

THE FRENCH *CONSEIL D'ETAT* (COUNCIL OF STATE)
in a final decision

N° 394399, 400239

FRENCH REPUBLIC

Mr ABLYAZOV

IN THE NAME OF THE PEOPLE

Mr Clement Malverti
Rapporteur

The *Conseil d'Etat* in a final decision
(Claims Department)

Ms Beatrice Bourgeois-Machureau
Public rapporteur

On the report of the 2nd Chamber
of the Claims Department

Session of December 9, 2016

Reading on December 9, 2016

Considering the following procedures:

1° Under ref. N°394399, Mr. Ablyazov filed a summary application, a supplementary brief, a reply brief and three new briefs on November 4, 2015, February 4, May 10, July 5, July 7 and October 21, 2016, requesting that the *Conseil d'Etat* annul a September 17, 2015 decree granting his extradition to the Russian authorities, on the grounds of *ultra vires*.

It sustains that

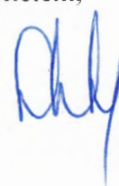
- the contested decree is vitiated for want of form in that the ampliation which is given to it is not signed by the Prime Minister or by the Minister of Justice, and it has not been established that the original act was signed.

- the contested decree is lacking in comprehension of the specialty principle and the favorable opinion of the examining chamber of the Court of Appeal of Lyon on October 24, 2014;

-the contested decree is vitiated by an error of law and an error of legal qualification when extradition is request for a political aim, in misunderstanding the stipulations of paragraph 2 of Article 3 of the European Extradition Convention of December 13, 1957;

- the contested decree was taken in the misunderstanding of Article 6 of the European Convention for the protection of the fundamental human rights and freedom of December 13, 1957 and the 7° of Article 696-4 of the French Code of Criminal Procedure, in that there are substantial ground to fear that he will not benefit from a fair trial once extradited to Russia;

- the contested decree was taken in the misunderstanding of Articles 2 and 3 of the European Convention for the protection of the fundamental human rights and freedom, of Article 3 of the Convention against torture and other penalties of cruel, inhuman or degrading treatment and Article 3 and 15 of the European Extradition Convention, in that, on the one hand, there are substantial reasons to think that, once extradited to Russia, he will be subject to treatment banned by these texts and, on the other hand, that the guarantees given by the Russian authorities in the matter are insufficient;



- the contested decree was taken in the misunderstanding of Article 3 of the European Convention for the protection of the fundamental human rights and freedom, of Article 3 of the Convention against torture and other penalties of cruel, inhuman or degrading treatment, of Article 18 and 19 of the Charter for fundamental rights of the European Union and Article 33 of the Geneva Convention relative to the status of refugees, in that there are substantial grounds of refoulement to Kazakhstan, the country in which he could be subject to torture and other degrading treatment; that, to rule on these grounds, the *Conseil d'Etat* shall refer to the European Union's Court of Justice a prejudicial question relative to the respective scope of protection from which a refugee or an asylum seeker may benefit in a member State and the protection conferred by Article 3 of the European Convention for the protection of the fundamental human rights and freedom;

- the contested decree is vitiated by an error of law and a violation of the principle of the separation of powers in that it provides that the Russian authorities shall not extradite him to third State without the authorization of the competent French legal authorities, even though in the matter of extradition, the executive is solely competent to take a decision relative to the execution of the specialty principle;

- the contested decree was taken in the misunderstanding of the principle of the ban on inhuman or degrading penalties or treatment taking into account the insufficient character of the guarantee given by Russia that no unconsented work penalty would be given and executed against him;

- the contested decree was taken in the misunderstanding of the second paragraph of Article 1 of the Reservations issued by France and Article 8 of the European Convention for the protection of the fundamental human rights and freedom in that his extradition would have the effect of infringing disproportionately on the rights in respect to his private and family life;

- the contested decree was taken on the grounds of a request which does not meet the requirements of Article 12 of the European Extradition Convention and Article 696-8 of the French Code of Criminal Procedure, in the translation of the documents of the procedure present numerous imperfections;

- the contested decree was taken in the misunderstanding of Article 10 of the European Extradition Convention and the 5° of Article 696-4 of the French Code of Criminal Procedure in that certain facts for which extradition was granted are prescribed.

In four defense briefs registered on April 8, June 8, July 29 and November 18, 2016, the Minister of Justice filed a rejection of the petition. He sustained that the grounds raised by the applicant were unfounded.

2° Under ref. N°400239, Mr Ablyazov filed an application, a supplementary brief and a new brief on May 30, July 7 and October 21, 2016, requesting that the *Conseil d'Etat*:

1°) annul the Prime Minister's implied refusal to withdraw the decree of September 17, 2015, granting his extradition to the Russian authorities on the grounds of *ultra vires*;



2°) order the State to pay the sum of 5,000 Euros pursuant to Article L. 761-1 of the French Code of Administrative Justice

It is sustained that:

- the decision refusing to withdraw the decree of September 17, 2015 granting his extradition to the Russian authorities misunderstands Article 6 of the European Convention for the protection of the fundamental human rights and freedom, the reserves issued by France at the signing of the European Extradition Convention of December 13, 1957 and the 7° of Article 696-4 of the French Code of Criminal Procedure, in that, taking into account the conversion of the order by the Constitutional Court of the Russian Federation on July 14, 2015 and the constitutional revision of December 14, 2015, there is substantial cause to fear that he shall not benefit from a fair trial once extradited to Russia;

- the contested decision misunderstands Article 2 and 3 of the European Convention for the protection of the fundamental human rights and freedom and Article 3 of the Convention against torture and other penalties of cruel, inhuman or degrading treatment, in that, on the one hand, there are substantial reasons to think that, once extradited to Russia, he will be subject to treatment banned by these texts and, on the other hand, that the guarantees given by the Russian authorities in the matter are insufficient;

- the contested decision misunderstands the stipulations of paragraph 2 of Article 3 of the European Extradition Convention of December 13, 1957, in that there are substantial reasons to fear that his situation risks to be worsened with the consideration of political opinions.

In two defense briefs registered on, July 29 and November 18, 2016, the Minister of Justice filed a rejection of the petition. He sustained that the grounds raised by the applicant were unfounded.

Given the other supporting documents provided;

Considering :

- The Constitution, including its Preamble;
- The European Convention for the Protection of Human Rights and Fundamental Freedoms;
- The European Convention on Extradition of December 13, 1957;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984;
- The Criminal Code;
- The Code of Criminal Procedure;
- The Code of Administrative Justice;

After hearing in open session:



- A report by Mr. Clément Malverti , “auditeur”,

- Conclusions by Ms Béatrice Bourgeois-Machureau, public rapporteur;

and counsel for Mr Abylazov from the Waquet, Farge, Hazan, law firm who spoke before and after the conclusions.

1. Whereas, by decree of September 17, 2015, the Prime Minister granted to the Russian authorities the extradition of Mr. Abylazov., a Kazakh national, on the basis of an order dated October 7, 2010 by a judge of the Tver District Court demanding his detention in connection with an investigation for acts of fraud and breach of trust on a large scale in an organized group, laundering on a large scale in an organized group, with prior agreement, attempted *ultra vires* by a person in a management position in a trading company with serious consequences and large-scale subtraction by fraud and breach of trust, falsification of official documents with intention to grant a right or release from an obligation in order to conceal another crime; that the applications filed by Mr. Abylazov request the annulment for excess of power of such decree and implicit refusal to withdraw it; whereas it is necessary to combine those two applications in order to render a single decision;

2. Whereas, by virtue of a fundamental principle recognized by the laws of the Republic, the State shall refuse the extradition of a foreigner when it is requested for a political purpose; whereas, according to Article 3 (§2) of the European Convention on Extradition, extradition shall not be granted “if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons” ;

3. Whereas it appears from the documents brought before this Court that Mr Abylazov is an opponent of the political regime in Kazakhstan and that he has been recognized as a political refugee by the British authorities to protect him against the risks he would incur in his homeland ; that the evidence brought forth shows that the Kazakh authorities, who had previously pressured the Ukrainian authorities to request the extradition of Mr Abylazov sought to pressure Russia to initiate criminal prosecution against Mr Abylazov and pressure the Russian authorities to request the applicant's extradition to Russia; that it is also clear from the evidence brought forth that the extradition procedure was monitored by the Kazakh authorities and was the subject of repeated exchanges between the Russian and Kazakh authorities during the investigation; whereas all circumstances in this case show clearly that Mr Abylazov's extradition to Russia was sought for a political purpose; therefore, such extradition could not be lawfully granted; whereas, without need to further examine the other pleas in the applications, Mr Abylazov is justified in seeking the annulment, on the grounds of *ultra vires*, of the decree of September 17, 2015 by which the Prime Minister granted his extradition to the Russian authorities and of the PM's implied refusal to withdraw it.



4. Whereas there is cause, in the circumstances of the present case, to order the State to pay the sum of € 3,000 to Mr Abylazov under the provisions of Article L. 761- 1 of the Code of Administrative Justice;

THE COURT RENDERS THE FOLLOWING DECISION:

Article 1: The decree of September 17, 2015 granting the extradition of Mr Mukhtar Abylazov to the Russian authorities and the implied refusal to withdraw it are annulled.

Article 2: The State shall pay Mr Abylazov a sum of € 3,000 under Article L. 761-1 of the Code of Administrative Justice.

Article 3: This decision shall be notified to Mr Mukhtar Abylazov and to the French Minister of Justice.

Deliberated after the session of December 9, 2016 with the following present: Mr Bernard Stirn, President of the Claims Department, presiding; Mr Edmond Honorat, Mr Alain Ménéménis, Mr Rémy Schwartz, deputy Presidents of the Claims Department; Mr Didier Chauvaux, Mr Jacques-Henri Stahl, Mr Jean Courtial, Ms Pascale Fombeur, Mr Denis Piveteau, Mr Guillaume Goulard, Mr Mattias Guyomar, Presidents of Chambers, Ms Célia Vérot, Counselor of State and Mr Clément Malverti, auditeur-rapporteur.

Read at the hearing on December 9, 2016.

Signed by the President: Mr Bernard Stirn

Signed by the rapporteur: Mr Clément Malverti

Signed by the secretary: Ms Nabila Ammar-Khodja

The Republic commands and orders the Minister of Justice, where it concerns him or all bailiffs on this requirement, concerning the rights of common law, to put the present decision to execution.

True certified copy,

Signed by the secretary of the Claims Department
by delegation

