhstani authorities, on the basis of information gathered by the former director of French internal intelligence, Mr. Squarcini. On January 8, 2014, the British authorities notified him of their intention to end his refugee status, a decision finally issued on October 23. On December 9, 2016, the State Council annulled the decree of September 17, 2015 through which the Prime Minister had granted his extradition to the Russian authorities, on the grounds that this extradition was requested for a political purpose. At the time of his release, General Dutbaev, senior officer of the Kazakhstani National Security Commission (KNB) which provided him with information relating to his security between 2005 and 2009, was arrested and faced criminal charges of high treason in Kazakhstan. On April 20, 2017, he announced the resurgence of the DCK political movement on social networks and called for the arrest of President N. Nazarbayev and the establishment of a parliamentary-type republic. Through a decision of July 13, 2017, Interpol withdrew Mr. ABLYAZOV from their red notice list, considering that there was a predominant political dimension to the criminal proceedings against him in Kazakhstan. On the following September 20, 2017, nine months after the annulment in France of the decree granting his extradition to the Russian authorities, he *was* sentenced in Kazakhstan to twenty years in prison for having ordered the murder of his former partner, Mr. Tatishev, in 2004, even though an investigation carried out at the time and Justice had concluded it was a hunting accident for which a third party, Mr. Tokmadi, had been definitively convicted for involuntary manslaughter for recklessness. This new decision came on the basis of the confession of Mr. Tokmadi himself who incriminates him after having suffered acts of torture in detention.

On the country in respect to which the fears are examined:

4. While the applicant spontaneously reported that he had held a Central African passport, which could not be examined by the Office or by the Court, the issuance of a passport is not in itself a sufficient element to establish that the person concerned actually has the rights and obligations attached to the possession of the nationality of the country of issue. As Mr. ABLYAZOV has declared that this travel document had been issued to him discreetly by the Central African authorities without any procedure for recognizing the nationality of that country, this travel document could not be sufficient to establish that he could benefit from this nationality, especially since this travel document was not issued in his name. It is therefore necessary to examine his fears with regard to Kazakhstan, his only country of nationality.

On the existence of a well-founded fear of persecution for a political reason:

5. Under the terms of Article 1, A, 2 of the Geneva Convention of July 28, 1951 and of the protocol signed in New York on January 31, 1967, any person must be considered a refugee who *"fears with reason of being persecuted due to his race, religion, nationality, membership of a certain social group or political opinions, is outside the country of which he is a national and who cannot, or, because of this fear, does not want to claim the protection of this country"*. The provisions of article L. 723-4 of the code on the entry and stay of foreigners and on the right of asylum relating to the procedural guarantees recognized for persons seeking protection from France provide that the fact that the applicant has already been the subject of persecution or serious harm or direct threats of such persecution or harm constitutes a serious indication of the fundamental character of the applicant's fears of being persecuted or of the real risk of suffering serious harm, unless there are precise and circumstantial elements which suggest that these persecutions or these serious attacks will not recur.

6. At the date of this decision, numerous pieces of evidence of the case file make it possible to establish that Mr. ABLYAZOV is a political opponent to the Kazakhstani regime currently in power. These same elements also make it possible to establish that he has already been the subject of persecution and threats of persecution for the same political reason by the authorities in power in his country and that he may well fear being persecuted again in the event of his return to Kazakhstan.

7. It appears from the documents in the case file that Mr. ABLYAZOV has already been persecuted by the authorities of his country for political reasons. Thus, his sentence in 2002 to six years in prison for "abuse of power, embezzlement and tax evasion" followed by his pardon decided by President N. Nazarbaiev, after one year of imprisonment and ill-treatment, present all the characteristics of a common law conviction for political reasons, a very widespread and practical mode of persecution against political opponents in the republics of the former Soviet Union. The available public documentation makes it possible to establish that the Kazakhstani judicial and repressive apparatus is an instrument in the hands of power. Thus, the report of the American State Department on the situation of human rights in Kazakhstan in 2013, not denied by more recent sources, notes that prosecutors almost play a role of judge and that corruption is manifest at all stages of legal proceedings. According to this report, although judges are well paid, they solicit bribes of yin in exchange for biased decisions in the majority of criminal cases. The same report published in 2020

points to significant obstacles to the independence of the judiciary. *Freedom House's annual report, Freedom in the World 2020 - Kazakhstan*, published in March 2020, states that the judiciary is subordinate to the executive power insofar as the president appoints or designates judges directly upon the proposal of the Supreme Judicial Council, also appointed by the president himself. Judges are subject to political pressure there and the entire judiciary is affected by corruption. Thus, the applicant's conviction in 2002 and then his pardon a year later is part of this mode of operation known to the Kazakhstani judicial system, and must be regarded as the message of a political disgrace from a former ally and then a pardon addressed as a warning from President N. Nazarbaiev to the person who had defied him by resigning from his functions as minister and participated in the creation, on November 18, 2001, of the opposition movement called the "Democratic Choice of Kazakhstan" (DVK). Thus, there are serious reasons to believe that this sentence had a political overtones and constituted persecution.

8. Next, while the complainant's allegations of attempted assassinations targeting him while living in Moscow are not supported by tangible evidence, it has been established that in January 2011, the British authorities informed him of the existence of threats to his safety and their inability to protect him. While the origin of these threats is not specified by the British authorities, there are serious reasons to believe that they came from Kazakhstan. Indeed, it is apparent from many pieces of evidence in the public information available, in particular an article of *Human Rights Watch* of July 22, 2013 or the appeal addressed to the Italian authorities by three human rights experts of the United Nations to assure their return to Italy, that the conditions under which the applicant's wife and one of the applicant's daughters were the subject to in 2013 of a deportation order by the Italian authorities to Kazakhstan with means, in particular by air, planned and provided by the Kazakhstani authorities, are akin to an attempted extrajudicial arrest which was intended to put pressure on the applicant and this motive was political. Moreover, following what had become a political scandal, Italy has ensured the return of these two people to its soil and recognized them as refugees. This case illustrates what independent observers regularly denounce. Arbitrary arrests, extrajudicial detentions and the torture of opponents in prison are, in fact, methods commonly practiced by the Kazakhstani authorities. The United Nations Human Rights Council was thus led to denounce multiple violations of fundamental rights in the case of Iskander Yerimbetov, the brother of Botagoz Jardemalie, a former employee of the BTA who became the applicant's lawyer and who obtained refugee status in Belgium. From this opinion adopted by the Council's working group on arbitrary detention, published on December 7, 2018, it follows that the seriousness of the violations observed qualifies his arrest and detention as arbitrary. It also emerges from a February 15, 2018 *Human Rights Watch* article entitled "*Kazakhstan: businessman alleges torture*" that the latter allegedly reported having been subjected to acts of torture in detention, for which the organization called for the opening of an investigation. Such cases of torture, intended to coerce witnesses or suspects in political affairs to confessions, are also recorded in the reports by the American State Department, including those public for the last three years in 2017, 2018 and 2019 or even by the non-governmental organization (NGO) *Kazakhstan International Bureau for Human Rights and Rule of Law* (KIBHR) which registered one hundred and fifteen complaints of torture during the first six months of 2016, of which 75% of cases took place in the

investigation phase. *Amnesty International's* March 2016 report, "*Dead end justice, impunity for torture in Kazakhstan,*" also cites cases of torture in criminal proceedings. The authors of these various reports observe that the complaints of torture against representatives of the authorities very rarely lead to prosecution and most plaintiffs withdraw their evidence. *Human Rights Watch's* latest annual report published in 2020 indicates that out of one hundred and nineteen complaints of torture recorded during the first half of 2019, only thirteen have been followed up with legal proceedings and reports the concern of human rights activists in regard to the withdrawal of complaints from numerous victims a few months after a video scandal showing prison guards torturing detainees. With regard specifically to other relatives of the applicant, the public documentation available shows numerous cases of persecution. Thus, the Polish authorities refused the extradition of the opponent and deputy leader of the Alga party, Muratbek Ketebayev, and demanded his removal from the Interpol red notice list on the grounds that the charges were politically motivated. The British extradition judge refused the extradition of Igor Kononko, an associate of Mr. ABLYAZOV accused of having participated in financial embezzlement in the BTA case, also on the grounds that it was politically motivated. In response to an Interpol red notice, his brother-in-law, Syrym Shalabayev, was recognized as a refugee in February 2016 by the Lithuanian authorities. His wife and daughter were recognized as refugees in Italy after the political scandal of their deportation to Kazakhstan. His former bodyguard, Alexander Pavlov, was finally protected from extradition and recognized as a refugee by a decision of the Spanish Supreme Court after a procedure strongly affected by pressure attempts, as the Spanish newspaper *El Pais* described in an article published on March 14, 2014. Finally, his former employee and lawyer, Ms. Jardemalie, already mentioned in this paragraph, was also the subject of an attempted kidnapping in Belgium even though she already enjoyed the status of a refugee there.

9. Finally, there are very worrying indications of the risk of persecution, the unsuccessful attempts to extradite the person concerned to Ukraine and the Russian Federation presented to the French authorities, as well as the dissemination of an international arrest warrant and red notices to Interpol. These procedures, which were based on prosecutions brought on charges of financial embezzlement in the management of the BTA bank, have, in fact, transpired to be indirect maneuvers by the Kazakhstani authorities whose real political goal has finally been established in two parallel, reliable and independent procedures: On the one hand, by the Council of State in its decision of December 9, 2016 and, on the other hand, by Interpol in its decision of July 13, 2017. In this latter decision, Interpol found that it was established that, despite the common law character of the prosecutions founding the red notices relating to the applicant in the BTA affair, the true motive of the Kazakhstani authorities presented a predominant political dimension. However, such a misuse of the criminal law and of the fundamental instruments of international criminal cooperation for a mainly political purpose constitutes a serious attack on the principle of mutual trust which is at the very heart of cooperation between States to fight against impunity and constitutes a form of persecution against the person who fell victim of such maneuvers. This serious attack establishes that Kazakhstan is ready to divert powerful legal means, including in its international relations, in order to suppress their political opponent. This worrying reality of the methods prevailing in Kazakhstan had moreover led the United Nations Special Rapporteur for torture, Nils Melzer, on December 7, 2016, to call on the French authorities to refrain from extraditing the applicant to Russia, in view of the risks that he then would be extradited to Kazakhstan, where there were, according to him, serious grounds for

believing that he would be exposed to a risk of torture there. The fact that the European Union has concluded a partnership and enhanced cooperation agreement with Kazakhstan which enters into force on March 1, 2020 and contains, in particular, a section devoted to judicial cooperation, does not in itself call into question the foregoing observations on the proof of the political motive of the proceedings instituted against the applicant by Kazakhstan in the BTA case.

10. The evidence presented to the Court also makes it possible to establish that the political engagement of Mr. ABLYAZOV is still relevant and that his movement is banned in Kazakhstan. After his release in France, in December 2016, he notably reactivated the DCK party on social networks. On March 13, 2018, this political party was qualified as an "*extremist organization inciting national discord*" by a court in the capital of Kazakhstan. According to an *Amnesty International* document dated March 27, 2018 (AU 63/18, EUR 57/8122/2018, Kazakhstan), this decision was issued on the basis of "anti-extremism" legislation formulated in vague terms and a representative of the Attorney General's office reportedly declaring that this party "*maintained a negative image of the authorities and aroused attitudes of protest*" and announced that any support given to this opposition party, including in the form of comments on social networks, would be considered an offense, punishable by criminal prosecution under anti-extremism legislation. However, this type of criminal offense constitutes a political offense by its nature and many cases of arrests and prosecutions of DCK activists have subsequently been recorded by international observers and human rights organizations such as *Human Rights Watch* in its world report published in 2019. The resignation of President N. Nazarbaiev in March 2019 does not allow this appreciation to be changed, as his successor, President K.J. Tokaiev, places himself in strict continuity and insofar as President N. Nazarbaiev maintained the post of the head of the powerful Security Council and received the title of "Father of the Nation", guaranteeing him judicial immunity for life, after an AFP article published in *Le Point* entitled "*Presidential election in Kazakhstan, without Nazarbayev*", June 8, 2019.

11. Thus, it follows from all of the above that Mr. ABLYAZOV rightly fears, within the meaning of the aforementioned stipulations of the Geneva Convention, being persecuted in the event of return to his country because of his political opposition commitment.

On the conclusions related to the application of an exclusion clause

12. Pursuant to section F of Article 1 of the Geneva Convention: "*The provisions of this convention will not be applicable to persons for whom there are serious reasons to believe: a) that they have committed a crime against peace, a war crime or a crime against humanity, in the sense of the international instruments drawn up to provide for provisions relating to these crimes; that they have committed a serious common law crime outside the host country before being admitted there as refugees; c) that they are guilty of acts contrary to the purposes and principles of the United Nations*". Pursuant to the second paragraph of Article L. 711-3 of the code of entry and residence of foreigners and the right of asylum, "*The same section F also applies to persons who are the instigators or the accomplices of crimes or acts mentioned in said section or which are personally implied therein*".

13. Pursuant to the guiding principles of the United Nations High Commissioner for Refugees (UNHCR) on the application of exclusion clauses published on September 4, 2003, the primary purpose of exclusion clauses is to deprive those guilty of abominable acts and serious common law crimes of the international protection granted to refugees in order to protect the integrity of the institution of asylum. However, these same guiding principles remind us that, given the potentially serious consequences of exclusion, it is important to apply them with great caution and only after full consideration of the specific circumstances of each case.

14. With regard to the definition of a serious crime under common law and according to these same guiding principles, this cause for exclusion concerns people whose past crimes under another jurisdiction are particularly serious in view of several factors, such as extent of the damage inflicted on the natural person, or on property, and the type of criminal sentence that he is facing within the legal system concerned. In its decision no. 2003485 DC of December 4, 2003 concerning law no. 52-893 of July 25, 1952 relating to the right of asylum, the Constitutional Council judged that the gravity of the crime likely to exclude a person from the benefit of international protection must be assessed in the light of the principles of French criminal law, while the European Asylum Support Office (EASO) states in its legal analysis "*Exclusion: articles 12 and 17 of the Qualification Directive (2011/95/EU)*" published in January 2016, that "serious crime" should be understood as a crime of major importance, a serious punishable act or another crime considered particularly serious, committed deliberately and subject to criminal prosecution in most legal systems.

15. Finally in its "*Practical Guide*" on exclusion, published in January 2017, EASO recalls that the level of proof of "*serious reasons for believing*" that a person has committed a serious common law crime is higher than that used to assess the risk when determining the need for international protection. More specifically in regard to persons who have been the subject of prosecution or a criminal conviction in their country of origin, the guide recalls that it is imperative to verify that these legal prosecutions are legitimate and whether the applicant has or has not, for example, been prosecuted or convicted on political grounds. The guide also recalls that a given behavior can be considered a criminal act in the country of origin of the applicant but not in the receiving State and that a criminal conviction does not automatically mean that the exclusion clauses must be applied.

Regarding the accusations of massive fraud and embezzlement imputed to Mr. ABLYAZOV:

16. The OFPRA finds that the applicant's conviction and punishment of twenty-two months' imprisonment, confirmed on appeal by the British civil courts for contempt of court and the order to repay the cumulative sum of \$4.6 billion to the BTA bank in the framework of these civil proceedings make it possible to consider that there are serious reasons to believe that he was guilty in his country of origin of serious crimes of common law within the meaning of article 1, F, b) of the aforementioned Geneva Convention. The Office observes that an economic crime of such scale and the grand financial frauds noted by these decisions make it possible to sufficiently establish that the applicant committed a serious crime of common law in his country

before his flight in January 2009. The Office also considers that attempts by the Kazakhstani authorities to interfere with the British judiciary, established and recognized by the British judges themselves, are not sufficient to call into question the proven nature of the grand fraud committed by the applicant.

17. However, by limiting itself to relying on the civil decisions of the British courts to justify the exclusion of the applicant, the OFPRA does not provide sufficient evidence to establish the existence of serious reasons for believing that Mr. ABLYAZOV could be the perpetrator of a serious crime of common law in Kazakhstan before 2009, of the nature of those which are likely to come within the scope of article 1, F, b) of the Geneva convention cited above.

18. Indeed and first, the conviction of Mr. ABLYAZOV and his punishment of twenty-two months in prison for contempt of court, by a British court, is not likely to come within the scope of the definition of a serious common crime within the meaning and for the application of the exclusion clause provided for by Article 1, F, b) of the aforementioned Geneva Convention, as this conviction is not founded on any serious injury to persons or property but rather is the penal sanction of a procedural failure of the applicant in the framework of the civil actions he was subject to in the United Kingdom.

19. Secondly, the mere reference to the British civil decisions as well as to the decision of October 23, 2014 of the British judge to exclude Mr. ABLYAZOV from the status of refugee, which do not have *res judicata vis-a-vis* the French administrative and judicial authorities responsible for asylum, is not sufficient to establish the existence of serious reasons to believe that Mr. ABLYAZOV is the author of a serious crime of common law committed in his country of origin before 2009. If the Office observes that the classification of serious crime of common law could apply to important economic crimes such as embezzlement of funds and cases of massive and systematic economic fraud having generated heavy losses both for the State of origin and for individuals and private law companies, this qualification alone is not sufficient to establish serious reasons for believing that such crimes have been committed. It is also necessary that there exist sufficiently tangible, objective, impartial and serious pieces of evidence making it possible to assess and establish in particular the threshold of gravity of such crimes, with regard to the damage caused to third parties or to the economy of a country. However, on the contrary, there are serious reasons to believe that the civil and criminal proceedings brought against Mr. ABLYAZOV under cover of the action of the BTA in Kazakhstan or in other foreign jurisdictions are, in fact, motivated by political aim.

20. Thus, in third place, it results from the aforementioned decisions of the Council of State and the competent authorities of Interpol that the political goal of the criminal proceedings initiated in the Russian Federation and Ukraine at the initiative of the BTA bank is established. More generally, and in line with the principles cited above in point 15, recalled by EASO in terms of the standard of proof, the asylum authorities cannot logically rely on criminal proceedings based on a political motive for, in the first place, to establish fears of political persecution, then, secondly, to base oneself on these same criminal proceedings to exclude the

person who is the victim of such persecution from the status of refugee. It thus emerges in particular from the aforementioned Interpol decision, which annuls the red notice issued against the applicant, that this red notice was based on an arrest warrant relating to criminal proceedings opened on March 2, 2009 before the Kazakhstani courts against Mr. ABLYAZOV and more than twenty people for the large-scale misappropriation of BTA funds by an organized group. At the end of these proceedings, Mr. ABLYAZOV was reportedly sentenced on June 7, 2017 to twenty years' imprisonment for breach of trust by the Kazakhstani courts. Thus, according to Interpol, the criminal proceedings initiated in Kazakhstan in 2009 in the context of the BTA affair are based on a political motive. Consequently, all of the facts and accusations imputed to Mr. ABLYAZOV concerning alleged massive fraud committed to the prejudice of the BTA bank come from or are based on criminal proceedings opened in Kazakhstan or in the Russian Federation, the political motive of which was established in France by the Council of State and by Interpol and therefore emanate from the agent of persecution. This modus operandi is moreover in line with the findings of the *Freedom House* organization on the functioning of this former Soviet republic, described in its report "*Nations in Transit 2012: Kazakhstan*" and not contradicted by more recent sources. It portrays a political system where personal loyalty to President N. Nazarbaiev is fundamental, access to nominations and resources is linked to Loyalty to the President, and the consequence of this oligarchic system is systemic corruption and complete confusion between political and economic spheres. The ruling elites are guided by rent seeking through the ownership, control and distribution of enterprises and economic resources. In such post-Soviet economies, hostile takeovers (*reiderstvo*) of a business by non-commercial means are commonplace, including forced bankruptcy, tax investigations, actual threats or criminal prosecutions, or the use of violence, especially when this company provides financial support to opposition political parties or activities. The expert on this point, Professor David Lewis, an internationally recognized specialist in the former Soviet socialist republics, who notably worked for the *International Crisis Group* as Asia director, produced both before the Council of State and before the British courts and whose independent and objective nature is not seriously contested by the OFPRA, recalls that these legal actions are rather based on political decisions than on genuine violations of the law or acts of corruption in an oligarchic system or the opacity of laws, and the deliberate lack of transparency in regulatory and corporate governance systems make many businessmen vulnerable when investigating their activities. This use of the law as a weapon against opposition leaders has long been, according to this expert, the preferred mode of operation of the Kazakhstani regime, in order to maintain a semblance of legality and lessen criticism from the international community.

21. Thus, considering the pieces of evidence on which the Court is able to rely, there is no sufficiently objective evidence to determine the circumstances and the real reasons behind the nationalization of the BTA by the clan of President N. Nazarbayev in 2009, when the applicant gave a particularly detailed testimony of the political process which led to this nationalization, which accredits the hypothesis of deliberate political pressure in order to take possession of the bank. No public evidence available allows us to rule out the hypothesis that this operation was purely motivated by the desire to regain political and economic control of the banking sector, which remained until then an area of relative freedom to attract a new generation

of entrepreneurs equipped with financial skills, rather than the displayed desire to save a bank in difficulty, in a context where all Kazakhstani banks had suffered from the financial crisis of 2008. No reliable, objective and independent source of the Kazakhstani authorities can thus establish, at the date of this decision, that the BTA was nationalized in 2009 as part of a rescue operation after massive frauds for which responsibility could be attributed to the applicant.

22. Fourth and lastly, there are also precise, serious and consistent pieces of evidence which highlight the clear attempts by external agents to exert influence on the asylum authorities and to coerce them to issue decisions unfavourable to Mr. ABLYAZOV. The British judicial authorities, in holding that attempts at interference by third parties before them had no influence on their decisions, have therefore admitted the existence of such interference. The extradition proceedings carried out against Mr. ABLYAZOV by the Russian Federation and Ukraine under cover of fraud committed to the prejudice of BTA or its clients have made it possible to establish that these states were acting in conjunction with the Kazakhstani authorities with a view to handing over Mr. ABLYAZOV to them. This Court of Law also deplors overt attempts by third parties to influence the meaning of its decision. The Court, to disclose only the most flagrant facts, was in particular the addressee of an envelope deposited anonymously at the registry of the Court and presented the envelope to the general direction of the French national police force, containing documents relating to alleged fraud on a large scale committed by the Applicant. In response to an investigative measure ordered by the Court, the Minister of the Interior declared that this document hadn't been issued by his services and that they were not its authors.

23. Thus, in view of the strict conditions for assessing the evidence necessary to establish serious reasons for believing that a person threatened with political persecution in his country must be excluded from the protection conferred by the Geneva Convention, neither the evidence presented to the asylum judge nor the investigation do not, at the date of this decision, establish that there are serious reasons to believe that Mr. ABLYAZOV has committed in Kazakhstan financial crimes, grand fraud, breach of trust or embezzlement of such a gravity as to be capable of being qualified as a serious crime of common law within the meaning and for the application of Article 1, F, b) of the Geneva Convention.

Regarding the conviction of Mr. ABLYAZOV in Kazakhstan for complicity in homicide:

24. A third party brought to the attention of the Court and the OFPRA, in the course of the proceedings, evidence relating to the request for extradition presented by the Kazakhstani authorities to France, based on the applicant's criminal conviction by the Kazakhstani courts for having ordered the murder of Yerzhan Tatishev, his former associate. In response to an investigative measure of the Court, the Paris prosecutor's office confirmed the existence and content of this extradition procedure.

25. Although the National Court of Asylum, in regard to its office, is not bound by the opinion issued by the judicial judge in response to a request for extradition against an asylum seeker, it is nevertheless able to take into account all the pieces of evidence submitted to it, including those appearing in the extradition case file if it is produced before said court. In this

regard, the conviction by a criminal court in the country of origin for complicity in murder constitutes, in principle, sufficient evidence to establish that there are serious reasons for believing that the perpetrator has committed a serious crime of common law within the meaning and for the application of article 1, F, b) of the Geneva Convention.

26. However, and for the same reasons as those set out in paragraphs 12 to 15 above, it is the responsibility of the Court, in excluding from conventional protection a person who has been the subject of prosecution or a criminal conviction in his country of origin, to verify that these proceedings were legitimate and whether the applicant was not prosecuted or convicted for political reasons.

27. In the first place, many pieces of evidence of the case file and the investigation described above, establish and illustrate the control of the Kazakhstani authorities over the judicial apparatus, the existence of a widespread practice in this country of using common legal proceedings against political opponents, and finally the political motivations which contaminate the various procedures and prosecutions brought against not only the applicant but many members of his family and his political or professional entourage. These circumstances constitute a first serious indication of the lack of credibility of the recent criminal proceedings initiated against Mr. ABLYAZOV on the count of complicity in the murder of a person who died by homicide in 2004 and whose author was definitively convicted in September 2007 for manslaughter.

28. Second, this recent criminal conviction is part of a chronology of events which also casts serious doubt on the credibility of these prosecutions, while repeated interference in the British proceedings and then before the Court of Law, demonstrate the existence of a desire to affect the normal course of justice. Indeed, these criminal proceedings were only initiated after December 2016, when France definitively rejected the request for extradition from the Russian authorities. The reopening of this criminal case, although judged definitively over ten years ago, led the Kazakhstani courts to sentence Mr. ABLYAZOV to life imprisonment on November 27, 2018 by the court of first instance, a conviction which was confirmed on appeal on January 10, 2019, i.e. less than two months after the first conviction. Mr. ABLYAZOV, sentenced by default in these two judgments, specifies that he had never been informed of these proceedings and that he has never appealed against the judgment of November 27, 2018 as he never had any knowledge of them.

29. Third, the conditions under which these criminal proceedings have been reopened in Kazakhstan must be analyzed in the light of international standards which govern the fundamental rules of criminal procedure and the right to a fair trial which ensues therefrom. However, in the light of these fundamental principles, the documents in the extradition file available to the Court do not make it possible to establish the credibility of the conditions under which a person definitively convicted on September 3, 2007 for the manslaughter of a third party could then ten years later confess to the murder of this same third party and to designate accomplices. It also emerges from the investigation that this self-incriminating testimony from Mr. Tokmadi was obtained when the person concerned had been arrested for other criminal acts

unrelated to the case of the homicide of Mr. Tatishev.

30. Finally, the Court recalled in point 8 of this decision the frequency of recourse to torture and ill-treatment in extracting confessions in detention in Kazakhstan, in particular in political trials. Various sources independent of the Kazakhstani authorities, such as a written statement by members of the Parliamentary Assembly of the Council of Europe on October 11, 2017, a parliamentary question on November 17, 2017 addressed to the European Commission, or a report from *Freedom House*, "Kazakhstan holds citizens hostage in pursuit of regime opponent" of March 12, 2018, report that there are serious suspicions that the confession of Mr. Tokmadi in the murder case of Mr. Tatishev could have been obtained under torture.

31. Thus, in view of the strict conditions for assessing the elements necessary for establishing serious reasons for believing that a person threatened with political persecution in his country must be excluded from protection for having committed a serious common law crime there before his flight, neither the information presented to the asylum judge nor the investigation make it possible, on the date of this judgment, to establish that there are serious reasons to believe that Mr. ABLYAZOV was the accomplice of a murder committed in 2004 in Kazakhstan, nor, in particular, do the only documents and criminal judgments issued by the Kazakhstani authorities appearing in their extradition request. The Court notes in this regard that OFPRA expressly maintained orally at the hearing that it did not intend to rely on this criminal conviction for complicity in murder to support the exclusion of the applicant from the benefit of asylum.

On the application of article 75-I of the law of July 10. 1991:

32. Under the terms of article 75, I of the law of 10 July 1991: "*in all instances, the judge condemns the party liable for the costs or, failing that, the losing party, to pay the other party the sum the court determines, in respect of the costs incurred (...)*" In the circumstances of this case, there is no need to charge the OFPRA the sum requested by Mr. ABLYAZOV for the costs incurred by him not included in the expenses.

THIS COURT DECIDES:

Article 1: To annul the decision of the Director General of the OFPRA of May 31, 2018.

Article 2 : To grant to Mr. Mukhtar ABLYAZOV, the refugee status.

Article 3 : To dismiss the remainder of the conclusions of the appeal.

Article 4: To notify Mr. Mukhtar ABLYAZOV and to the Director

General of the OFPRA of this decision.

Deliberated after the hearing of July 29, 2020 presided over by:

- Mr. Beaufays, president;
- Mr. Lagrange, person nominated by the United Nations High Commissioner for refugees;
- Mr. Fournier, person appointed by the vice-president of the Council of State.

Read in open session on September 29, 2020.

The President:

The Clerk of the Chamber:

[Seal: National Court of Asylum]

F. Beaufays

C. Piacibello

The Republic requests and orders the Minister of the Interior as far as he is concerned or all bailiffs to this request with regard to common law remedies against private parties, to provide for the execution of this decision.

33. If you believe that you must appeal this decision in cassation, your appeal must be presented by the ministry of a lawyer to the Council of State and to the Court of Cassation within a period of two months, before the Council of State. The period mentioned above is increased by one month for the persons who live in Guadeloupe, Guyana, Martinique, La Reunion, Saint-Barthelemy, Saint-Martin, Mayotte, Saint-Pierre-et-Miquelon, in French Polynesia, in the Wallis and Futuna Islands, in New Caledonia and in the Southern and Antarctic Lands of France and two months for persons living abroad