

Jordanian national (*VV v Secretary of State for the Home Department*, SC/59/2006). On 23 November 2007, it dismissed the appeal of another Algerian national (*PP v Secretary of State for the Home Department*, SC/54/2006).

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## II. THE LUGOVOY EXTRADITION CASE

This note examines the exclusion of nationals from extradition arrangements in the light of the recent refusal of the Russian Federation to extradite Andrei Konstantinovich Lugovoy<sup>1</sup> to the United Kingdom for his alleged murder of a naturalized British citizen (a former Russian national), Alexander Valterovich Litvinenko, in London on 23 November 2006. Both men had previously been members of the Russian secret services.

The facts of the case are highly contested but circumstances leading to the extradition request are well known. On 23 November 2006, Litvinenko died in a London hospital of acute radiation injury, allegedly after having ingested a fatal dose of the radioactive isotope polonium-210 three weeks earlier. On the day Litvinenko fell ill and is suspected to have been contaminated, he had met with Lugovoy at a bar in London. According to the Crown Prosecution Service (CPS), traces of polonium-210 were later found at the bar, as well as in several other places visited by Lugovoy, including aboard the British Airways plane in which he had travelled to the United Kingdom.<sup>2</sup> On 22 May 2007, the CPS announced that it had decided to prosecute Lugovoy, a Russian citizen, for the murder of Litvinenko.<sup>3</sup> By that time Lugovoy had left the United Kingdom for Russia and so a formal extradition request was made under the terms of the 1957 European Convention on Extradition (ECE) on 28 May 2007.<sup>4</sup> Russia formally declined extradition on 6 July 2007, stating that that it was prepared to consider putting Mr Lugovoy on trial in Russia if the CPS's evidence was forwarded to the Russian prosecutor. Russia's refusal to extradite was unsurprising since the Russian Prosecutor General had, with reference to the Russian Constitution, already proclaimed the impossibility of surrender.<sup>5</sup> The United Kingdom was clearly not satisfied with the official response and on 16 July 2007 the Foreign Secretary announced various measures taken to induce cooperation, among others the expulsion of four Russian diplomats as well as the tightening of visa requirements in relation to Russian Government officials travelling to the United Kingdom. The United Kingdom did not put forward the suspension of the ECE with Russia as a proper response.

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<sup>1</sup> Sometimes spelled 'Logovoi'.

<sup>2</sup> For an official account of events see *Hansard* HC Deb vol 463 cols 21–2 (16 July 2007). See also Evidence of the Minister for Europe to the FAC, 'Global Security: Russia' (18 July 2007). HC 459-iii, Qs 95–155.

<sup>3</sup> *Hansard* HC Deb vol 692 col WS37 (22 May 2007).

<sup>4</sup> European Convention on Extradition, Paris, 13 Dec 1957 (ETS No 24).

<sup>5</sup> See Statement by Prosecutor General's Office spokeswoman, Marina Gridneva, to Interfax (22 May 2007) <[http://www.interfax.ru/e/B/0/28.html?id\\_issue=11751107](http://www.interfax.ru/e/B/0/28.html?id_issue=11751107)>.

In his statement to the House of Commons, the Foreign Secretary gave the following explanation:

Given the importance of this issue and Russia's failure to co-operate to find a solution, we need an appropriate response. Our aims are clear: first, to advance our judicial process; secondly, to bring home to the Russian Government the consequences of their failure to co-operate; and thirdly, to emphasise our commitment to promoting the safety of British citizens and visitors.<sup>6</sup>

Russia responded three days later by expelling four British diplomats, stating that it would act in a mirror-like fashion in regard to all visa-related issues taken by the United Kingdom.<sup>7</sup> By this time diplomatic relations were severely strained. Russia had responded to the British measures by calling them 'immoral and provocative'<sup>8</sup> and the British Foreign Secretary had issued a statement on the day of the Russian expulsions saying that the decision to expel embassy staff was 'completely unjustified'.<sup>9</sup> The situation was further complicated by allegations that the British Foreign Intelligence Agency, MI6, had tried to recruit Litvinenko and Lugovoy, both former Russian intelligence agents. Lugovoy said also that the poisoning could not have happened without some involvement from the British intelligence services.<sup>10</sup> Other distinct but intimately related matters, such as the ongoing issue of the extradition of Russian dissident Boris Berezovsky, likewise added to controversies.<sup>11</sup> In this respect Russia has stated:

It is no secret that Russia has made requests for the extradition of 21 Russian citizens, including Berezovsky who has called for the overthrow of the existing system in Russia and Zakayev, an accomplice of terrorists. Not one was extradited. If Russia had gone down the same path chosen by London, the British embassy would by now have been at least 80 diplomats short.<sup>12</sup>

Tensions increased further when it was reported in the British media that a person of supposed Russian origin had been arrested in London on suspicion of conspiracy to murder in connection with an alleged attempt to assassinate Berezovsky.<sup>13</sup> Thus, as has so often happened before, what is normally an obscure subject—the surrender of a

<sup>6</sup> *Hansard* HC vol 463 col 22 (16 July 2007).

<sup>7</sup> By 25 July 2007, however, nothing had changed in the visa regulations of either country. See answer by the Spokesman of Russia's Ministry of Foreign Affairs, 'Answers a Media Question Regarding State of Affairs with UK in Consular/Visa Sphere' (1198-25-07-2007) <<http://www.mid.ru/>>.

<sup>8</sup> See 'Russia Set to Respond to British Expulsion' Reuters (17 July 2007).

<sup>9</sup> See 'Response to Russian Foreign Ministry Statement' (19 July 2007) <<http://www.fco.co.uk/>>.

<sup>10</sup> See 'UK "behind Litvinenko poisoning"' BBC News (31 May 2007) <<http://news.bbc.co.uk/2/hi/europe/6706921.stm>>. Thus far neither Government has acknowledged any connection with either of the two persons, which rules out the possibility of a claim of State immunity. Lugovoy stood successfully as a candidate for the Duma and he now enjoys parliamentary immunity in Russia, *Daily Telegraph*, 12 Dec 2007 (<[www.telegraph.co.uk/news/mainjhtml?xml2/news/2007/12/04/wrussian204.xml](http://www.telegraph.co.uk/news/mainjhtml?xml2/news/2007/12/04/wrussian204.xml)>).

<sup>11</sup> See interview, 'Litvinenko Case Could be Called Berezovsky Case—Former FSB Chief' Interfax (2 Aug 2000) <<http://www.interfax.com/17/298975/Interview.aspx>>.

<sup>12</sup> See 'Russian MFA Information and Press Department Commentary on Russian-British Relations' (1160-17-07-2007) <<http://www.mid.ru/>>. See also *Hansard* HC Deb vol col 259WH (25 July 2007).

<sup>13</sup> See 'Russia Questions 'Berezovsky Murder Plot Arrest' *The Guardian* (26 July 2007).

person from one jurisdiction to another—rapidly developed into a substantial controversy between two nations. Economic ties have remained unchanged but counter-terrorism cooperation is said to have been suspended.<sup>14</sup>

#### *A. The European Convention on Extradition*

Both the United Kingdom and the Russian Federation are parties to the ECE and have signed a Memorandum of Understanding on criminal cooperation;<sup>15</sup> the latter being a non-binding instrument.<sup>16</sup> As Contracting Parties to the ECE, both States are obliged, subject to certain conditions, to surrender ‘all persons against whom the competent authorities of the requesting Party are proceeding for an offence’.<sup>17</sup> This applies to all offences which fulfil the double criminality and minimum penalty requirement established in Article 2. Since the request for Lugovoy concerns an alleged homicide, both conditions are evidently satisfied. Neither are there any problems in relation to procedural prerequisites. Instead, Russia has so far refused extradition on the basis of Article 6(1) of the ECE, which provides that Contracting Parties ‘shall have the right to refuse extradition of their nationals’.<sup>18</sup> This provision was inserted to allow as many States as possible to accede to the Convention since the laws of several drafting States proscribed extradition of their nationals.<sup>19</sup> The exception of nationals from extradition arrangements is a fairly general practice, especially in continental Europe and Latin America.<sup>20</sup> The main reason for differences in practice is that a crime committed by nationals abroad in most civil law jurisdictions is considered an offence against the laws of the homeland, whereas common law jurisdictions traditionally give priority to territorial jurisdiction.<sup>21</sup> Insistence on the importance of territorial jurisdiction is well reflected in comments of the British Attorney General and other official statements.<sup>22</sup> The case against Lugovoy is said to concern a ‘British’ crime, though here the claim is made by the Government rather than by a defendant.<sup>23</sup>

<sup>14</sup> See ‘Russia Expels 4 British Diplomats’ *International Herald Tribune* (19 July 2007). In relation to measures taken by the UK Government see also replies of the Minister for Europe, 18 July 2007, Foreign Affairs Committee, Global Security: Russia, HC 459-iii, Q95–Q115.

<sup>15</sup> Memorandum of understanding on cooperation between the Office of the Prosecutor General of the Russian Federation and the Crown Prosecution Service of England and Wales (Feb 2006) <[http://www.cps.gov.uk/publications/agencies/opgrf\\_cps.html](http://www.cps.gov.uk/publications/agencies/opgrf_cps.html)>.

<sup>16</sup> *Hansard* HC vol 463 col 25 (16 July 2007). British police visited Russia at an early stage in their inquiries.

<sup>17</sup> European Convention on Extradition (1957) (ETS No 24) Art 1.

<sup>18</sup> Russia has also made a specific declaration in its instruments of ratification stating, in accordance with Art 61(1) of the Russian Constitution, that ‘a citizen of the Russian Federation may not be extradited to another State’.

<sup>19</sup> See Explanatory Report to the European Convention on Extradition, (ETS No 24) Art 6.

<sup>20</sup> This exception is included in the UN Model Treaty in Extradition (A/RES/45/116, 1990), which in Art 4 mentions nationality as an optional ground for refusal of extradition.

<sup>21</sup> cf G Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Brill, Leiden, 1998) 175–84.

<sup>22</sup> See, eg, comments of the Attorney General in ‘Lugovoi “must face trial in UK”’ *The Guardian* (25 May 2007). See also *Hansard* HC Deb vol 170 cols WA908–WA909 (18 Apr 1990).

<sup>23</sup> See, K Brookson-Morris, ‘Conflicts of Criminal Jurisdiction’ (2007) ICLQ 659; Police and Justice Act 2006, sch 13, paras 4 and 5 (not yet in force), amending the Extradition Act 2003.

Any State which does not surrender its national upon request in accordance with the ECE is obliged at the demand of the requesting Party to submit the case to its competent authorities in order that proceedings may be taken there.<sup>24</sup> This obligation is similar to the principle of *aut dedere aut judicare*, which is common to the Geneva Conventions and most international counter-terrorism instruments.<sup>25</sup> The rationale of this principle is, as in the ECE, that any person alleged to have violated the law must not go untried. Just as with the *aut dedere aut judicare* principle, the obligation in the ECE is not absolute. Thus legal proceedings are not mandatory as long as any decision not to prosecute is taken in good faith and in accordance with normal procedures applicable to similar serious offences. So far, however, the British authorities have insisted on extradition and have made no request for a Russian trial.<sup>26</sup> In addition, the British Government says that there would be a legal challenge to any decision it made to cooperate with a trial in Russia, based on human rights concerns that the ‘law in Russia is applied selectively’.<sup>27</sup>

Thus the incident would seem to be fairly straightforward, had it not been for the United Kingdom’s continued insistence on extradition and taking highly public steps to try to compel the return of Lugovoy.<sup>28</sup>

### B. Possible Ways to Facilitate Extradition

In his statement to the House of Commons, the Foreign Secretary stated that the Russian authorities had given no indication of a willingness to work to address the constitutional ‘obstacle’ preventing extradition.<sup>29</sup> The situation is not unique, he stated, referring to other countries that have recently amended similar provisions in their Constitutions to give effect to the European Arrest Warrant (EAW), thus more than hinting that Russia could solve the problem, if it were so willing, either by making an exception to the rule or amending its Constitution. It is, though, not at all clear why the very special regime of the EAW should be relevant to relations with Russia, not a member of the EU. Assuming Russia was willing to cooperate, how could they accommodate the United Kingdom request?

#### 1. The interpretative approach

By referring to the constitutional provision preventing extradition as an ‘obstacle’, the British Foreign Secretary seemingly infers that there must be a way around this

<sup>24</sup> European Convention on Extradition (1957) (ETS No 24) Art 6(2).

<sup>25</sup> On the principle see generally International Law Commission ‘Preliminary Report on the Obligation to Extradite or Prosecute (“*aut dedere aut judicare*”)’ (7 June 2006) UN Doc A/CN.4/571.

<sup>26</sup> During a debate in the House of Commons, a suggestion was made for a Russian trial under British law, similar to the *Lockerbie* case. It was rejected. *Hansard* HC vol 463 cols 29–30 (16 July 2007).

<sup>27</sup> *Hansard* HC Deb vol 483 col 22 (16 July 2007); *Hansard*, HC vol 463, col 259 WH (25 July 2007)

<sup>28</sup> The present article will not comment of the expulsion of diplomats or the tightening of visa requirements. It suffices to say that as parties to the 1961 Vienna Convention on Diplomatic Relations both have the explicit right, at will, to declare any member of a diplomatic staff *persona non grata*—Vienna Convention on Diplomatic Relations (1961) Art 9.

<sup>29</sup> *Hansard* HC vol 463 cols 21–2 and col 27 (16 July 2007).

hindrance, eg by making an exception to the rule or by creative interpretation of the constitutional provision itself. Methods of constitutional interpretation vary according to constitutional theory and practice and are pre-eminently a domestic issue.<sup>30</sup> Some national constitutions explicitly incorporate international law, which is the case with the Russian Constitution, and which gives clear priority to customary and conventional international obligations.<sup>31</sup> Thus any domestic provision would generally have to be interpreted in conformity with international law. Supremacy, however, is given to constitutional provisions.<sup>32</sup> Even if international obligations were attributed constitutional importance, it would still be difficult to facilitate extradition. First, because Russia is under no international obligation to extradite; secondly, because the constitutional bar on extradition is unequivocal: a citizen of the Russian Federation may not be deported from Russia or extradited to another State.<sup>33</sup> Thus there is no room for interpretation.<sup>34</sup> Russia has previously extradited persons of dual citizenship but this was found by domestic courts to be unconstitutional.<sup>35</sup>

## 2. *Constitutional amendment*

Constitutional changes are naturally not impossible, but almost so: and rightly. The prohibition of extradition of nationals in the Russian Constitution is especially difficult to change since it falls within a special chapter of the Constitution concerning fundamental rights and liberties.<sup>36</sup> This is one of three chapters that are particularly hard to amend.<sup>37</sup> Any change would have to be supported by three-fifths of the members of the Council of the Federation and the deputies of the State Duma.<sup>38</sup> Thereafter, a Constitutional Assembly would have to be convened. The Assembly would either have to confirm the invariability of the existing Constitution or draft a new one. A new Constitution could only be adopted by two-thirds of the Constitutional Assembly or submitted to popular vote. Difficulty in changing the provision on extradition is evident *inter alia* in the long delay in implementing the Rome Statute of the International Criminal Court (ICC).<sup>39</sup> Constitutional problems about ICC participation are not unique to Russia.<sup>40</sup> In addition, whereas States might be inclined to initiate the arduous

<sup>30</sup> See generally G Danilenko, 'The New Russian Constitution and International Law' (1994) 88 AJIL 451.

<sup>31</sup> Art 15(4) of the Russian Constitution: The universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied. For an English version see <<http://www.constitution.ru/>>.

<sup>32</sup> The Constitution of the Russian Federation, Art 15(1).

<sup>33</sup> *ibid* Art 61(1).

<sup>34</sup> Unlike, for instance, Costa Rica's Constitution which states that: no Costa Rican may be compelled to abandon the national territory, Constitución Política de la República de Costa Rica (1949) Art 32.

<sup>35</sup> For the facts of the case see *Garabayev v Russia* (ECtHR, 7 June 2007) Application no 38411/02.

<sup>36</sup> cf The Constitution of the Russian Federation, Chapter 2 (Arts 17–64).

<sup>37</sup> *ibid* Art 135.

<sup>38</sup> The legislative chamber of the Federal Assembly.  
<sup>39</sup> cf B Tuzmukhamedov, 'The ICC and Russian Constitutional Problems' [2005] J Intl Criminal Justice 621–6.

<sup>40</sup> See, eg, H Duffy, 'National Constitutional Compatibility and the International Criminal Court' [2005] 11 Duke J Comparative & Intl 5–38.

work of changing their Constitution in order to participate in international mutual criminal cooperation schemes, no State has yet done so to enable extradition in an individual case. Moreover, whereas some States did indeed change their constitutions to enable implementation of the EAW, some did not.<sup>41</sup> In those countries that tried to implement the EAW without changing their Constitution, there were constitutional challenges.<sup>42</sup>

### 3. *Circumventing extradition procedures*

The Foreign Secretary mentioned in his speech that international agreements mean that Lugovoy could be extradited to the UK if he travelled abroad.<sup>43</sup> Although this is undoubtedly true, it would also be highly suspicious if Lugovoy should suddenly decide to do so after having resisted extradition. In this regard it should be noted that the Russian Constitution not only protects against extradition but also deportation. Importantly, any circumvention of extradition proceedings by State authorities to facilitate surrender might also violate the right to liberty, in that everyone is entitled to security of the person and only to be restrained in accordance with due process.<sup>44</sup>

### C. *Conclusion*

The problem of (non-) extradition of nationals is as old as extradition itself and the episode concerning Lugovoy is but another chapter in this long and continuous story.<sup>45</sup> Strong reasons have been advanced over the years for the removal of nationality as a ground for refusal of extradition but until recently with little practical effect. Renewed interest in the subject emerged with the establishment of the ad hoc tribunals for the Former Republic of Yugoslavia and Rwanda and the International Criminal Court. The establishment of these tribunals did not bring much change to inter-State cooperation because it was preferred to make a fundamental distinction between 'surrender' to an international institution and 'extradition' to other States.<sup>46</sup> This distinction was also adopted by some States with regard to their obligations under the EAW, although it has been subject to criticism.<sup>47</sup> Thus it would seem that even with the realities of modern life, where movement around the world has been made easy and crime often takes on international dimensions, attitudes have not fundamentally changed. Either for

<sup>41</sup> cf Z Deen-Racsmány, 'Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court [2007] Leiden J Intl L 170–1. <sup>42</sup> *ibid.*

<sup>43</sup> *Hansard* HC vol 463 col 22 (16 July 2007).

<sup>44</sup> European Convention on Human Rights (1954) Art 5. The European Court of Human Rights has been very firm on this point. cf *Bozano v France*, (ECtHR, 18 Dec 1986) Application no 9120/80.

<sup>45</sup> cf generally IA Shearer, 'Non-Extradition of Nationals' (1963–6), *Adelaide L Rev* 273–309; and M Plachta, '(Non-)Extradition of Nationals: A Neverending Story' (1999), *Emory Intl L Rev* 77–159.

<sup>46</sup> Statute of the International Tribunal for the Former Yugoslavia since 1991, adopted by Security Council Resolution 827 (25 May 1993) Art 19(2); Statute of the International Tribunal for Rwanda, adopted by Security Council Resolution 955 (8 Nov 1994), Art 18(2); Rome Statute for the International Criminal Court (1998) Art 102.

<sup>47</sup> M Plachta, 'The European Arrest Warrant: Revolution in Extradition' (2003) 11 *Eur J Crime, Criminal L and Criminal Justice* 178–94.

pragmatic reasons or nostalgic notions of a special relationship between citizens and their national State, many countries do not want to change their laws preventing extradition of nationals. In this context, the position of the United Kingdom may have been affected by the traditional common law approach and the broad provisions of its own extradition law which allow for ad hoc extradition in some circumstances (though not with States with which there are regular arrangements), making too easily the assumption that other States could make similar flexible arrangements—if they chose to do so.<sup>48</sup> In any event, the case provides an important reminder of one of the limitations of international criminal cooperation, which often looks fragile where a fugitive is affiliated to the authorities of the requested State. In such circumstances constitutional guarantees tend to be afforded supremacy over conflicting international obligations.<sup>49</sup> This is despite the general rule that a State may not invoke provisions of its internal law as justification for its failure to perform a treaty obligation,<sup>50</sup> even if it is a constitutional provision.<sup>51</sup>

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### III. THE BAE/SAUDI AL-YAMAMAH CONTRACTS: IMPLICATIONS IN LAW AND PUBLIC PROCUREMENT

#### *A. Introduction*

Recently, BAE Systems, a UK manufacturer of defence equipment has been embroiled in bribery allegations in respect of contracts to supply military aircraft<sup>1</sup> to the Government of Saudi Arabia. The allegations that have been levelled against BAE concerning these contracts include the payment of bribes to various members of the Saudi royal family and the use of various accounts to conceal these payments. This article will give a brief overview of the contracts between BAE and the Saudi Government; discuss the corruption allegations made against BAE and the investigations into these allegations by the Serious Fraud Office; and examine the UK's legal regime against the bribery of foreign public officials, assessing the UK's compliance with its obligations under the OECD Convention prohibiting such bribery. The article will conclude with an examination of the future prospects for BAE as the United States Department of Justice undertakes an investigation into the Al-Yamamah contracts.

<sup>48</sup> See United Kingdom Extradition Act (2003) s 194.

<sup>49</sup> eg the *Lockerbie* case. The argument is not, however, limited to cases where the requested subject has a relationship with the requested State. A similar argument could be advanced in relation to constitutional fundamental rights such as the prohibition of capital punishment (See eg *Venezia v Ministero di Grazia e Giustizia* (Italian Constitutional Court, 27 June 1996) Judgment No 223.79, 815 *Rivista Diritto Internazionale*).

<sup>50</sup> Vienna Convention on the Law of Treaties (1969) Art 27.

<sup>51</sup> *Qatar v Bahrain* (Jurisdiction on admissibility) [1994] ICJ Rep 112, paras 24–5.

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<sup>1</sup> These contracts were called Al-Yamamah (The Dove) by the Saudi Government.